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Unmasking the Presumption in Favor of Preemption

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UNMASKING THE PRESUMPTION IN FAVOR OF PREEMPTION

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I. INTRODUCTION

It is inescapable: there is a presumption in favor of preemption. Historically, the Supreme Court has said differently—that, rather, there is a presumption against preemption. There is no such presumption any longer, if, indeed, there ever really was one. Preemption doctrine has been exceedingly puzzling in the last decade, but when one recognizes that the Court's doctrine not only favors preemption, but presumes it, preemption doctrine is not a puzzle at all.

Preemption doctrine is the judicial tool by which courts define the contours of federal control of a subject when Congress has legislated pursuant to one of its enumerated powers. The Supremacy Clause of the Constitution defines the constitutional principle that federal law is supreme.[1] Preemption doctrine gives content to the parameters of that principle in areas left in doubt under particular federal legislation, and there inevitably will be areas of doubt.

The purpose of preemption doctrine, therefore, is to define the sphere of control between federal and state law when they conflict, or appear to conflict. The pieces of the preemption puzzle are very familiar: a piece of federal legislation; an administrative body given authority to enforce, and, perhaps to further define, the legislation; a concurrent state law or regulation that would seem also to operate in the same sphere as the federal legislation; and a party who wants to enforce the state regulation and ignore the federal, opposed by another party who wants to obey only the federal law, and not the state law. There are many ways to fit these pieces together, and many variables to consider in the process.

One such variable has historically been the supposed presumption against the preemption of state regulation in the area of traditional police power—those governing the life, health, and safety of the general public.[2] Most commentators favor such a presumption as consistent with federalist notions of limited federal government.[3] The Supreme Court has mentioned such a presumption often in the

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1. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . 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.").

2. This "presumption" was articulated very early in the life of preemption jurisprudence. *See, e.g.*, N.Y. Cent. R.R. Co. v. Winfield, 244 U.S. 147, 156 n.1 (1917) (Brandeis, J., dissenting) (citing various Supreme Court opinions). The modern statement of the presumption is usually traced to *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). On the presumption against preemption see generally Susan Raeker-Jordan, *The Pre-emption Presumption That Never Was: Pre-emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379 (1998) (exploring the presumption against preemption and noting its ineffectiveness).

3. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 290-91 (2000); Raeker-Jordan, *supra* note 2, at 1428-29. *But see* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000) (criticizing the presumption against preemption).

For articles exploring preemption doctrine generally, see Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559 (1997); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69 (1988). On preemption principles as applied to products liability actions specifically, see Richard C. Ausness, *Federal Preemption of State*

one hundred plus years it has been concentrating on this doctrine. When Congress legislates in a field within its enumerated powers, typically under the Commerce Clause, courts must determine how much state law has been displaced in the process. Consequently, preemption doctrine is central to the definition of power and control under our federal system of government.[4]

Preemption cases, at one level, then are about the specific subject matter of the legislation in issue, and how Congress has chosen to legislate in that field. Recent preemption cases in the products liability field have involved cigarette labeling,[5] railroad crossing warnings,[6] medical device marketing,[7] and air bags.[8] The Court has decided a significant number of preemption cases in the last decade, particularly involving products liability,[9] and is poised to decide more in the coming years.[10]

On a more basic level, though, preemption is about power and politics because it involves the fundamental balance of Congress's power in relation to the states. It is a doctrine full of complexity borne of the enormity of the task with which it is charged. To the extent that the Supreme Court has something to say about the power struggle of federalism, it speaks, partially at least, through its preemption decisions.

A definition of the terminology of preemption may be in order. Preemption doctrine begins with the Supremacy Clause which defines federal law to be supreme. The scope of federal legislation is within the power of Congress to define, and if Congress does not want federal law to be supreme in any particular area, then it is not. So, preemption doctrine seeks Congress's intent on the scope of

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Products Liability Doctrines, 44 S.C. L. REV. 187 (1993).

4. It has been said that preemption doctrine is the most frequently used constitutional law doctrine. Gardbaum, *supra* note 3, at 768.

5. Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) (involving preemptive effect of federal cigarette labeling statutes).

6. Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000) (involving preemptive effect of federal railroad grade crossing warning regulations).

7. Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) (involving preemptive effect of Medical Device Amendments to the Federal Food, Drug and Cosmetic Act).

8. Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) (involving preemptive effect of National Highway Traffic and Safety Act regulations regarding air bag use in automobiles).

9. A search by the author of preemption cases decided by the Supreme Court since 1940 disclosed approximately 150 decided between 1940 and 1980 and an additional 150 in the twenty years between 1980 and 2000, roughly double the amount of the previous forty years.

Until the 1990s, the Court had decided only a handful of cases involving preemption of common law damages actions. *E.g.*, Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984), discussed *infra* notes 145-74 and accompanying text, and San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), discussed *infra* notes 71-87 and accompanying text.

Between 1990 and 2001, the Court decided five preemption cases involving products liability actions alone: Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001); *Geier*, 529 U.S. 861; *Medtronic*, 518 U.S. 470; Freightliner Corp. v. Myrick, 514 U.S. 280 (1995); *Cipollone*, 505 U.S. 504. During the same time period, the Court also decided two cases involving preemption of tort actions stemming from railroad accidents: Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000); CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993).

10. The Court will hear another products liability preemption case in its 2002-2003 term. Sprietsma v. Mercury Marine, 757 N.E.2d 75 (Ill. 2001), *cert. granted*, 122 S.Ct. 917 (2002) (mem.).

displacement of state law. If Congress has included an express preemption provision in a statute addressed to the matter of the legislation's scope, that provision must be interpreted. In the absence of an express preemption provision, the Court must determine Congress's intent to preempt implicitly. Three categories of implied preemption are typically utilized: (1) occupation of the field implied preemption, where Congress's legislation is so complete, and the area is one requiring national uniformity of regulation, that Congress can be said to have intended to occupy the field; (2) implied conflict preemption, where the federal and state regulations are in such conflict that state law must yield to the federal because either (a) there is an actual conflict in that it is impossible for a party to comply with both federal and state regulation or (b) state law "stands as an obstacle" to the accomplishment of federal objectives and, therefore, must yield.[11] Use of the last-mentioned implied preemption doctrine known as "obstacle" preemption causes the most doctrinal difficulty because of the inherent uncertainty in determining Congress's intent to preempt based on an *ex post* judicial assessment of congressional objectives.[12]

The temptation is very strong to explain the Court's preemption doctrine by an assessment of the Justices' political or philosophical beliefs about the scope of federal legislation and how it should be interpreted.[13] After a review of the Court's decisions over the last century, it will be difficult to resist that temptation. This Article attempts to explain trends in preemption doctrine by another method: chronicling the shifts in the Court's preemption doctrine historically. Such an historical treatment serves to illuminate the forces that have operated on the doctrine and, perhaps, enable a prediction of where it may be headed.

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11. *See* Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 712-13 (1985); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230-31 (1947); Hines v. Davidowitz, 312 U.S. 52, 61 (1941). *See generally* Nelson, *supra* note 3, at 226-29 (discussing the Court's analysis of preemption doctrine); Raeker-Jordan, *supra* note 2, at 1382-1384 (same).

12. *See* Nelson, *supra* note 3, at 277. In discussing obstacle preemption, Professor Caleb Nelson stated the following:

> When a federal statute does not expressly address preemption, it is quite possible that members of Congress did not even consider preemption, or at least did not reach any actual collective agreement about how much state law to displace. To the extent the Court is talking about subjective intent at all, the Court appears to be conducting an exercise in "imaginative reconstruction": The Court is trying to reconstruct how the enacting Congress *would have* resolved questions about the statute's preemptive effect *if* it had considered them long enough to come to a collective agreement.

Id. (footnote omitted).

13. *See* David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1129 (1999) ("For most judges, whether liberal or conservative, these cases pit one dimension of their ideology, their principles of federalism, against another, their policy preferences or attitudes toward the particular local regulation at issue."). Others have observed the unusual alliances borne of preemption doctrine. *See, e.g.*, Nelson, *supra* note 3, at 229 ("In recent years, conservative advocates of federalism and liberal advocates of government regulation have joined in arguing that the current tests for preemption risk displacing too much state law. This alliance is not as odd as it might seem, because the politics of preemption are complicated.") (footnotes omitted).

