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AUTHOR'S NOTE

In March 2004, the NAAG Preemption Working Group published the first edition of *The Law of Preemption*. That edition, whose principal authors were California Deputy Attorney General Susan Durbin and myself, was a primer on preemption doctrine that “provided a general overview of preemption law and a detailed discussion of several particularly important components of that body of law.”

The ensuing seven years have seen major developments in preemption law. The United States Supreme Court has issued more than a dozen major preemption rulings during that time; myriad law review articles analyzed the issue; and the arguments asserted by both sides of the preemption debate became more sophisticated. It therefore seemed a propitious time not only to update the publication, but to reorient it. The second edition of *The Law of Preemption* continues to “provide[] a general overview of preemption law and a detailed discussion of several particularly important components of that body of law.” But it also provides concrete suggestions on arguments state attorneys should advance and on how state attorneys should respond to assertions made by pro-preemption advocates. So revised, we hope this publication is of use not only to state attorneys who are grappling with preemption law for the first time, but also to state attorneys with experience in this area of the law.

Although I am listed as the author of this publication, many other individuals contributed greatly to its production. Mostly notably, Susan Durbin's efforts on the first edition made this edition possible. I would also like to thank Thomas Fisher, Sean Jordan, Michael Scodro, and Barbara Underwood for reviewing a draft and providing thoughtful comments and suggestions; Kevin Leske for the insights he offered when we co-authored an amicus brief in *Wyeth v. Levine*; Sarah Kessler for updating portions of the first edition; and Adam Eisenstein for cite-checking the document.

All views expressed in this publication remain, of course, my own and should not be attributed to NAAG or any of the aforementioned individuals.

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INTRODUCTION

Our federal system is based on the concept of dual sovereignty: that state governments and the federal government each retain and actively exercise the functions and powers of government at the same time. When two sovereigns act simultaneously, however, conflict often arises. The Supremacy Clause is the Constitution's choice-of-law provision that resolves conflicts between state and federal law by declaring that federal law prevails. Although straightforward in principle, that rule can be difficult to apply in practice. The law of preemption is the body of law that fleshes out the Supremacy Clause's application.

The Supreme Court has long struggled with the doctrine, and has failed to craft a clear and unified theory of preemption. Perhaps that it is the inevitable result of preemption cases involving a wide array of federal and state statutes, each of which must be assessed on its own terms. Even taking that into account, though, each recent Supreme Court term has yielded surprising decisions, with the Justices differing markedly among themselves and forming unexpected alignments.

There is no dispute that, in theory, when state and federal law directly and unavoidably conflict, the Supremacy Clause makes the federal law the "supreme Law of the Land," displacing and voiding conflicting state law. The disputes arise as a policy matter over when it is appropriate—in terms of the nation's health, safety, and economic interests—for a federal rule (and federal enforcement agency) to supplant varied state rules and enforcers. The disputes arise as a legal matter in construing existing federal laws and regulations to determine whether a conflict between state and federal law exists, the extent of the conflict, and whether the conflict is too severe to permit continued state regulation.

Many commentators have expressed concern that the proliferation of preemptive federal laws and regulations has impeded the ability of States to function as politically accountable and effective sovereigns. See, e.g., Kenneth Starr et al., *The Law of Preemption* 47, 56 (1991) ("preemption diminishes the state sphere that federalism teaches us to protect"); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. Rev. 559, 561 (1997). Whether or not that is the case, there can be little doubt that few legal doctrines are more important to state Attorneys General than the doctrine of preemption. The goal of this publication is to provide an overview of preemption law and to provide insights that should assist state attorneys as they litigate preemption cases.

DISCUSSION

I. General Preemption Principles

The legal foundation for preemption is the Constitution's Supremacy Clause, art. VI, cl. 2:

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.

As is usually the case with constitutional analysis, these 64 words, simple on their face, have formed the basis for thousands of cases, articles, and books, and for a complex and still evolving web of legal doctrine. At bottom, they give Congress the power to override state law in any area where Congress has authority to act, including by expressly negating States' ability to adopt or enforce laws in a given area. See *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.").

The expansion of Congress' powers under the Commerce and Spending Clauses since the 1930s has dramatically increased Congress' ability to displace state law under the Supremacy Clause. Although Congress' powers are not without limit, see, e.g., *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 521 U.S. 898 (1997), Congress now regulates virtually every sector of our economy and myriad non-economic matters as well. Convincing Congress and the courts to limit the preemptive force of federal law is one important means by which States can retain their vibrant roles as independent sovereigns.

For Attorneys General, the principal battleground is the courts. Preemption cases involve ordinary statutory construction—assessing what the relevant statutory provisions mean based on their plain language, the statutory structure, and the legislative history—overlaid by preemption doctrine. And there lies the nub of preemption law. How does the potential preemptive effect of a federal statute affect how courts should construe the statute? And how should a court decide whether a federal statute's substantive terms oust a state law that covers some of the same subject matter?

A. Categories of Preemption

The answers to those questions vary depending upon the *type* of preemption at issue. The basic dividing line is between “express preemption” and “implied preemption.” And implied preemption can be subdivided, in turn, into “impossibility preemption” and “obstacle (or frustration) preemption.” Complicating matters still further is that Congress, both expressly or impliedly, can preempt not just a specific matter, but an entire field. This is known as “field preemption.”

Express Preemption

“Express preemption” occurs when Congress puts language into a federal statute expressly declaring that state law is preempted. For example, the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 U.S.C. §14501(c), provides that “a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier.” By one count, Congress has enacted 355 statutes that contain express preemption provisions. See James T. O’Reilly, *FEDERAL PREEMPTION OF STATE & LOCAL LAW* §1.2, at 2 (2006).

Where Congress has clearly expressed its intent to preempt state law, the only question remaining for the courts is the extent of preemption, *i.e.*, how broadly or narrowly to read the express preemption provision. For example, in *Altria Group v. Good*, 555 U.S. 70 (2008), the Supreme Court addressed the preemptive effect of the Federal Cigarette Labeling and Advertising Act, which bars States from imposing any “requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of cigarettes,” 15 U.S.C. §1334(b). The court held that it does not preempt a lawsuit brought under the Maine Unfair Trade Practices Act against tobacco companies based on their fraudulent advertising that “light” cigarettes delivered less tar and nicotine than regular brands. The dispute centered on whether that lawsuit was “based on smoking or health” within the meaning of the express preemption provision. Five Justices held that it was not, and that the lawsuit therefore did not fall within the scope of the provision.