This historical treatment reveals a preemption doctrine that has evolved over the last century from one based on an assumption of congressional legislative exclusivity and almost certain preemption of state regulation to a doctrine, in the mid-part of the century, based on a search for congressional intent to preempt so that state laws, particularly those based on historical police powers, were not needlessly displaced. This effort to discern congressional intent to preempt has been, at least facially, paramount such that the Court, for a short time, relied on express preemption provisions to the exclusion of attempts to discern implicit congressional intent. The effort to discern congressional intent to preempt has fallen by the wayside, however, and the Court's preemption doctrine has reverted to its early-twentieth century focus on federal exclusivity, but, this time, in the guise of implied obstacle preemption.

This Article argues that the Supreme Court's recent preemption decisions compel the conclusion that the Court's preemption analysis has, in effect, created a presumption *in favor of* preemption, contrary to the Court's oft-quoted dicta that there is a presumption *against* preemption of historic state police powers. Indeed, there is no presumption against preemption: the Court has found preemption of state law tort actions when Congress has, in no uncertain terms, expressly stated the contrary. Express preemption provisions, today, are read narrowly; implied preemption doctrine is applied broadly against the silent backdrop of presumed preemptive intent.

Part II of this Article provides a history of the Court's primary preemption cases since the early part of the twentieth century, focusing on the way in which the doctrine has evolved and opining about the reasons for the evolutionary shifts as they occurred. The application of preemption doctrine to common law damages actions is highlighted given the particular difficulty the Court has had with such cases and the importance that preemption of such actions has to products liability matters.

Part III takes preemption doctrine into the twenty-first century by first explaining the Court's most recent struggles with preemption's focus on congressional intent. Part III explores how the Court has resolved that struggle, by refocusing on implied preemption with a presumption in favor of preemption. Further, this Part summarizes the Court's preemption doctrine and makes clear that the Court's modern preemption doctrine looks very much like its early preemption doctrine, which broadly presumed preemption when it suited the Court to do so.

Part IV explains the current preemption doctrine, applying the presumption in favor of preemption, and seeks to justify it. Without agreeing that the current doctrine strikes the proper balance between congressional and state control over the historic police powers, this Part explains the benefits that may ensue from having a broadly applied preemption doctrine. Clarity of doctrine, ease of application, and certainty of result all increase efficiency in the operation of the legal system. Compensation of injured tort claimants, in the case of products liability preemption, will surely decrease as liability is preempted. When compensation decreases not only is the victim irretrievably affected, the tortfeasor's incentive to modify its tortious behavior is significantly lessened to the extent that tort liability motivates

behavior. Clarifying this result of preemption doctrine may enable legislators to confront directly the effect of their legislation under the Court's doctrine.[14] Congress will be able to see, if it chooses, the effect of the Court's preemption doctrine without the shroud of veiled attempts to discern congressional intent.

Part V uses a federal regulatory scheme that the Court has not yet analyzed under the current preemption doctrine to illustrate how the Court's preemption doctrine may apply to it. The federal Boat Safety Act has been the subject of a number of lower court preemption cases in recent years and is poised to be the next victim of the Court's presumption in favor of preemption.

Many have called for Congress to speak its intent to preempt clearly;[15] I join that chorus but with no anticipation that the song will be heard. By exposing the Court's presumption in favor of preemption, this Article applauds the increase in clarity of congressional intent that may be obtained. That clarity will be forthcoming only if Congress is really disposed against preemption. It may not be. If not, so be it. But it is at least possible that the increasing number of persons who are affected by the federal preemption of state common law damages actions might be motivated to act on their federal legislators to defeat the presumption of preemption that the Supreme Court has created. In our federalist system, the Supreme Court should not be permitted to continue to affect the traditional operation of state law in the stealth manner that it has by hiding behind behind a presumption that does not exist. This Article seeks to unmask the presumption in favor of preemption that, indeed, operates.

It is important to define legal doctrines as accurately as possible so that they can be understood and relied upon predictably. In the area of federal preemption of common law actions, particularly product liability actions, doctrinal clarity will be promoted, and thus predictability furthered, only if the presumption that operates in preemption analysis is unmasked for what it is—a presumption in favor of, not against, preemption.

II. THE SUPREME COURT AND PREEMPTION DOCTRINE

Preemption doctrine has a long history[16] and is based in a variety of constitutional sources.[17] By far the bulk of preemption analysis has taken place,

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14. *E.g.*, Nelson, *supra* note 3, at 302 ("If members of Congress are unaware of a bill's preemptive effects when they vote for it, the political safeguards of federalism are unlikely to check those effects.... *Whatever* competing interests Congress is trying to balance, the lawmaking process does not function in an ideal way when members of Congress vote for bills without fully understanding what they mean.").

15. Grey, *supra* note 3, at 613-18; Raeker-Jordan, *supra* note 2, at 1381, 1428-45.

16. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 211 (1824) (stating that preemption occurs when state laws "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution").

17. U.S. CONST. art. I, § 10 (listing prohibited state governmental actions such as treaty activity, coining of money, or granting of nobility); U.S. CONST. art. I, § 8, cl. 3 (dormant Commerce Clause limitation on state regulation that places an undue burden on interstate commerce); U.S. CONST. art. IV, § 2, cl. 1 (privileges and immunities clause); U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

however, under the Supremacy Clause which states that federal law "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."[18] Most of the Court's very early cases involved the tension between the newly formed federal government's powers and those of the states and, thus, necessarily required an evaluation of the relationship of the power of those governments. Cases such as *McCulloch v. Maryland*,[19] and its discussion of the exclusivity of the federal government's taxing power, and *Gibbons v. Ogden*,[20] on the supremacy of a federal licensing statute regarding the use of the nation's waterways, provide powerful examples of how the early Republic had many conflicts to resolve as the federal government and the states challenged each other on how the shared governmental authority would be wielded.[21] The Framers very likely had no reason to expect the broad power that would be placed in Congress under the Commerce Clause and, thus, likely would not have contemplated the nature of the federal/state conflicts that have resulted from it.[22]

True preemption doctrine, then, was in its infancy until the unprecedented legislative activity of the post-Depression era. Until that time, the Court was faced with little truly comprehensive legislation of the kind that the 1930s and 1940s

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18. U. S. CONST. art. VI, cl. 2. For an alternative view of the source of the preemptive power of congressional legislation, see Gardbaum, *supra* note 3, at 781-83 (placing preemption authority in the Necessary and Proper Clause), but see Nelson, *supra* note 3, at 234 & n.32 (refuting Gardbaum's thesis).

Recent scholars have given content to the history of preemption under the Supremacy Clause. *See* Nelson, *supra* note 3, at 235-60. Professor Nelson describes the meaning of the Clause's concluding *non obstante* clause and has persuasively argued that much of preemption doctrine under the Supremacy Clause is misguided as a result of a failure to understand that clause from the perspective of legislative drafting techniques used at the time. *Id.* at 237-44. Professor Nelson argues for an analytical framework for preemption cases that would rely on a "logical contradiction" test, based on his historical analysis of the Supremacy Clause. *Id.* at 260-64.

Professor Wolfson argues that the Supremacy Clause was adopted by the Framers in lieu of a proposed congressional veto of state law power that was rejected by the Constitutional Convention as a way of compromising on that thorny issue, and, therefore, also ensuring that state judges respected and enforced federal law. Wolfson, *supra* note 3, at 88-91.

19. 17 U.S. (4 Wheat) 316 (1819).

20. 22 U.S. (9 Wheat) 1 (1824).

21. For a discussion of the early Supreme Court cases and their relation to preemption doctrine, see Nelson, *supra* note 3, at 265-76; *see also* Gardbaum, *supra* note 3, at 785-95 ("For most of the nineteenth century, the Court typically decided cases involving the relationship between state and federal power not on preemption grounds, but on grounds of exclusivity or supremacy alone.").

22. In arguing that Congress exercises a power that the Framers probably intended to deny it, Wolfson states:

> There is considerable support for the view that the expansion of Congress'[s] commerce power was essential to enable some part of the government to address commercial problems that are national in scope, and thus beyond the power of the states to regulate effectively, and yet not so national in nature as to demand regulation by Congress alone.

Wolfson, *supra* note 3, at 91 (footnotes omitted).

produced.[23] It may seem unusual, then, that the Court would analyze the more limited congressional legislation enacted during the early twentieth century by finding that, simply by virtue of that legislation, the states were entirely precluded from exercising their concurrent power within it. That is, however, in fact exactly how the Court's preemption analysis at that time can be described.

A. Preemption Doctrine in the Early Twentieth Century

In the early part of the twentieth century, the Court's preemption cases can usefully be classified as involving the concept of latent exclusivity.[24] At that time, the Court's preemption analysis involved a very broad reading of congressional purposes and, thus, federal legislation was often found to "occupy the field," to the exclusion of state regulation. This very broad reading of many federal regulations, with virtually no support for congressional intent to so operate, resulted in almost automatic preemption of concurrent state regulation.[25]

That regulation of railroads in interstate commerce might be one such area is not surprising,[26] though the limited nature of the early federal legislation in the area does not compel that conclusion.[27] Nonetheless, the notion that federal legislation in an area "occupied" that field began to take form in the early twentieth century

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23. *See* Gardbaum, *supra* note 3, at 783 (stating that "recognition of preemption was an intrinsic part of the expansion of federal power that has taken place over the course of this century").

24. This phrase is borrowed from Professor Stephen Gardbaum. *Id.* at 801. Professor Gardbaum explores the pre-twentieth century cases and describes them as reflecting "confusion and ambivalence." *Id.* at 795-800. He further states:

> The period from 1912-1920 marked the end of the prevailing confusion, with the Court issuing for the first time consistently clear and explicit statements of genuine preemption principles. It is not merely conflicting state laws that are overridden by federal law on the same subject, but any state laws–even those that are consistent with and supplement federal law. The effect of congressional action is to end the concurrent power of the states and thereby to create exclusive power at the federal level from that time on.

Id. at 801.

25. *See id.* at 786 (discussing early preemption cases having this effect).

26. Those who have only passing familiarity with tort law know the power that the railroads had on the formation of tort law in this country, as well as on our economic and social structure. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 468 (2d ed. 1985) ("The modern law of torts must be laid at the door of the industrial revolution, whose machines had a marvelous capacity for smashing the human body."); EDWARD G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 16, 22 (1980).

Equally as influential on this subject is the work of Professor Gary T. Schwartz, whom this Symposium honors. *See, e.g.*, Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1739-48 (1981); Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 651-60 (1989).

On this topic generally, see MARTIN J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

27. Gardbaum, *supra* note 3, at 801 (citing Herbert Hovenkamp, *Regulatory Conflict in the Guilded Age: Federalism and the Railroad Problem*, 97 YALE L. J. 1017 (1988)).

with cases involving railroad regulations.[28] In *Southern Railway Co. v. Reid*,[29] the Court described in some detail the doctrine which would come to be known as "occupation of the field" implied preemption. *Reid* involved railroad freight regulations under the Interstate Commerce Act,[30] but no federal regulations had been issued dealing with the plaintiff's particular transportation needs.[31] The Court concluded that even though there was no particular federal regulation governing the plaintiff's claim, the broad federal regulatory authority under the Interstate Commerce Act was action enough to indicate the Congress had taken possession of the field.[32] This was so even though the state regulation the plaintiff relied upon complemented the federal scheme. The Court declared that the absence of federal regulation did not leave room for the states to regulate, and that the railroad must be left to follow the dictates of the federal scheme.[33] In a subsequent railroad regulation matter, the Court stated, "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."[34]

In *New York Central Railroad Co. v. Winfield*,[35] the Court concluded similarly that the Employers' Liability Act,[36] which defined the negligence liability of railroads to employees, prevented the states from providing either a supplemental common law or workers' compensation coverage for such injured workers, even where the state coverage was intended to complement the Act's provisions.[37]

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28. Gardbaum, *supra* note 3, at 801 ("This double shift in the direction of enhanced federal power, which was in stark contrast to the Court's practice of almost always upholding state laws during the previous century, was undoubtedly driven by a perception that uniform regulation, especially (but not only) of the railroads, had become a national necessity.").

29. 222 U.S. 424 (1912).

30. *Id.* at 435.

31. Mrs. Reid tendered household and other goods to the railroad to be transported across state lines. *Id.* at 432-33. The railroad refused to accept the goods until it could determine the rate, which had not yet been established for that particular route. *Id.* at 433. It took the railroad six days to do so, and the delay cost Mrs. Reid $25.00. *Id.* at 432-34. Mrs. Reid sued under a North Carolina statute which required carriers to accept freight tendered for shipment or pay a fine and damages, and she won. *Id.* at 431-34. The railroad challenged the North Carolina law as a violation of the interstate Commerce Clause of the Constitution. *Id.* at 434.

32. *Id.* at 437-38.

33. *Id.* at 442. Indeed, in future cases the Court would declare that:

> [T]he power of the State over the subject-matter [of railroad regulation] ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme.

Chicago, Rock Island & Pac. Ry. Co. v. Hardwick Farmers Elevator Co., 226 U.S. 426, 435 (1913).

34. Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915) (citations omitted) (holding that federal law preempted a South Carolina statute that imposed a penalty for failure to settle claims within forty days, even though plaintiff claimed the state statute complemented Congress's scheme to govern railroad conduct).

35. 244 U.S. 147 (1917).

36. 45 U.S.C. §§ 51-60 (1994) (originally enacted Apr. 22, 1908, amended 1939).

37. *Winfield*, 244 U.S. at 148-54.

Plaintiff was injured during his employment with the railroad, though not through its negligence, and received workers' compensation coverage from his state.[38] The Court found that the Act was exclusive, though it did not so provide,[39] and that state law was entirely preempted.[40] The Court relied almost singularly on the desire for uniformity stated in the legislative history.[41] The Court's analysis is conclusory:

> "[I]f Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere . . . . In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it." Thus, the act is as comprehensive of injuries occurring without negligence, as to which class it *impliedly* excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carriers' duty or obligation as to both.[42]

In dissent, Justice Brandeis defined as clearly as had theretofore been attempted, the circumstances in which congressional action would be found to *impliedly* preempt state regulation in the field, and particularly in an area of the state's "police powers."[43] Modern "obstacle" implied preemption, as identified above where the Court evaluates whether state law stands as an obstacle to the accomplishment of federal purposes to determine the preemptive effect of federal legislation, can be traced to Justice Brandeis' description of the bases of preemption. He states that if Congress's legislative purpose cannot be accomplished, or "its operation frustrated" by state law, then state law must yield but *only if* Congress's intent to supercede is supported by actual conflict with the state law; limited federal legislation in the field is insufficient to infer total

38. *Id.* at 148.

39. 45 U.S.C. § 51 states:

> Every common carrier by railroad . . . shall be liable . . . to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence . . . .

40. *Winfield*, 244 U.S. at 149-53.

41. *Id.* at 149-150. The Court never even quoted the language of the statute.

42. *Id.* at 153 (citations omitted) (emphasis added).

43. *Id.* at 155 (Brandeis, J., dissenting). The first rule is that Congress's commerce power was not intended to deprive the states from legislating on subjects "relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Id.* (Brandeis, J., dissenting) (citation omitted).

preemption.[44] He concluded that the legislation in issue was not comprehensive but, rather, that it was narrowly written, and clearly so, to deal only with negligence actions and to permit injured employees to get out from under the long-subsisting common law defenses that continued to hamper recovery.[45] Congress, therefore, did not mean to prevent the States from providing more in the way of compensation for injured railroad workers.

The difference between the analysis in the majority opinion in *Winfield*, very thin and conclusory, and the thorough study of the legislation in Justice Brandeis' opinion reflects a difference in approach to preemption that continues to exist today. The majority would broadly find preemption based on perceived rather than factually supported congressional intent, to accomplish a broad Court-derived legislative purpose; the dissent would narrowly analyze the federal legislation in respect for the reserved police powers of the states. This difference in *Winfield* might reflect, more than anything, the Court's willingness to find expansive federal preemption at a time when the federal government was beginning, in a meaningful way, to flex its legislative muscle.[46] Nonetheless, the result was an expansive implied preemption doctrine which supported preemptive scope on little to no evidence of congressional intent—a presumption in favor of preemption.