Implied Preemption

A state law can conflict with a federal law, and therefore be displaced by operation of the Supremacy Clause, even when the federal law does not have a specific, express preemption provision. For example, the Fair Labor Standards Act (FLSA) requires employers to pay most employees time-and-a-half for overtime. 29 U.S.C. §207(a)(1). If a State enacted a law saying that “employers must pay employees their regular hourly salary for overtime work,” that law would be preempted because it directly conflicts with the federal mandate. And that is so, even though the FLSA does not have a specific provision declaring that all state laws regulating overtime pay (or mandating less than time-and-a-half overtime pay) are preempted. This type of

preemption dates as far back as *Gibbons v. Ogden*, 22 U.S. 1 (1824), where the Supreme Court famously held that a federal license granted to Gibbons to operate steamboats across the Hudson River overrode a steamboat monopoly New York had granted Ogden: “the act of a state inhibiting the use of [vessels], to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act.” *Id.* at 221. There are two basic types of implied preemption.

Impossibility Preemption. State and federal law are most obviously in conflict when “compliance with both federal and state regulations is a physical impossibility.” *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). The paradigmatic case of “impossibility preemption” occurs when, as in the FLSA overtime example, a federal statute says “private entities must do X” and a state law says “private entities may not do X.” When that occurs, the Supremacy Clause plainly voids the state law.

Preemption doctrine is not complicated in impossibility-preemption cases. Few would dispute that a state law is preempted when compliance with that law makes it impossible to comply with federal law. When a party asserts impossibility preemption, the only issue is the substantive meaning of the federal and state statutes: Is it really impossible to comply with both? For example, in *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), a drug manufacturer (Wyeth) argued that it was impossible for it to comply with a state-law duty to strengthen its warning label because the Food and Drug Administration approved the exact text of its original label and federal law barred it from changing the label. If Wyeth’s characterization of federal law were correct, its impossibility preemption argument would have prevailed. By a 6-3 vote, however, the Court construed the Food, Drug, and Cosmetics Act as permitting Wyeth unilaterally to revise its label in response to new information (subject to later FDA approval). *Id.* at 1196-99. By contrast, the Court in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), accepted a generic drug manufacturer’s impossibility preemption argument because generic drug manufacturers are not permitted unilaterally to revise their labels subject to later FDA approval.¹

Obstacle preemption. Even where it is possible to comply with both federal and state law, a state law may be preempted if it “stands as an obstacle to the

¹ This does not mean that the impossibility determination is always simple and straightforward. In *PLIVA*, the plaintiffs argued that the generic manufacturers could have proposed stronger warning labels to the FDA. If the FDA agreed with that proposal, it would have required the brand-name manufacturer to strengthen its label, which (in turn) would have required the generic manufacturer to strengthen *its* label. In the plaintiffs’ view, the generic manufacturers could only prevail on an impossibility defense if they could “demonstrate that the FDA would not have allowed” them to strengthen their labels. 131 S. Ct. at 2578. A 5-Justice majority called this a “fair argument,” but rejected it, holding that “when a party cannot satisfy its state duties without the Federal Government’s special permission and assistance, which is dependent on the exercise of judgment by a federal agency, that party cannot independently satisfy those state duties for pre-emption purposes.” *Id.* at 2579, 2581. Put another way, “the possibility of *possibility*” does not “defeat[] pre-emption.” *Id.* at 2581 n.8.

accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). For example, in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), the Supreme Court held that a state tort-law action based on an auto manufacturer’s failure to install air bags was preempted by an administrative agency’s safety standards, which “deliberately provided the manufacturer with a range of choices among different passive restraint devices” in order to “lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance.” *Id.* at 875. A state tort-law duty to install airbags “would have presented an obstacle to the variety and mix of devices that the federal regulation sought.” *Id.* at 881.

Obstacle preemption involves multiple inquiries: What do the federal and state laws substantively mean? What were Congress’ objectives in enacting the federal law? Does the state law burden the federal objectives and, if so, to what extent? Did Congress have any preemptive intent? Is the obstacle the state law imposes on federal objectives significant enough to warrant preempting the state law? As discussed in Section III below, this array of issues makes obstacle preemption cases particularly challenging for state attorneys-and threatening to state sovereignty.

Field Preemption

When a federal statute or regulatory scheme is so extensive and detailed that it leaves no room for the States to act, that entire field of regulation and all state law regulating within it is said to be preempted. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). On those occasions where the Supreme Court has found that Congress has “occupied the field,” it has usually involved a subject matter of particular federal interest or committed to federal control by history and tradition. See, e.g., *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 212 (1983) (“the Federal Government has occupied the entire field of nuclear safety concerns”); *Hines*, 312 U.S. at 66 (the regulation of aliens).

The Supreme Court has long held that courts should not lightly find field preemption: “federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons-either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.” *Fla. Lime & Avocado Growers*, 373 U.S. at 142. Abiding by that admonition, the Court now rarely finds field preemption based on statutory complexity alone. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting) (“our recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it”); *New York Dep’t of Social Services v. Dublino*, 413 U.S. 405, 415 (1973) (rejecting “the contention that pre-emption is to be inferred merely from the comprehensive character of the federal” program).

B. *The Interrelationship Between Express and Implied Preemption*

Let's say that a federal law includes an express preemption provision, and a court holds that the provision does not cover the state law at issue. Does that necessarily dispose of the preemption claim? The answer is no; the court can still hold that the state law is *impliedly* preempted.

The Supreme Court held in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), that an express preemption provision does not foreclose “any possibility of implied preemption.” *Id.* at 288. And in *Geier*, the Court went a step further, holding that even where a saving clause saves a state law from express preemption, that “does *not* bar the ordinary working of conflict pre-emption principles.” 529 U.S. at 869. Nor, held the Court, do “the express pre-emption and saving provisions . . . create a ‘special burden,’ which a court must impose ‘on a party’ who claims conflict pre-emption.” *Id.* at 872. Private entities therefore routinely assert that state laws are both expressly *and* impliedly preempted by a given federal statute.

This does not mean, however, that a State's victory on the express preemption claim has no bearing on the implied preemption analysis. In *Freightliner* itself, the Court stated that “an express definition of the pre-emptive reach of a statute ‘implies’-*i.e.*, supports a reasonable inference-that Congress did not intend to pre-empt other matters.” 514 U.S. at 288. And in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1985 (2011), the Court relied on the express preemption provision when it rejected several of the Chamber of Commerce's obstacle-preemption objections to an Arizona law imposing certain sanctions on employers who hire unauthorized aliens. The Court noted that “Arizona's procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue.” *Id.* at 1981.

II. The Presumption Against Preemption

One of the cornerstones of preemption doctrine is that courts should presume that Congress does not intend to displace state law, particularly where the state law concerns traditional areas that come within the police power, such as health and safety laws. See, *e.g.*, *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (“Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.”); *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985). This presumption stems from the importance of federalism and dual sovereignty in our system of government. Precluding a State from regulating in an area within the State's sovereignty is a grave act that should not casually be attributed to Congress.