B. Preemption Doctrine and Post-Depression Federal Regulation: The 1940s and 1950s

Congress continued to flex its legislative muscle in the 1930s and 1940s with New Deal legislation, and the Court permitted the significant expansion of

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44. *Id.* (Brandeis, J., dissenting) (citing Savage v. Jones, 225 U.S. 501 (1912)). In addition, "a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress . . . unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled." *Savage*, 225 U.S. at 535. *Savage*, on which Justice Brandeis relied, involved the Food and Drug Act of 1906 and its regulations regarding misbranding. *Id.* at 509. The State of Indiana had certain food misbranding regulations dealing with animal feed which were challenged as contrary to the federal requirements and, thus, preempted. *Id.* at 503-09. There was no express preemption provision directed at the issue. *Id.* at 532. Seeking evidence of congressional intent to preempt, the Court stated:

> But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.

Id. at 533.

45. *Winfield*, 244 U.S. at 164 (Brandeis, J., dissenting).

> The facts showing the origin and scope of the act . . . indicate also its purpose. It was to end the denial of the right to damages for injuries due to the railroads' negligence—a right denied under judicial decisions through the interposition of the defenses of fellow-servant, assumption of risk, and contributory negligence.

Id.

46. *See* Gardbaum, *supra* note 3, at 805-806 (referring to the Progressive social and political movement of the 1920s as influencing the Court's preemption decisions).

Congress's power under the Commerce Clause at this time.[47] If the "presumption in favor of preemption" described above were to continue, vast areas of traditional state authority would be subsumed under congressional legislation with very little showing in the way of congressional intent to so legislate. The Court found itself in the unenviable position, then, of defining Congress's power under the Commerce Clause expansively, and through its preemption doctrine implicitly expanding that power even further.

The Court, perhaps in partial recognition of this dilemma, began in earnest in the 1940s to refocus preemption analysis on the discernment of congressional intent. The Court began to apply circumspectly the "occupation of the field" implied preemption doctrine derived from the railroad cases. In 1941, the Court decided *Hines v. Davidowitz*,[48] in which it elaborated upon "occupation of the field" preemption. *Hines* involved the Alien Registration Act of 1940 in which Congress enacted an all-embracing system of alien registration.[49] One year before *Hines*, Pennsylvania had enacted a statute dealing with the same general topic through slightly different means.[50]

The Court began by emphasizing the flexibility of preemption analysis, abjuring "any rigid formula,"[51] when seeking Congress's intent absent its expression. The Court focused on the uniquely national nature of the foreign affairs field such that any concurrent state power must be "restricted to its narrowest limits."[52] The Court found that the federal legislation was intended to be "all-embracing" and "plainly manifested" an intention to regulate through one uniform national system, relying throughout on the national importance of unitary treatment of the issue.[53]

While trying to restrict the scope of "occupation of the field" implied preemption, the Court was also becoming more solicitous of the preserved state police powers and, indeed, began to require clearer evidence of congressional intent

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47. *Id.* at 806 ("The greatly enlarged power granted to Congress by the new interpretation of the Commerce Clause took from the states their previously sacrosanct exclusive power over *intra*state commerce.").

48. 312 U.S. 52 (1941).

49. *Id.* at 60-61.

50. *Id.* at 59-61. Several other states had similar legislation at that time as well. *Id.* at 61 n.8.

51. *Id.* at 67.

52. *Id.* at 68. The Court was also sensitive to the impact that either federal or state regulations in the area would have on the individual rights and liberties of the persons affected. The Court studied the history of treatment of aliens in this country as well as the history of the particular legislation at issue. *Id.* at 70-71.

53. *Id.* at 72-74. In dissent, Justice Stone reminds the reader of the continuing tension in our federal system of government over how to strike the balance between state and federal control:

> At a time when the exercise of the federal power is being rapidly expended through Congressional action, it is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted.

Id. at 75 (Stone, J., dissenting).

to preempt in other circumstances.[54] In *Rice v. Santa Fe Elevator Corp.*,[55] the Court defined the importance of discerning congressional intent to preempt. *Rice* continues to be considered the classic explanation of implied preemption doctrine which focuses on the discernment of congressional intent, and the Court continues to cite it for its general explanation of implied preemption doctrine.

Rice involved the Federal Warehouse Act,[56] which as originally enacted in 1916 specifically gave state regulation in the area priority over federal regulation.[57] The statute was amended in 1931 to provide authority to the Secretary of Agriculture to license warehouses and gave the Secretary "exclusive" authority over those federal licensees.[58] The plaintiff in *Rice* challenged a variety of Illinois warehousing regulations, most of which did not directly conflict with federal regulations but, rather, were more comprehensive than the federal counterpart.[59] The federal act gave exclusive authority to the Secretary regarding federal licensees only and did not speak to many of the issues governed by the state regulation.[60]

The Court applied implied preemption doctrine and began the ongoing debate over how to define congressional intent. The Court defined in *Rice* the widely quoted presumption against preemption: "Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by Federal Act unless that was the clear and manifest purpose of Congress."[61] Congress's purpose, according to the Court, can be evidenced in several ways: (1) the federal scheme is pervasive, leaving no room for the States to supplement it;[62] (2) the federal legislation involves a field dominated by the federal interest precluding state enforcement of laws on the same subject;[63] or (3) state policy produces a result inconsistent with the federal objective.[64] Finding no dominant federal interest or

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54. *See, e.g.*, Allen-Bradley Local No. 1111 v. Wis. Employment Relations Bd., 315 U.S. 740, 748-49 (1942) (holding that the National Labor Relations Act did not impliedly preempt local regulations against mass picketing, threatening employees desiring to work with physical injury or property damage, obstructing entrance to and egress from the company's factory, obstructing the streets and public roads surrounding the factory, and picketing the homes of employees; "an 'intention of Congress to exclude states from exerting their police power must be clearly manifested.'") (citations omitted); Mintz v. Baldwin, 289 U.S. 346, 350 (1933) (holding that an intention to impliedly preempt state regulation to prevent infectious cattle diseases must have a definite and clearly expressed "purpose to supersede or exclude . . . state action is not to be lightly inferred" by Congress's Cattle Contagious Diseases Acts).

55. 331 U.S. 218 (1947).

56. 7 U.S.C. §§ 241-256 (1994).

57. *Rice*, 331 U.S. at 222.

58. *Id.* at 223-24.

59. *Id.* at 224-29 (including such matters as rates, discrimination, mixing grain, and maintenance of elevators).

60. *Id.* at 229.

61. *Id.* at 230 (citing Napier v. Atl. Coast Line R.R., Co., 272 U.S. 605 (1917)).

62. *Rice*, 331 U.S. at 230 (citing Pennsylvania R.R. Co. v. Pub. Serv. Comm'n, 250 U.S. 566 (1919)).

63. *Id.* (citing Hines v. Davidowitz, 312 U.S. 52 (1941) and N.Y. Cent. R.R. Co. v. Winfield, 244 U.S. 147 (1917)).

64. *Id.* (citing Hill v. Florida, 325 U.S. 538 (1945)).

pervasive federal scheme of regulation, the Court applied the third method of discerning congressional intent: that state policy is inconsistent with the federal objective.[65]

After review of the statute's terms, and, most importantly, its "special and peculiar history,"[66] the Court found that the reference to "exclusive" authority in the Secretary of Agriculture coupled with the policy reflected in the legislative history to create independent regulation "without regard to State acts" evidenced Congress's intent to displace state regulation entirely in the field, in spite of the numerous areas left unregulated by the federal legislation.[67] The Court was sensitive to the argument that a more narrow interpretation of congressional intent was plausible,[68] but concluded that "[t]he test, therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State."[69] This statement suggests a simple test of preemption reminiscent of the latent exclusivity cases of earlier years, yet one much broader in application because it is not based on federal occupation of the field, but rather on a more general assessment of federal objectives and state interaction with those objectives.[70]

Rice describes a test of clear and manifest congressional intent to preempt and relies on statutory interpretation, statutory scope, and legislative history to discern that intent. *Rice* applies an implied preemption analysis that seeks to determine whether "state policy may produce a result inconsistent with the objective of the federal statute" in the case of very specific economic regulation. Cases dealing with conflicting direct state regulation would seem to admit a straightforward application of an intent-based test—did Congress intend to permit the states authority to regulate directly in the same area or not? To date, the Court's cases tell us little about the Court's view of preemption of indirect state "regulation" based on private litigation applying traditional state tort doctrine. The Court very broadly preempted state tort law, as well as workers' compensation statutes, in *Winfield* under the Federal Employers' Liability Acts because of the uniformity in railroad regulation it perceived as central to the federal legislative scheme. Will an implied preemption analysis seeking the clear and manifest purpose of Congress to preempt result

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65. *Id.* at 236.