Moreover, as Professor Tribe has stated, the presumption “further[s] the spirit of *Garcia* [*v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)] by requiring

that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end. . . . [T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* §6-28, at 1175-76 (3d ed. 2000), *quoted in part in Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

How the presumption against preemption applies depends on the type of preemption at issue.

Express preemption cases

By a 5-4 margin, the Supreme Court in *Altria Group v. Good* definitively held that the presumption against preemption applies in express preemption cases. 555 U.S. at 77 ("When addressing questions of express . . . pre-emption, we begin our analysis" with the presumption against preemption); *compare id.* at 102-03 (Thomas, J., dissenting) (arguing that the Court should not "unreasonably interpret expressly preemptive federal laws in the name of" the presumption). However thin that majority may be, the holding is fully binding on all lower courts.

The traditional version of the presumption is that preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice*, 331 U.S. at 230. Of course, an express preemption provision *is* a clear statement of Congress' purpose to preempt. But the scope of that provision may not be clear, and that is where this "clear statement rule" kicks in. In *Altria*, the Court embellished this test by adopting a *Chevron*-like rule: "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" 555 U.S. at 77 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

Altria adhered to the Court's earlier holding in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), where it rejected the contention that the presumption "should apply only to the question whether Congress intended any pre-emption at all," and not to "the *scope* of its intended invalidation of state law." *Id.* at 485. The Court explained that this "approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Id.*

Implied preemption cases

Applying the presumption against preemption is trickier when a party is claiming preemption, but not relying on an express preemption provision. It doesn't really make sense to say that Congress can preempt only through a clear statement if the other side's argument is that the state law directly conflicts with the federal law. In the FLSA example from earlier, for example, the state law is impliedly preempted even

though Congress did not say a word about preemption in the statute. If Congress says people may *not* do X, and a State says people *must* do X, the state law is preempted regardless of whether Congress made a clear statement regarding preemption.

So if the other side's claim is that it is impossible to comply with both federal and state law, it's no response to say, "maybe so, but there's a presumption against preemption." The state attorney has to convince the Court that the other side is wrong about how the federal or state law operates, and that, in fact, it is perfectly possible to comply with both. (And under *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996), the presumption against preemption does not apply when a court is assessing "the substantive (as opposed to pre-emptive) meaning of a statute.")

Does this mean the presumption against preemption has no force in implied preemption cases? Not at all. It can be very helpful when the other side is asserting obstacle preemption. The claim there is that, although it is possible to comply with both federal and state law, the state law undermines one of Congress' objectives in passing the federal statute. As discussed in Section III, that is often a very nebulous claim—it is often difficult to know precisely what Congress' objectives were or whether the "obstacle" is too great. That is where the presumption can make a difference. If it is not clear what Congress' purposes were, or whether the state law *really* burdens it, the presumption should prompt many judges to rule in favor of state law. See *Wyeth*, 129 S. Ct. at 1195 & n.3 (confirming that the presumption against preemption applies in "all pre-emption cases," including "to claims of implied conflict pre-emption").²

"Historic Police Powers"

The presumption against preemption applies to claims that federal law displaces "the historic police powers of the States." *Rice*, 331 U.S. at 230. Not surprisingly, parties have fought over what constitutes "historic police powers of the States." The Supreme Court muddied the waters in *United States v. Locke*, 529 U.S. 89 (2000), when it held that the presumption against preemption "is not triggered when the State regulates in an area where there has been a history of significant federal presence," for example, maritime commerce. *Id.* at 108. Since then, businesses have asserted that this limitation applies to virtually every field of activity. See, e.g., Brief for Petitioner at 51 n.23, *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (No. 06-1249) (arguing that the presumption does not apply because "[r]egulation of drug labeling has now been the domain of the federal government for more than a century").

The Court in *Wyeth* decisively rejected that argument, stating that it "misunderstands the principle: We rely on the presumption because respect for the

² Justice Alito's dissent in *Wyeth* (which Chief Justice Roberts and Justice Scalia joined) argued that the presumption against preemption does not apply in obstacle preemption cases. In his view, "the sole question is whether there is an 'actual conflict' between state and federal law; if so, then pre-emption follows automatically by operation of the Supremacy Clause." *Wyeth*, 129 S. Ct. at 1228. That analysis fails to account for what those three Justices all recognized in *Chamber of Commerce v. Whiting*: that the determination whether an "actual conflict" exists is rarely an easy one; usually it requires courts to exercise judgment. 131 S. Ct. at 1985. See also Section III, *infra*. The presumption against preemption is a tool that assists courts in that endeavor.

States as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly pre-empt state-law causes of action. The presumption thus accounts for the historic presence of state law but does not rely on the absence of federal regulation.” 129 S. Ct. at 1195 n.3 (internal quotation marks and citation omitted). The Court therefore applied the presumption to a case involving drug labeling-which both the States *and* the federal government have long regulated.

III. Recurring Obstacle Preemption Issues

As noted, the Supreme Court has held that state law is preempted when it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” This type of preemption presents a serious danger to state law because of its potential breadth. Congress often has a variety of objectives when it enacts a law; and any state law that regulates the same field as a federal law but does not do so *identically* might be viewed as being in tension with one of those congressional objectives. Where is the limit? And how does a judge decide whether the state law stands as too great an obstacle to a significant enough federal objective? The Supremacy Clause itself provides no guidance on the degree to which a state law must burden a federal purpose before it is ousted.³

Because state laws rarely are in perfect harmony with federal laws regulating the same subject matter, private parties routinely argue that state laws are preempted because they impede “execution of the *full* purposes and objectives of Congress.” The congressional purposes most commonly relied upon are uniformity, deregulation, and creating a national marketplace. See Alan E. Untereiner, *THE PREEMPTION DEFENSE IN TORT ACTIONS*, 144-54 (U.S. Chamber Institute for Legal Reform 2008). This Section addresses some of the arguments state attorneys can make in these challenging cases.

A. General Arguments State Attorneys Can Assert

Justice Thomas recently stated that obstacle preemption allows courts “to vacate a judgment issued by another sovereign based on nothing more than assumptions and goals that were untethered from constitutionally enacted federal law.” *Wyeth*, 129 S. Ct. at 1215 (Thomas, J., concurring). In his view, this sort of preemption “improperly [gives] broad pre-emptive effect to judicially manufactured policies.” *Id.* at 1217. For

³ Compare *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) (Federal Arbitration Act preempts California contract-law rule deeming arbitration agreements that disallow class-action proceedings to be “unconscionable” because the California law “stands as an obstacle to” achieving Congress’ objectives by making the arbitration “process slower, more costly, and more likely to generate procedural morass”), with *id.* at 1758 (Breyer, J., dissenting) (disagreeing that the objective of the Act was “to promote the expeditious resolution of claims,” and concluding that it was merely to “enforce” arbitration agreements) (internal quotation marks omitted).

that reason, Justice Thomas rejected the entire concept of obstacle preemption. He is the only Justice to have done so, however, which means state attorneys still must grapple with the issue.

Nonetheless, the concerns noted by Justice Thomas prompted a four-Justice plurality of the Court to agree that obstacle preemption cases threaten to produce a “free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives,” which “would undercut the principle that it is Congress rather than the courts that preempts state law.” *Chamber of Commerce v. Whiting*, 131 S. Ct. at 1985 (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring)). This prompted the plurality to adopt an important limitation that had previously appeared solely in a one-Justice concurring opinion: “Our precedents ‘establish that a *high threshold must be met* if a state law is to be pre-empted for conflicting with the purposes of the federal Act.” *Id.* (emphasis added) (quoting *Gade*, 505 U.S. at 110 (Kennedy, J., concurring)).⁴ State attorneys should insist that this “high threshold” rule, plus the presumption against preemption, means that a conflict must be manifest before it compels the displacement of state law.

Here are some additional arguments States can assert in response to the commonplace claim that state law interferes with some federal objective.

Absence of Congressional Intent to Preempt

The Supreme Court reaffirmed in *Wyeth v. Levine* that congressional intent “is the ultimate touchstone in every pre-emption case.” 129 S. Ct. at 1194 (internal quotation marks omitted). Applying that principle, the Court found that “all evidence of Congress’ purposes is . . . contrary” to the proposition that “Congress thought state-law suits posed an obstacle to its objectives.” *Id.* at 1199-1200. State attorneys should therefore study whether statutory sign-posts-based on the history or structure of the federal statute-suggest that Congress had no interest in displacing state law, irrespective of any supposed conflict with the purpose of the federal law.⁵

Wyeth v. Levine provides an excellent example. In the course of rejecting Wyeth’s obstacle preemption claim, the Court emphasized that Congress was well aware of the prevalence of state tort litigation involving FDA-approved drugs, yet stood by silently. The Court also found it telling that Congress enacted an express preemption provision

4 A five-Justice majority in *Chamber of Commerce v. Whiting* rejected an express and implied preemption challenge to an Arizona immigration law. Justice Thomas declined, however, to join the portion of Chief Justice Roberts’ opinion that explained why the Court was rejecting the obstacle preemption challenge to Arizona’s law. That was surely because of Justice Thomas’ statement in *Wyeth* that he rejected the concept of obstacle preemption altogether.

5 Although it may seem obvious that congressional intent to displace state law should matter, amicus briefs filed by the Chamber of Commerce and Product Liability Advisory Council (PLAC) in *Wyeth* argued that congressional intent to displace state law is irrelevant to the obstacle preemption inquiry. See Brief for Amicus Curiae Chamber of Commerce in Support of Petitioner, *Wyeth*, at 23-26; Brief for Amicus Curiae PLAC in Support of Petitioner, *Wyeth*, at 16 (“Conflict preemption does not depend on an inference of congressional intent.”). The *Wyeth* majority rejected that position.

elsewhere in the Food, Drug, and Cosmetic Act with respect to medical devices, but did not “enact[] such a provision for prescription drugs.” *Id.* at 1200. This “is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness.” *Id.* (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989) (“The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.”) (internal quotation marks omitted)).

The Court applied a similar brand of reasoning in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), where it held that the Price-Anderson Act does not preempt state tort actions arising from accidents at nuclear facilities. The Court noted that, “in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies . . . were available to those injured by nuclear incidents.” *Id.* at 256. For that reason, state tort law is not preempted even though “there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability.” *Id.* See also *Bates*, 544 U.S. at 449.

Difficulty of Discerning Congress’ Objectives

Obstacle preemption is premised on state laws being an “obstacle to the accomplishment and execution of the full *purposes and objectives* of Congress.” But how do we know what those purposes and objectives really were? As many judges and commentators have emphasized over the years, federal statutes are often the product of compromise or contain multiple “purposes and objectives” that are in some tension with each other. See, *e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2410-19 (2003). Individual members of Congress may have widely differing, even mutually contradictory, purposes. That is one of the main reasons why many judges believe that only the text of the statute should be consulted when construing a statute. *Id.* at 2419.

State attorneys can turn that reasoning to their advantage in obstacle preemption cases. If there is no preemption provision and it is possible to comply with both federal and state law, judges should not look beyond the text to divine undisclosed purposes that might preempt state law.

Congress Does Not Pursue Its Purposes “At All Costs”

A closely related argument is that “no legislation pursues its purposes at all costs,” and “it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.” *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). Yes, one of Congress’ objectives in passing a given statute may have been to foster uniformity. But a state-law action that frustrates

the goal of uniformity might advance legislators' expectation that injured consumers have access to remedies.

As Professor Caleb Nelson put it in a very influential article, even if we “suppose that all members of Congress can agree on the ‘full purposes and objectives’ behind a particular federal statute[,] [t]here still is no reason to assume that they would want to displace whatever state law makes achieving those purposes more difficult.” Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 280 (2000). The “mere fact that Congress enacts a statute to serve certain purposes . . . does not automatically imply that Congress wants to displace all state law that gets in the way of those purposes.” *Id.* at 281. See also *Pac. Gas & Elec.*, 461 U.S. at 222 (holding that a federal law encouraging the promotion of nuclear power did not preempt States' authority to decline to issue a license to build a nuclear plant for economic reasons because “the promotion of nuclear power is not to be accomplished ‘at all costs’”).

State Laws Further Countervailing Congressional Interests

When making these arguments, it helps to point out the various reasons why Congress may have been content to allow state laws to operate, even if they are in tension with one or another federal objective. Among them are:

- ▶ State law often provides the only remedy for injured persons. See *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002); *Bates*, 544 U.S. at 449-50 (citing *Silkwood*, 464 U.S. at 251).
- ▶ A statute might reflect a compromise in which legislators who wanted stricter federal standards settled for laxer standards in exchange for *not* displacing state standards.
- ▶ Congress might want additional enforcers on the beat, particularly given how underfunded some federal agencies are. See *Wyeth*, 129 S. Ct. at 1202 (noting the FDA's “limited resources to monitor the 11,000 drugs on the market”).
- ▶ Relatedly, state-law actions often produce additional information about the risks of products, which assist federal regulators and might prompt manufacturers to address the problem. See *id.* at 1202-03; *Bates*, 544 U.S. at 450, 451.

Addendum: All of those arguments apply even when there is a full-blown federal regulatory regime. Supporters of preemption frequently contend that a state tort regime is incompatible with a federal regulatory regime in which an expert agency is evaluating the products. In simple terms, why would we want juries around the nation second-guessing the judgments of expert regulators? See, e.g., *Wyeth*, 129 S. Ct. at 1229 (Alito,

J., dissenting) (“By their very nature, juries are ill-equipped to perform the FDA’s cost-benefit-balancing function.”).