66. *Id.* at 232.

67. *Id.* at 234-236.

68. *Rice*, 331 U.S. at 232.

69. *Id.* at 236.

70. For a recognition of the breadth of the Court's analysis, see *Rice*, 331 U.S. at 241 (Frankfurter, J., dissenting). Justice Frankfurter applied a more narrowly tailored test, very similar to that articulated by Justice Brandeis'dissent in *Winfield* decades earlier:

> [D]ue regard for our federalism, in its practical operation, favors survival of the reserved authority of a State over matters that are the intimate concern of the State unless Congress has clearly swept the boards of all State authority, or the State's claim is in unmistakable conflict with what Congress has ordered.

Id. (Frankfurter, J., dissenting); *see also* N.Y. Cent. R.R. Co. v. Winfield, 244 U.S. 147, 155 (1917) (Brandeis, J., dissenting).

differently in such cases?

In *San Diego Building Trades Council v. Garmon*,[71] the Court was faced with an application of modern implied preemption doctrine as it applied to state common law damages actions and their effect on a federal regulatory scheme.[72] *Garmon* involved whether the National Labor Relations Act (NLRA), as amended by the Labor Management Relations Act in 1947 (LMRA), preempted state tort law-based actions for damages by employers injured in the course of peaceful picketing by labor activists.[73] The NLRA did not occupy the field of labor and industrial relations and clearly left room for the states to regulate those matters not governed by the federal scheme.[74] The Court, therefore, had to determine the extent of authority left to the states in labor relations after the NLRA, particularly as it related to the permissibility of state tort actions based protected labor activity.[75]

The Court honestly spoke of the difficulty of ascertaining congressional intent, particularly when the enacting Congress, writing twenty-five years earlier, likely did not foresee, nor could have foreseen, the problems the Court would be required to address.[76] The Court was sensitive to the nature of the regulatory scheme in place—"new and complicated" and "drawn with broad strokes"[77]—that required the Court to carry out Congress's purposes "by giving application to congressional incompletion."[78]

The Court focused on the nature of the regulatory scheme Congress created and the potential conflicts that were posed to that scheme by "inconsistent standards of

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71. 359 U.S. 236 (1959).

72. *Id.* at 237-39.

73. *Id.* at 241-46 (analyzing National Labor Relations and Labor Management Relations Acts, 29 U.S.C. §§ 157, 158 (1994)).

74. *Id.* at 240. In determining that the NLRA did not occupy the field, Justice Frankfurter quoted an earlier Court decision dealing with this issue:

> "Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. . . . [T]he [LMRA] 'leaves much to the states, though Congress has refrained from telling us how much.' This penumbral area can be rendered progressively clear only by the course of litigation."

Id. (quoting Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480-81 (1955) (citations omitted)).

75. The Court in *Garmon* had earlier decided that the NLRA did preempt a state court injunction prohibiting the picketing, which was governed by the NLRA even though the National Labor Relations Board (NLRB) had declined jurisdiction over the representation proceeding in the case because it did not satisfy the Board's monetary standards in taking jurisdiction. *Id.* at 237-39.

76. *Id.* at 240 ("This Court was called upon to apply a new and complicated legislative scheme, the aims and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process.").

77. *Garmon*, 359 U.S. at 240.

78. *Id.* ("[T]he areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds.") (citing *Weber*, 348 U.S. at 488).

substantive law and differing remedial schemes."[79] The Court was governed by the "unifying consideration"of its prior decisions under the NLRA that Congress entrusted national labor policy to the NLRB, and, thus, "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted."[80] The Court focused on the *nature* of the activities regulated and not on the *method*, contrary to its analysis in both *Rice* and *Hines*, and concluded that state tort law damages were preempted because "to allow the States to control conduct which is the subject of national regulation would create *potential frustration of national purposes*."[81] The only reference to anything akin to a presumption against preemption in areas of historical state concern came with the Court's acknowledgment that in areas of "interests so deeply rooted in local feeling and responsibility" Congress's "compelling congressional direction" was required before depriving the States of the power to act.[82] The "compelling direction" to preempt was found, however, by reference merely to the "central aim of federal regulation."[83]

The state regulation in *Garmon*, it must be remembered, was through laws of "broad general application rather than laws specifically directed towards the governance of industrial relations."[84] The NLRB had specifically declined jurisdiction in the case,[85] arguably leaving room for the State to act to fill the void. The Court was unpersuaded that this void made any difference. Indeed, the Court found that a failure of the Board to act did not give the States any greater authority: "The governing consideration is that to allow the States to control activities that are *potentially* subject to federal regulation involves too great a danger of conflict with national labor policy."[86]

The Court's attitude toward the regulatory nature of common law damages actions is articulated in *Garmon*: "Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."[87] The Court's attitude toward the

79. *Id.* at 242.
80. *Id.* at 242-43.
81. *Id.* at 244 (emphasis added).
82. *Id.*
83. *Garmon*, 359 U.S. at 244.
84. *Id.* (footnote omitted).
85. *Id.* at 238.
86. *Id.* at 246 (emphasis added). The Court cites for this proposition one of its early railroad cases finding preemption of state authority in that field, *Charleston & W. Carolina R.R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915), where the Court said, "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition."
87. *Garmon*, 359 U.S. at 246-47. The Court sought to distinguish those cases which had been permitted to proceed under state law involving violent conduct which threatened the public order. *Id.* at 247. The Court stated that these cases were permitted to proceed because "the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." *Id.* The present case, according to the Court, presented "no such compelling state interest." *Id.* at 248.

permissibility of common law damages actions in the face of federal regulation of conduct which forms the basis for such actions continues to be central to preemption analysis. The Court will rely on *Garmon* for this proposition in future preemption cases. Of additional importance to the Court in *Garmon*, however, was the comprehensiveness of the NLRA and the powerful purpose which it served—to protect workers and recognize their collective efforts, not to inhibit them. In *Garmon*, the employer sought tort law damages against the putative union in a way that may have decreased the protection afforded to just those workers the NLRA sought to protect.

The Court in *Garmon* wrote with a very broad brush about the preemptive effect of a statute which it recognized left significant room for the states to regulate. As the 1950s drew to a close, the Court appeared to move back to its doctrine of latent exclusivity even though it paid some attention to the requirement of clear evidence of congressional intent to preempt. The concern for protecting state authority in areas of traditional local control which motivated cases early in this period turned out to be an insignificant one as the Court found intent to preempt in such a wide variety of circumstances. When the traditional state authority being considered was the private common law action for redress of grievances, the Court reverted to its earlier doctrine of exclusive federal authority. In the two areas seen thus far where the Court preempted common law damages actions, under the FELA and the NLRA, the Court was influenced more by the perceived national importance of the subject matter than by evidenced congressional intent to preempt or the concern for traditional state authority.

C. Preemption Doctrine and Individual Rights/Consumer Protectionism: The 1960s and 1970s

Preemption doctrine at the end of the 1950s can be described as building on the foundation of congressional intent but finding that foundation very unstable. Such intent had been found when the area regulated was one of peculiarly national concern as in *Hines*. When the area was not one requiring uniformity because of its national importance, but rather was one of traditional state regulation, congressional purpose to preempt was to be clearly found. Such purpose was typically found easily, as in *Rice* even though the federal statute was not comprehensive and the state regulations in issue were complementary and not in conflict. Finally, the legislative scheme in *Garmon*, which suggested a broad role for state law, supported a finding of intent to preempt to protect conduct "plainly within the central aim of federal regulation" and to prevent "frustration of national purposes."[88] The Court's implied preemption doctrine, then, continued its quest to discern congressional intent, and always seemed to find it.