That argument has some force, and may be why some federal statutes do, in fact, expressly preempt state law. But the *Wyeth* Court expressly recognized that countervailing considerations may prompt Congress to allow state actions to proceed. Cf. *Bates*, 544 U.S. at 448-49 (rejecting manufacturer’s contention that FIFRA preempts state law because otherwise “juries in 50 States” would be given “the authority to give content to FIFRA’s misbranding provision, establishing a crazy-quilt of anti-misbranding requirements different from the one defined by FIFRA itself and intended by Congress to be interpreted authoritatively by EPA”). Compliance with a federal regulatory regime might be evidence that supports a *defense* to a state enforcement or tort action. Restatement (Third) of Torts: Products Liability §4 (2007). But the mere fact that federal regulators play an important role in the federal regime does not automatically oust state law.

B. Responding to the “Upsetting the Federal Balance” Argument

Advocates of preemption often assert that the federal law, regulation, or action at issue struck a “balance” between competing considerations, and that applying state law would “upset that balance.” See, e.g., Brief for Petitioner, *Wyeth*, at 40 (arguing that, in determining the warnings on a particular drug’s label, the FDA “balanc[ed] therapeutic benefits against safety risks,” and that Vermont “seeks to alter that balance by substituting the judgment of lay juries”).⁶ There is superficial force to this argument. Federal lawmakers and regulators presumably do take competing considerations into account when they set rules and standards; and they presumably choose the rules and standards they believe strike the best balance.

The problem with that reasoning is that (to use a cliché) it proves too much. If state laws are preempted whenever they “upset the balance” Congress and federal regulators have struck, it would mean States are barred from virtually any field into which the federal government has entered. That would sweep away vast swaths of state power—far more than is tolerable in our federal system.

Thankfully, the Supreme Court has carefully confined that line of attack on state law. In *Williamson v. Mazda Motor of America*, 131 S. Ct. 1131 (2011), the Court held that it is wrong “to infer from the mere existence of . . . a cost-effectiveness judgment that the federal agency intends to bar States from imposing stricter standards.” *Id.* at 1139. Doing that, held the Court, would wrongly “treat all such federal standards as if

⁶ See also Robert R. Gasaway & Ashley C. Parrish, *The Problem of Federal Preemption: Toward a Formal Solution*, 221-22, in *FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS* (Richard A. Epstein & Michael S. Greve eds., 2007) (“When Congress establishes requirements that set a regulatory optimum, or ‘golden mean,’ the [state] standards are impliedly preempted because . . . the requirements represent a federal affirmation of one policy to the exclusion of all alternatives.”).

they were *maximum* standards, eliminating the possibility that the federal agency seeks only to set forth a *minimum* standard potentially supplemented through state tort law.” *Id.* The Court therefore held that a federal safety standard that gave automakers the option of installing lap belts or lap-and-shoulder belts on the rear seats of passenger vehicles did not preempt a tort suit that sought to hold the automaker liable for not installing a lap-and-shoulder belt. *Id.* at 1138-40.

The *Williamson* decision does not mean that the “upset the balance” argument can never prevail. In particular, the Court did not overrule *Geier*, which held that a different federal safety standard giving automakers a choice among passive restraint devices *did* preempt a state tort suit that would have held an automaker liable for not having selected a particular passive restraint device. Why the different outcomes in *Williamson* and *Geier*? The answer lies in the *reason* why the federal agency provided automakers with a choice.

In *Geier*, the Department of Transportation “deliberately sought variety—a mix of several different passive restraint systems” in the hope of obtaining better information about the devices’ “comparative effectiveness, which would . . . facilitate the development of alternative, cheaper, and safer passive restraint systems.” *Geier*, 529 U.S. at 878, 879. In *Williamson*, by contrast, the Department of Transportation gave automakers the choice of installing lap-and-shoulder belts or lap belts because it thought lap-and-shoulder belts may not be cost-effective yet. 131 S. Ct. at 1139. The DOT did not provide choice for choice’s sake—and that made all the difference.

Taken together, *Williamson* and *Geier* teach the following:

First, state law is not preempted merely because it deprives someone of a choice federal law had granted. Relying on *Geier*, many courts and even more litigants had argued that “any time an agency gives manufacturers a choice between two or more options, a tort suit that imposes liability on the basis of one of the options is an obstacle to the achievement of a federal regulatory objective and may be pre-empted.” *Williamson*, 131 S. Ct. at 1140 (Sotomayor, J., concurring). *Williamson* definitively rejected that contention.

Second, where choice itself *is* the federal regulatory objective, state laws that take away that choice are probably preempted.

Third, state law is not preempted merely because a federal standard is the product of a cost-benefit judgment (or other weighing of competing interests). *Williamson*, 131 S. Ct. at 1139. A party asserting preemption on the ground that the federal standard represents a “golden mean” that cannot be supplemented by state law has the burden of showing that the federal agency did not intend to create a mere minimum standard.

IV. Recurring Express Preemption Issues

A. State Common Law Claims

A key issue in several preemption cases heard by the Supreme Court was the extent to which express preemption provisions encompassed state common-law claims. Until the Court decided *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), courts generally held that provisions expressly preempting state laws did not encompass state common law. In *Cipollone*, however, a majority of the Court concluded that “common-law damages actions of the sort raised by petitioner are premised on the existence of a legal duty, and it is difficult to say that such actions do not impose ‘requirements’ or ‘prohibitions’”—the terms used in the preemption provision of the Federal Cigarette Labeling and Advertising Act. *Id.* at 522 (plurality opinion); *id.* at 548-49 (Scalia, J., concurring in the judgment in part and dissenting in part) (agreeing with that reasoning).⁷ Since that time, the preemption provisions in many other federal laws have been held to cover state common law.

Whether an express preemption provision embraces state common law has depended, naturally enough, on the precise wording of the express preemption provision, as well as the wording of saving clauses. In *Sprietsma v. Mercury Marine*, for example, the Court addressed a provision of the Federal Boat Safety Act expressly preempting “a [state or local] law or regulation.” 537 U.S. at 63. The Court unanimously concluded that the provision does not encompass common-law claims, in part because a saving clause declares that compliance with the Act “does not relieve a person from liability at common law or under State law.” *Id.* The Court reasoned that “the saving clause assumes that there are some significant number of common-law liability cases to save [and t]he language of the pre-emption provision permits a narrow reading that excludes common-law actions.” *Id.* (internal citation and quotation marks omitted). The Court in *Geier* reached the same conclusion in construing a federal law that preempts any state motor vehicle “safety standard,” but also provides that compliance with the federal law “does not exempt any person from any liability under common law.” 529 U.S. at 867-68. (*Geier* ultimately found the state common-law claim preempted based on *implied* preemption.)

By contrast, in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), the Court construed the Medical Device Amendments of 1976’s express preemption provision’s reference to “any requirement” as encompassing state common law. *Id.* at 503-05 (Breyer, J., concurring in part and concurring in judgment); *id.* at 509-12 (O’Connor, J., concurring

⁷ See also *Medtronic v. Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring) (“a federal regulation [that] requires a 2-inch wire” in a device preempts not only a state law or regulation that requires a 1-inch wire, but also “a state-law tort action that premises liability upon the defendant manufacturer’s failure to use a 1-inch wire”).

in part and dissenting in part). See also *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (provision preempting state “law, rule, regulation, order, or standard relating to railroad safety” preempted common-law negligence claim); *Bates*, 544 U.S. at 443 (provision preempting state law “requirements” encompasses common-law duties); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323-25 (2008).

B. Saving Clauses

As some of the above cases demonstrate, saving clauses—which expressly provide that certain types of state laws are *not* preempted by a federal statute, including its express preemption provision—are often the key to resolving preemption cases. Parties supporting preemption often quote the Court’s statement that it has “decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.” *United States v. Locke*, 529 U.S. 89, 106 (2000). While that may be true, the Court has been perfectly willing to read saving clauses broadly and to reject preemption claims based on them. *Chamber of Commerce v. Whiting*, discussed earlier, is the most recent example. The Court interpreted the Immigration Reform and Control Act (IRCA), which expressly preempts “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens.” 8 U.S.C. §1324a(h)(2). The Court broadly construed the saving clause to cover an Arizona law that suspends or revokes a company’s business license (*e.g.*, articles of incorporation or partnership certificate) if it knowingly and intentionally hires unauthorized aliens.

In reaching that conclusion, the *Whiting* Court rejected the Chamber of Commerce’s effort to use legislative history to narrow the scope of the saving clause: “Absent any textual basis, we are not inclined to limit so markedly the otherwise broad phrasing of the savings clause.” 131 S. Ct. at 1980. The Court also rejected the Chamber’s contention that broad application of the saving clause would upset the balance Congress sought to strike in IRCA: “[I]n preserving to the States the authority to impose sanctions through licensing laws, Congress did not intend to preserve only those state laws that would have no effect. The balancing process that culminated in IRCA resulted in a ban on hiring unauthorized aliens, and the state law here simply seeks to enforce that ban.” *Id.* at 1984-85. See also *Geier*, 529 U.S. at 871 (“the saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims”).

V. Preemption By Administrative Agencies

One of the most significant developments in preemption law has been the rise of preemption by federal administrative agencies. The Supreme Court has long recognized that an agency action with the force of law can preempt state law just as fully as a federal statute. See, e.g., *Easterwood*, 507 U.S. at 674-75 (holding that federal regulation governing maximum train speed preempts negligence claim that a speed under the federal maximum was excessive); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 170 (1982) (holding that federal regulation permitting due-on-sale clauses in mortgages preempts California law prohibiting due-on-sale clauses). But beneath the Court's straightforward statement that "[f]ederal regulations have no less pre-emptive effect than federal statutes," *de la Cuesta*, 458 U.S. at 153, lie many complexities.

In particular, agency efforts to preempt state law create a tension between *Chevron*⁸ deference and the presumption against preemption. Let's say a federal statute contains an express preemption provision, but it's not clear whether the provision encompasses a particular type of state law. The presumption against preemption should lead a court to find that Congress did not intend to preempt state law. Under *Chevron*, however, courts must defer to reasonable agency constructions of a federal statute unless Congress has "directly spoken to the precise question at issue." 467 U.S. at 842. What if the agency construes the statute as encompassing the disputed type of state law? Should courts defer to that agency construction under *Chevron* (and therefore find the state law preempted) or independently apply the presumption against preemption (and therefore find the state law not preempted)?

As discussed on page 8 above, the Court held in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), that *Chevron* applies to an agency's interpretation of the *substantive* meaning of a federal statute, even when the federal law, so interpreted, conflicts with (and therefore preempts) state law. *Smiley* involved an OCC regulation defining "interest" in the National Bank Act to include late fees. That construction, if valid, would preempt state laws providing that certain late fees are unconscionable. The Court held that under *Chevron* it must defer to the OCC's interpretation. And the Court rejected the contention that the OCC's regulation is not entitled to *Chevron* deference because of the presumption against preemption. That argument, found the Court, "confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive. We may assume (without deciding) that the latter question must always be decided *de novo* by the courts." *Id.* at 744.

The Court has still not decided whether the assumption it made in *Smiley*—that the validity of an agency rule addressing "*whether* a statute is pre-emptive . . .

⁸ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

must always be decided *de novo* by the courts”-is correct. Parties presented the issue to the Court in two recent cases, *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), and *Cuomo v. Clearing House Association, L.L.C.*, 129 S. Ct. 2710 (2009), but the Court resolved the cases without reaching it. (The dissent in *Watters*, authored by Justice Stevens and joined by Chief Justice Roberts and Justice Scalia, took a clear position on the issue, asserting that “expert agency opinions as to which state laws conflict with a federal statute” are entitled to “something less than *Chevron* deference.” 550 U.S. at 41.)⁹

The Court *has* decided that agency conclusions about preemption *that do not have the force of law* are not entitled to deference. In *Wyeth v. Levine*, the Court declined to give *Chevron* deference to a statement the Food and Drug Administration inserted in the preamble to a regulation about prescription drug labels, which declared that state law failure-to-warn actions “threaten FDA’s statutorily prescribed role as the expert Federal agency responsible for evaluating and regulating drugs.” *Wyeth*, 129 S. Ct. at 1200 (quoting 71 Fed. Reg. 3922, 3935 (2006)). The Court held that to the extent the preamble reflects an “explanation [by the FDA] of how state law affects the [federal] regulatory scheme,” it might be entitled to “some weight.” *Id.* at 1201 (quoting *Geier*, 529 U.S. at 883). But the amount of weight “depends on [the agency’s] thoroughness, consistency, and persuasiveness.” *Id.* The Court concluded that the FDA preamble did not merit any deference because it had not passed through the notice-and-comment process, was at odds with evidence that Congress did not intend to preempt state-law causes of action, and represented a change from the FDA’s long-standing position. *Wyeth*, 129 S. Ct. at 1201-02.

And although *Wyeth* did not explicitly address the weight it would give an agency regulation expressing a view about preemption that it adopted after notice and comment, the opinion suggests that such a regulation would be entitled to less than *Chevron* deference. The Court stated that in the case of a substantive regulation, “the Court has performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption.” *Id.* at 1200-01. The Court may have intended that principle to apply even when the “agency proclamation of preemption” takes the form of a regulation, at least where Congress has not specifically delegated preemptive authority to the agency.