In the early 1960s, however, the Court began in earnest to limit the breadth of its implied obstacle preemption analysis. In *Florida Lime & Avocado Growers, Inc.*

88. *Id.* at 244.

v. Paul,[89] the Court was asked to determine whether a California statute dealing with maturity standards for avocados could apply in the face of a seemingly contrary federal standard on the same issue.[90] Both the California and the federal regulation had as their purpose the protection of consumers from immature avocados.[91] Some portion of Florida avocados could not meet the California maturity standards, and the plaintiff sought a determination that the California standards were preempted by the federal regulations.[92] At first blush, it would seem that after *Hines*, *Rice*, and *Garmon*, each of which found implied preemption with much less in conflict than *Florida Lime & Avocado Growers*, the Court would have no difficulty with the avocado regulations. But that was not to be.

The Court reiterated that the implied preemption inquiry is whether there is clear congressional intent to preempt,[93] and such intent is discovered by reference to two questions: "Does either the nature of the subject matter, namely the maturity of avocados, or any explicit declaration of congressional design to displace state regulation, require [state regulation] to yield to the federal [regulation]?"[94] The Court could have, but did not, define the subject matter broadly as agricultural regulation to insure standards of quality and free competition.[95] The Court found that it was not physically impossible to comply with both regulations,[96] and observed that regulation of food quality was a traditional area of state concern such that "the States have always possessed a legitimate interest in 'the protection of . . .[their] people against fraud and deception in the sale of food products' at retail

89. 373 U.S. 132 (1963).

90. *Id.* at 134. The importance of the issue to the Florida and California avocado growers, and the nature of avocados, is fully explored by the Court. *Id.* at 138-141.

91. *Id.* at 137-38. The California regulation was enacted in 1925. *Id.* at 137. The federal marketing regulations were adopted in 1954 pursuant to the Agricultural Adjustment Act, 7 U.S.C. §§ 601-627. *Id.* at 138. The declared purposes of the Act "are to restore and maintain parity prices for the benefit of producers of agricultural commodities, to ensure the stable and steady flow of commodities to consumers, and 'to establish and maintain such minimum standards of quality and maturity'" in the public interest. *Id.* (quoting 7 U.S.C. § 602(3)).

92. *Id.* at 141.

93. *Id.* at 142. The Court stated:

> The principle to be derived from our decisions is that 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 the Congress has unmistakably so ordained.

Id. (citations omitted).

94. *Florida Lime & Avocado Growers*, 373 U.S. at 143.

95. Indeed, the dissent makes just this point when applying the implied preemption doctrine from *Rice* and *Hines* to the case: "The Secretary has promulgated a comprehensive and pervasive regulatory scheme for determining the quality and maturity of Florida avocados, pursuant to the statutory mandate to 'effectuate such orderly marketing of such agricultural commodities.'" *Id.* at 166-67 (White, J., dissenting).

96. *Id.* at 142-43. The impossibility standard of implied preemption is often mentioned but rarely applied. *Id.*

markets within their borders."[97] The Court sought *unambiguous* congressional intent to oust traditional state authority in this field of consumer protection.[98] The Court found no desire by Congress for uniformity of regulation nor an intent to regulate in any comprehensive way.[99]

A few months later, the Court relied on *Florida Lime & Avocado Growers* and concluded that the Federal Communications Act of 1934 did not preempt price advertising regulations in that field of comprehensive federal legislation.[100] It emphasized the validity of state statutes "unless there is found 'such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field.'"[101] The Court at this time seems to have a renewed interest in protecting state authority, at least in the area of consumer protection.[102]

Consistent with an increased respect for traditional state roles, the Court, in *Retail Clerks International Ass'n v. Schermerhorn*,[103] the Court concluded that in the area of right-to-work laws, Congress chose to abandon any search for uniformity and left the area to the states.[104] This result seems at odds with *Garmon* decided just a few years earlier. The Court in *Retail Clerks* stated that "[t]he purpose of Congress is the ultimate touchstone" in preemption analysis.[105] The NLRA had expressly reserved a state's power to permit right-to-work laws, however inconsistent with the general purpose of the labor laws to support collective bargaining.[106] *Retail Clerks,* then, suggests that the Court was serious

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97. *Id.* at 144 (citing, *inter alia*, Savage v. Jones, 225 U.S. 501 (1912) (alteration in original). The Court stated that minimum federal regulations in one aspect of a regulated field should not be taken to imply preemption over other aspects, particularly in an area of traditional state interest:

> Federal regulation by means of minimum standards of the picking, processing, and transportation of agricultural commodities, however comprehensive for those purposes that regulation may be, does not of itself import displacement of state control over the distribution and retail sale of those commodities in the interests of the consumers of the commodities within the State. . . . Congressional regulation of one end of the stream of commerce does not, *ipso facto*, oust all state regulation at the other end.

Id. at 145 (emphasis omitted).

98. *Id.* at 146-47 (citing Rice v. Santa Fe Elevator Co., 331 U.S. 218 (1947)).

99. *Id.* at 147. The Court canvassed the legislative scheme, its history, the limited administrative authority established, and the enactment of other legislation at the same time that did reflect a desire for uniformity. *Id.* at 148-150.

100. Head v. New Mexico Bd. of Exam'rs in Optometry, 374 U.S. 424, 431 (1963).

101. *Id.* at 430 (quoting *Florida Lime & Avocado Growers*, 373 U.S. at 141)) (alteration in original).

102. In the area of labor and industrial relations, the Court continued to find preemption according to *Garmon*, but its dedication to a broad implied preemptive scope seemed to lessen. In several cases the Court found preemption of state labor regulations. *E.g.*, Liner v. Jafco, Inc., 375 U.S. 301, 310 (1964); Local No. 207 v. Perko, 373 U.S. 701, 708 (1963).

103. 375 U.S. 96 (1963).

104. *Id.* at 98.

105. *Id.* at 103.

106. *Id.* at 99.

about the centrality of congressional intent in preemption analysis.[107] The Court acknowledged the potential conflict with *Garmon* but emphasized that where Congress's intent is clear,[108] the implied preemption doctrine of *Garmon* does not control.[109]

The Court continued to recognize during this time, however, that some legislative schemes are all-encompassing based on the history which informs them,[110] or their peculiarly national focus.[111] A legislative enactment that preempted conflicting state law because of its uniquely national nature was the Federal Aviation Act of 1958, as amended by the Noise Control Act of 1972.[112] The Court found in *City of Burbank v. Lockheed Air Terminal, Inc.*[113] that local ordinances prohibiting air traffic at certain times of day were preempted by federal regulations.[114] The Court recognized the peculiarly local nature of noise control,[115] but also recognized that Congress had created "a delicate balance between safety and efficiency, and the protection of persons on the ground" whose "interdependence . . . require[d] a uniform and exclusive system of federal regulation if the congressional objectives" of the Act were to be fulfilled.[116]

The Court explored the legislative history closely, finding equivocation regarding the intent to preempt, and ultimately focused on the nature of the problem that Congress sought to address, one it considered to require the uniformity of unimpeded national regulation.[117] In dissent, now-Chief Justice Rehnquist strenuously advocated in favor of the presumption against preemption of state

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107. *Id.* at 100-01. The Court relies on the legislative history for the "clear and unambiguous . . . purpose of Congress not to preempt the field," including not affecting state court power to enforce laws. *Id.* at 101.

108. *Id.* at 103 ("Where Congress gives state policy that degree of overriding authority, we are reluctant to conclude that it is nonetheless enforceable by the federal agency in Washington.").

109. *Retail Clerks*, 375 U.S. at 103. The Court describes *Garmon* as not providing a "constitutional principle," but, rather, it "merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations. . . ." *Id.*

110. *See* Hamm v. City of Rock Hill, 379 U.S. 306, 308, 310-12 (1964) (holding that the Civil Rights Act of 1964 required reversal of state trespass convictions even though convictions predated passage of the Act; regardless of congressional intent to reach pending state prosecutions, the Civil Rights Act forbad the state laws from operating); Oregon v. Mitchell, 400 U.S. 112, 118 (1970) (holding that the Voting Rights Act broadly preempts conflicting state laws except those regarding purely state elections).