Among the arguments why an agency rule declaring that a federal statute has preemptive effect should not receive *Chevron* deference are:

First, a general delegation by Congress to an agency to promulgate regulations does “not include the authority to decide the pre-emptive scope of the federal statute.” *Gonzales v. Oregon*, 546 U.S. 243, 263 (2006) (describing holding in *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990)). As Justice Stevens noted in his *Watters*

⁹ In both *Medtronic*, 518 U.S. at 495-96, and *Hillsborough County*, 471 U.S. at 714-15, the Court gave *Chevron* (or *Chevron*-like) deference to an agency’s view that a statute did *not* have a certain preemptive effect. In that situation, of course, there is no conflict between *Chevron* and the presumption against preemption.

dissent, Congress has occasionally delegated to agencies the specific power to preempt state law. *Watters*, 550 U.S. at 38-39 & n. 21 (citing statutes). When Congress has not specifically delegated that power, a court should not infer it “[f]or there is a vast and obvious difference between rules authorizing or regulating conduct and rules granting immunity from regulation.” *Id.* at 39. See also Brief of the Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. as Amicus Curiae in Support of Petitioner at 17-19, *Watters v. Wachovia*, 550 U.S. 1 (No. 05-1342) (hereafter, “State Center Amicus Brief”).

Second, as outlined in the State Center Amicus Brief, authored by Professor Thomas Merrill, “the decision to displace state law also implicates the consideration of a wide range of systemic variables as to which the judiciary has a superior claim, not only to competence, but also to authority under our constitutional order.” State Center Amicus Brief, at 8. These include:

- ▶ When making preemption findings, agencies often interpret precedent—particularly, the complex law of preemption itself—developed by the courts. Suffice to say, the courts are better suited to interpreting their precedents than an administrative agency. *Id.* at 9-10.
- ▶ Preemption implicates questions of constitutional federalism, which the judiciary is designed to resolve. By contrast, agencies are “specialized institutions” not well suited to contemplating

larger structural issues such as the relative balance of authority between the federal and state governments, the importance of preserving state autonomy, the value of allowing policy to vary in accordance with local conditions, or the systematic advantages of permitting state experimentation with divergent approaches to social problems.

Id. at 11. See also *Geier*, 529 U.S. at 908 (Stevens, J., dissenting) (“Unlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law.”); Nina A. Mendelson, *Chevron and Preemption*, 102 Mich. L. Rev. 737, 779-90 (2004) (explaining why “the relative institutional competence of agencies in considering federalism values weighs against deferring to agency interpretations of preemption questions”).

- ▶ Deciding whether state law frustrates federal objectives implicates the scope of agency authority, and self-interested agencies are not good at defining the limits of their own delegation. State Center Amicus Brief, at 12-14; see also Mendelson, *supra*, at 794-97. Although the Court “has been unwilling to deny *Chevron* deference on the sole ground that an agency determination addresses the scope of its own authority,” that is “because it may be difficult in some case[s] to distinguish[] between jurisdictional and non-jurisdictional issues. But preemption questions are easily identified.” Brief for Petitioner at 50-51, *Cuomo v. Clearing House Association, L.L.C.*, 129 S. Ct. 2710 (No. 05-1342).¹⁰

VI. Preemption in Areas of Special Federal Interest

The Supreme Court has been quick to find state laws preempted in cases that “involve uniquely federal areas of regulation.” *Chamber of Commerce v. Whiting*, 131 S. Ct. at 1983. Most notable among these “uniquely federal areas” are foreign affairs and Native American affairs.

A. Foreign Affairs

The Constitution specifically assigns power over foreign commerce to Congress, while power over foreign relations has long been read to be the province of the federal government in the person of the President. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). In two fairly recent cases, the Court has held that the importance of the United States “speaking with one voice” in foreign affairs overrides even traditionally strong state interests, and compels preemption where there is a conflict with federal conduct of foreign relations.

In the first of these cases, *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), the Court found preempted a Massachusetts statute that, as a protest of Burma’s human rights record, forbade the Commonwealth from buying goods and services from companies doing business with Burma. Even though the state statute governed only Massachusetts’ role as a market participant, the Court held that a federal statute imposing certain sanctions on Burma and giving the President authority and latitude to change those sanctions preempted the less-flexible state law. The Court ruled that the state law sanctions stood as an obstacle to Congress’ intent to give the President discretion; to Congress’ intent “to limit economic pressure against the Burmese Government to a specific range”; and with the President’s capacity “to speak for the Nation with one voice in dealing with other governments.” *Id.* at 377, 381.

¹⁰ For a forceful response to these arguments, see Brief for Administrative Law Professors Richard J. Pierce, Jr., Frank B. Cross, & Mark B. Seidenfeld as Amicus Curiae in Support of Affirmance, *Watters v. Wachovia*, 550 U.S. 1 (No. 05-1342).

It therefore did not matter that the federal statute did not contain an express preemption provision. Nor did it matter that the Massachusetts statute's general goal of pushing Burma to greater democracy was the same as the federal statute's goal. The Court held that "[t]he fact of a common end hardly neutralizes conflicting means." *Id.* at 379. This is a far more stringent test than is applied to non-foreign policy cases.

Second, in *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), the Court held that a California statute that compelled insurance companies to disclose policies sold in Europe to Holocaust victims interfered with the President's conduct of foreign affairs, and was therefore preempted. Although the California statute solely mandated disclosure, California had enacted other laws that would have allowed Holocaust victims who had not received the benefits to which they were entitled under their war-era insurance policies to sue their insurers. The Court found that California's approach conflicted with "Presidential foreign policy," which "has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions." *Id.* at 421; see also *id.* at 427 ("California seeks to use an iron fist where the President has consistently chosen kid gloves").

The decision provoked a sharp dissent from an eclectic lineup of Justices (Stevens, Scalia, Thomas, and Ginsburg), who criticized the majority for preempting a state law in a traditionally state-regulated area, particularly where the preempting federal executive agreement contained neither express preemption language nor any mention of the type of information that was the subject matter of the preempted state law.

B. *Native American Affairs*

Native American affairs form a unique area of preemption law because the tribes are considered in some senses to be sovereign nations themselves, introducing yet another sovereign authority into the analysis. The Constitution's Indian Commerce Clause gives Congress primary authority for regulation of Native American commercial affairs, and federal common law reflects this. Preemption analysis in Native American affairs cases, therefore, differs significantly from normal federal preemption analysis. Under normal federal preemption doctrines, state laws may apply on federal lands or in areas of federal interest except to the extent they conflict with federal law. *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976). In Native American affairs preemption analysis, the presumption is reversed: state laws are generally inapplicable as against Native Americans in "Indian country," except where Congress provides to the contrary. The presumption is applied with notably less force when States attempt to regulate non-Native Americans on such land. See generally *Montana v. United States*, 450 U.S. 544 (1981).