111. Matters involving foreign affairs continue to be treated in this way. *See* Zschernig v. Miller, 389 U.S. 429, 432 (1968) (holding foreign affairs power supreme; state property disposition laws preempted where in conflict with foreign affairs matters). Similarly, immigration and nationality matters are treated this way. *See* Graham v. Richardson, 403 U.S. 365, 380 (1971) (finding immigration policy supreme over inconsistent state residency requirements).

112. 49 U.S.C. §§ 40101-60503 (1994) (section number revised in 1994).

113. 411 U.S. 624 (1973).

114. *Id.* at 640.

115. *Id.* at 638.

116. *Id.* at 638-639 (citations omitted).

117. *Id.* at 634-38. There was no express preemption provision and the Court acknowledged that the pervasive nature of the federal regulatory scheme supported its conclusion of preemption most of all. *Id.*

police powers and quoted from *Garmon:* "This assumption derives from our basic constitutional division of legislative competence between the States and Congress; from 'due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy.'"[118] Justice Rehnquist has since joined those on the Court who disagree with the presumption which suggests the tenuous hold it has had in preemption doctrine, as well as the Court's internal struggles with the doctrine generally.

In *Perez v. Campbell,*[119] the Court addressed the question of implied preemption by one federal statutory scheme, bankruptcy legislation, of an entirely different state regulatory scheme, motor vehicle safety and responsibility laws.[120] In *Perez,* the Court overruled two prior cases in which the Court had concluded that the federal bankruptcy laws did not preempt state motor vehicle public responsibility legislation.[121] The federal bankruptcy code, intending to provide a clean slate for debtors,[122] preempted the state motor vehicle responsibility legislation which would suspend the drivers' license of a judgment debtor even though the bankruptcy code provided relief from the debt.[123]

The Court in *Perez* applied implied obstacle preemption doctrine.[124] The Court noted that it was not important that the state regulation was enacted for a different purpose than the federal legislation, but the controlling principle was whether the state law, whatever its purpose, frustrated the full effectiveness of the federal law.[125] Of course, all the cases relied on by the Court did, in fact, deal with federal and state legislation directed at the same purpose, and also involved regulatory schemes that called for national uniformity such as immigration[126] and labor laws.[127] The Court did not refer to any provision of the federal bankruptcy legislation, nor any legislative history, nor any other evidence of congressional intent to support its conclusion. With very little analysis, the Court rejected the state motor vehicle safety and responsibility laws, with nary a word of the presumption against preemption in areas involving public health and safety, traditional areas of state

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118. *City of Burbank,* 411 U.S. at 643 (Rehnquist, J., dissenting) (emphasis omitted) (citations omitted).

119. 402 U.S. 637 (1971).

120. *Id.* at 638.

121. *Id.* at 650-52 (overruling Kesler v. Dep't of Pub. Safety, 369 U.S. 153 (1962) and Reitz v. Mealey, 314 U.S. 33 (1941)).

122. *Id.* at 648 (citations omitted).

123. *Id.* at 641-42.

124. *Id.* at 649.

125. *Id.* at 651-52.

126. *See* Hines v. Davidowitz, 312 U.S. 52, 53 (1941).

127. Nash v. Florida Indus. Comm'n, 389 U.S. 235, 235-36 (1967); Hill v. Florida, 325 U.S. 538, 539 (1945). The Court also refers to *Florida Lime & Avocado Growers* for the frustration of purposes implied preemption doctrine, *Perez,* 402 U.S. at 650, and, of course, it found no preemption in that case even though the state regulation directly related to the subject matter of the congressional legislation. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-47 (1963).

domain.[128] The Court did not appear concerned with discerning congressional intent nor with protecting the state's traditional authority in the area.[129]

The use of obstacle/frustration of purposes implied preemption in *Perez* is important for a variety of reasons. The Court overruled two prior cases directly finding no Supremacy Clause violation in the same type of case. The Court relied on cases which involved a need for national uniformity in the field in question; *Perez* certainly did not. The Court spoke not once of a presumption against preemption, even though the subject matter of state regulation was so clearly directed at local public safety issues. The Court did not consider the provisions of the federal bankruptcy code, enacted in the 1920s and 1930s, in any detail to discern congressional intent to preempt.

Implied preemption cases during this time seem to be coalescing into what have become the standard implied preemption categories. The Court applied federal "occupation" of a field implied preemption more narrowly to cases where Congress had regulated not only comprehensively, but in an area deserving of nationally uniform treatment, thereby displaying an intent to leave the states no regulatory room to act.[130] Congressional intent to preempt areas of traditional state authority was, the Court said, to be demonstrated as the "clear and manifest purpose,"[131] particularly where state and federal legislation did not directly conflict.[132]

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128. *Perez*, 402 U.S. at 652. Expressing skepticism of state legislative purposes, the Court opined: "[S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy." *Id.*

129. *See id.* at 657 (Blackmun, J., dissenting). Justice Blackmun stated:

> The slaughter on the highways of this Nation exceeds the death toll of all our wars. . . .
>
> This being so, it is a matter of deep concern to me that today the Court lightly brushes aside and overrules two cases where it had upheld a representative attempt by the States to regulate traffic and where the Court had considered and rejected the very Supremacy Clause argument that it now discovers to be so persuasive.

Id. (Blackmun, J., dissenting). For a strenuous criticism of obstacle implied preemption, and *Perez*, in particular, see Nelson, *supra* note 3 at, 265-268.

130. *See supra* notes 116-123 and accompanying text. *Compare* DeCanas v. Bica, 424 U.S. 351 (1976) (holding California Labor Code regulating employment of illegal aliens *not* preempted by the Immigration and Nationality Act, which while regulating aliens in many respects did not purport to regulate employment matters which are matters of peculiar state concern).

131. *See Florida Lime & Avocado Growers*, 373 U.S. at 142; *DeCanas*, 424 U.S. at 358.

132. *E.g.*, Ray v. Atl. Richfield Co., 435 U.S. 151, 159-60 (1978) (finding partial actual conflict preemption of Washington State Tanker Law by federal Coast Guard regulations regarding tanker design and Ports and Waterways Safety Act of 1972).

In the area of family law, the Court is dedicated to the principle that congressional legislation will be found to preempt only upon a direct, positive requirement in the federal legislation. *See e.g.*, Ridgway v. Ridgway, 454 U.S. 46, 59-60 (1981) (finding federal law displaces state family law only when in clear conflict); McCarty v. McCarty, 453 U.S. 210, 232-33 (1981) (holding that federal retirement benefits displace state family law because of clear direction to that effect); Hisquierdo v. Hisquierdo, 439 U.S. 572, 582-83 (1979) (holding Railroad Retirement Act does not preempt family law absent positive requirement).

Eventually, though, obstacle implied preemption doctrine continued to operate as a default doctrine in a wide variety of cases where congressional intent to preempt could not otherwise be discerned and where the frustration of national legislative purposes seemed unrelated to a need for national uniformity, as was the genesis of the doctrine in *Hines* and *Rice,* but which was not the case in *Perez.*[133] The Court continues to refer in passing to the presumption against preemption, but not when it may matter, as in *Perez.* The cases begin to contain references to express preemption though the Court's analysis of such provisions is as yet quite undefined, and restricted to cases involving direct actual conflict.[134]

The Court preserved the operation of state law during the 1960s and 1970s, more so than in previous decades, as it seemed poised at times to carve out a more meaningful place for the presumption against preemption.[135] As the Court struggled to find the proper division of state and federal power, its analysis became increasingly complex as the subjects of regulation become more complex. Many federal legislative enactments, born of the consumer rights, civil rights, and environmental movements of the time, would seem to support the conclusion that national, not local, legislation was the preferred vehicle for addressing those concerns.[136] The preemptive effect of these statutes does not come before the Court for another decade. During the 1970s the nation focused on getting out of Vietnam and weathering the Watergate scandals, both of which may have caused many to lose faith in the ability of those in power not to abuse it, and to seek refuge, ultimately, in the familiarity of local control. As the more complex regulatory schemes come before the court in the coming decades, the fundamental tension between state and federal control of important national issues, and the Court's

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133. *See generally* Jones v. Rath Packing Co., 430 U.S. 519, 543 (1977) (finding a frustration of purpose behind congressional regulation of consumer protection in product labeling though no actual conflict and no other evidence of intent to preempt); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 280-82 (1974) (finding that federal labor laws preempt state common law definition of malice in libel action to the extent state seeks to impose liability based on less than constitutional actual malice standard); Perez v. Campbell, 402 U.S. 637, 649-52 (1971) (holding federal bankruptcy code preempts state motor vehicle responsibility laws based on frustration of purposes).