When determining whether a state law that would affect Indian country is preempted, the courts do not require an express congressional statement of intent to

preempt. Rather, the Supreme Court has held there should be a “particularized inquiry into the nature of the state, federal, and tribal interests at stake,” with courts balancing these various interests to determine whether the exercise of state authority would violate federal law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). Many of the cases in this area have concerned taxation. Although the Court’s initial tendency was to limit the application of state tax laws, see *Bracker*, 448 U.S. at 145-53; *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164 (1973), more recently it has approved of some state taxation relating to services performed on Indian reservations. See, e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Arizona Dept. of Revenue v. Blaze Constr. Co.*, 526 U.S. 32 (1999).

The triple-sovereign problem also shows up when the Court analyzes the extent of tribal authority over tribal members, non-member Native Americans, and non-Native Americans. See, e.g., *Nevada v. Hicks*, 533 U.S. 353 (2001) (tribal court lacks jurisdiction to adjudicate state officers’ alleged tortious conduct on reservation while executing search warrant for off-reservation crime); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (tribe may not tax transaction occurring between two non-Indians on fee land within reservation). With the development of Indian gaming and frequent litigation concerning the limits of state authority in Indian country, tribal sovereignty and the authority of States on tribal lands remains a dynamic area of law.

VII. Non-Preemption Doctrines that Limit the Extent of Preemption

A. *Constitutional Limits on Congressional Power*

Congress’ enactment of numerous preemptive federal statutes is one of the many consequences of the Supreme Court’s decision in the late 1930s to construe the Commerce Clause as granting Congress expansive powers. Accompanying the expansion of Congress’ Commerce Clause power was a diminution in the independent force of the Tenth Amendment. Starting in the mid-1990s, however, the Court began enforcing some federalism-based limits on Congress’ authority. Although these decisions are not, strictly speaking, preemption cases, they must be mentioned, at least briefly, as limiting federal preemption of certain state prerogatives.

The Rehnquist Court struck down several federal laws for violating principles embodied in the Tenth Amendment. In *Printz v. United States*, 521 U.S. 898 (1997), the Court held that Congress cannot “conscript[.]” state officials to conduct background checks on handgun purchasers under the Brady Violence Protection Act. *Id.* at 935. And in *New York v. United States*, 505 U.S. 144, 174-77 (1992), the Court held that Congress may not force States to enact legislation providing for the disposal of radioactive waste generated within their borders or take title to the waste. The Tenth Amendment, from

a mere “tautology” in the past, *id.* at 157, has now been revitalized as a shield against federal commandeering of state government.

The Court has also reinvigorated the notion that the Commerce Clause does not grant Congress unlimited power. In *United States v. Lopez*, 514 U.S. 549 (1995), the Court struck down the federal Gun-Free School Zones Act of 1990, which forbade possession of a gun within 1,000 feet of a school. The Court held that the law was beyond the enumerated powers of Congress, finding that gun possession near a school is not a commercial activity and does not substantially affect interstate commerce. *Id.* at 561. The majority expressed concern that if mere gun possession near a school was seen as within Congress’ Commerce Clause power, Congress could exert federal control over schools and even over child-rearing. *Id.* at 564-65. The Court also discussed the values of federalism at some length, and cited the federal structure in the Constitution as a basis for its holding. *Id.* at 552, 557; see also *id.* at 575-83 (Kennedy, J., concurring). The Court confirmed that *Lopez* was not an aberration five years later, in *United States v. Morrison*, 529 U.S. 598 (2000), where it held that §13981 of the Violence Against Women Act—which provided a federal civil remedy for victims of gender-motivated violence—exceeded Congress’ power under the Commerce Clause.

In *Gonzales v. Raich*, 545 U.S. 1 (2005), however, the Court backtracked. By a 6-3 vote, the Court held that Congress’ Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana in compliance with California law. The Court found that Congress could rationally have concluded that the ban on personal marijuana growth “was an essential part of the larger regulatory scheme,” namely, the Controlled Substances Act. *Id.* at 27. By contrast, *Lopez* specifically noted that the Gun-Free School Zones Act was “*not* an essential part of a larger regulation of economic activity.” 514 U.S. at 561 (emphasis added). Having distinguished *Lopez*, the *Raich* Court held that *Wickard v. Filburn*, 317 U.S. 111 (1942), “firmly establishe[d] Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.” *Raich*, 545 U.S. at 17.

B. Quasi-Constitutional Rules of Statutory Construction

The Supreme Court’s reinvigoration of federalism-based constitutional limits on Congress’ power has had a collateral impact on preemption litigation. Even if a State is unable to convince a court that a purportedly preemptive federal statute is unconstitutional, quasi-constitutional rules of statutory construction can help States convince the court that the statute should not be construed to preempt state law. For instance, the Court has long held that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). See also *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

A notable application of this “constitutional doubt” doctrine was *Jones v. United States*, 529 U.S. 848 (2000), in which the Court unanimously construed the federal arson statute not to cover the arson of an owner-occupied private residence “to avoid the constitutional question that would arise” under the Commerce Clause were the provision “read to make virtually every arson in the country a federal offense.” *Id.* at 857, 859. Although *Jones* was not a preemption case *per se*, Justice Stevens’ concurring opinion (joined by Justice Thomas) “emphasize[d] the kinship between our well-established presumption against federal pre-emption of state law . . . and our reluctance to believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this.” *Id.* at 859 (internal citations and quotation marks omitted).

Another quasi-constitutional rule of statutory construction that is often useful to States in preemption cases is the clear statement rule of *Gregory v. Ashcroft*. In *Gregory*, the Court addressed whether the federal Age Discrimination in Employment Act applied to, and hence preempted, a state constitutional provision setting a retirement age for appointed state judges. The Court ruled that

Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, “it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides” this balance.

501 U.S. at 460 (citation omitted). Accordingly, where application of a federal statute will “affect[] the federal balance in an area that has been a historic power of the States,” Congress must speak in language that “helps assure that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 544 (2002) (internal citations and quotation marks omitted). A number of federal statutes that are alleged to preempt state law can be cast as “affect[ing] the federal balance in an area that has been a historic power of the States,” and hence subject to this stringent clear statement rule.

CONCLUSION

Preemption has become the preeminent federalism issue of our time. Courts hear preemption cases far more often than they hear Tenth Amendment cases or challenges to Congress’ power under the Commerce Clause. It is therefore critical that state attorneys be familiar with the law of preemption, and become familiar with the arguments they can use to defend state laws. We hope this manual assists state attorneys in that effort.