As to federal labor law preemption, with which the Court continues to struggle, see also N.Y. Tel.Co. v. N.Y. State Dep't of Labor, 440 U.S. 519, 545-46 (1979) (holding that NLRA and Social Security Act did not preempt state's power to pay unemployment compensation).

134. *Ray*, 435 U.S. at 151 (noting direct actual conflict preemption of certain waterways regulations); *Jones*, 430 U.S. at 519 (stating all Justices agree that no express preemption exists based on the federal Warehouse, FDCA, and product labeling statutes). There are cases in which Congress expressly states its intent to entirely dominate the field, as in the case of the Employee Retirement Income Security Act (ERISA). *See* Malone v. White Motor Corp., 435 U.S. 497 (1978).

135. *See Florida Lime & Avocado Growers*, 373 U.S. at 141-42; *see also* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 643 (1973) (Rehnquist, J., dissenting) (arguing stridently for stronger presumption against preemption); *Jones*, 430 U.S. at 545-49 (Rehnquist, J., dissenting) (same).

136. *E.g.*, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 - 136y (2000); Federal Hazardous Substances Act, 15 U.S.C. §§ 1261-1278 (2000); Federal Cigarette Labeling Act of 1965, 15 U.S.C. §§ 1331-1341 (2000); Consumer Product Safety Act of 1972, 15 U.S.C §§ 2051-2084 (2000); Magnuson-Moss Warranty Act, 15 U.S.C. §§2301-2312 (2000); National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. §§ 30101-30169 (1994 & Supp. V 1999).

attitude toward the balance of that control, takes center stage.

D. Preemption Doctrine and a Focus on Traditional State Authority: The 1980s and 1990s

The Court's cases in the early 1980s continued to apply implied obstacle preemption doctrine to find preemption in a wide variety of cases, involving regulations as diverse as the Interstate Commerce Commission's regulations on abandonment of railroad cars,[137] permissibility of due-on-sale clauses in home mortgages,[138] and business anti-takeover statutes.[139] In immigration and labor cases, as well, the Court continued its previously articulated implied preemption analysis, typically finding preemption.[140]

In the early 1980s, the Court begins in earnest its struggle with the proper analysis of express preemption provisions, beginning with the preemption provision of the Employee Retirement Income Security Act (ERISA),[141] which has a very specific express preemption provision.[142] The Court will struggle with ERISA preemption over the next decades[143] as it continues its struggle with preemption doctrine generally.

The Court returned to the thorny problem of preemption of common law damages actions in the 1980s. Not since *San Diego Building Trades v. Garmon*[144] in the labor law area in 1959 had the Court addressed the issue. The Court did so

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137. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 331-32 (1981) (holding that a state statute providing cause of action for damages preempted by ICC regulations permitting abandonment of lines under obstacle implied preemption).

138. Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 170 (1982) (holding that Federal Home Loan Board regulations permitting due-on-sale clauses in home mortgages preempted contrary state doctrine).

139. Edgar v. MITE Corp., 457 U.S. 624, 654-55 (1982) (finding that the Illinois business anti-takeover statute invalid because of implied conflict with securities laws).

140. Toll v. Moreno, 458 U.S. 1, 17 (1982) (finding University of Maryland admissions requirements regarding in-state status preempted by federal immigration laws); Local 926, Int'l Union of Operating Engineers v. Jones, 460 U.S. 669, 678 (1983) (holding NLRB preempts common law tort action). *But see* Belknap, Inc. v. Hale, 463 U.S. 491, 512 (1983) (holding NLRA did not preempt state law misrepresentation and breach of contract claims by strike replacements against employer).

141. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1994 & Supp. V 1999).

142. 29 U.S.C. § 1144(a) provides preemption of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA, if it has connection with or reference to such plan.

143. *See* Pegram v. Hedrich, 530 U.S. 211 (2000); UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358 (1999); Boggs v. Boggs, 520 U.S. 833 (1997); Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., 519 U.S. 316 (1997); Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1 (1987); Metro. Life Inc. Co. v. Taylor, 481 U.S. 58 (1987); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983). Detailed explanation of ERISA preemption is beyond the scope of this Article. For a thorough discussion of ERISA preemption, see generally Edward A. Zelinsky, Travelers, *Reasoned Textualism, and the New Jurisprudence of ERISA Preemption*, 21 CARDOZO L. REV. 807 (1999); Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption: A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35 (1996).

144. 359 U.S. 236 (1959).

in *Silkwood v. Kerr-McGee Corp.*[145] *Silkwood* involved application of the Atomic Energy Act (AEA)[146] to a tort action for personal injuries and property damage filed by Karen Silkwood who had worked at a nuclear power plant operated by Kerr-McGee Corp.[147] Silkwood became contaminated with plutonium and alleged a variety of irregularities in the operation of the plant that led to her contamination.[148] She pled negligence and strict liability claims and sought punitive damages.[149]

The AEA was enacted in 1954 to free the nuclear energy industry from total federal control and to provide for some private involvement in the development of nuclear power.[150] Limited regulatory authority was given to the states, which had never had any authority over nuclear power.[151] The NRC, however, retained exclusive jurisdiction to license the "transfer, delivery, receipt, acquisition, possession and use of nuclear materials."[152] Congress amended the AEA shortly thereafter to clarify "the respective responsibilities . . . of the States and the Commission,"[153] and confirmed that the states were precluded from regulating the safety aspects of nuclear material.[154] The preemption provision of the AEA, thus, delineated the limited scope of state authority that was being carved out of historically federal authority.

The trial court in *Silkwood* concluded that the AEA did not preempt Silkwood's action and permitted a jury to find for her on the underlying claim and to award punitive damages of $10,000,000.[155] The Tenth Circuit Court of Appeals reversed the preemption decision, concluding based on a "broad preemption analysis" that "'any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material was impermissible.'"[156] Just one year earlier, the Supreme Court in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission,*[157] had concluded, after a review of the statutory scheme and the legislative history, that the AEA "occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States."[158]

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145. 464 U.S. 238 (1984).

146. *Id.* at 241 (discussing 42 U.S.C. §§ 2011-2297h-13 (1994 & Supp. V 1999). The AEA is administered by the Nuclear Regulatory Commission (NRC), formerly the Atomic Energy Commission. 42 U.S.C. § 2073 (defining NRC authority).

147. *Silkwood*, 464 U.S. at 241.

148. *Id.* at 243. Silkwood was killed in an automobile accident during discovery of the extent of her contamination and her father brought suit on behalf of her estate. *Id.* at 242.

149. *Id.* at 241, 243-45 .

150. The Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2284.

151. Pac.Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 205-06 (1983).

152. *Id.* at 207 (citing 42 U.S.C. §§ 2014(e),(z),(aa), 2061-2064, 2071-2078, 2091-2099, 2111-2114).

153. 42 U.S.C. § 2021(a)(1); *see* S. Rep. No. 870 (1959), *reprinted in* 1959 U.S.C.A.N. 2872.

154. 42 U.S.C. § 2021(c)(4).

155. *Silkwood*, 464 U.S. at 244.

156. *Id.* at 246 (quoting Silkwood v. Kerr-McGee Corp., 667 F.2d 908, 923 (10th Cir. 1981)).

157. 461 U.S. 190 (1983).

158. *Id.* at 212 (footnote omitted).

In *Silkwood,* then, the Court was called on to elaborate on the scope of the state authority that had been permitted under the AEA, while specifically deciding whether the availability of traditional damages actions constituted an impermissible state regulation of nuclear safety concerns. The Court unanimously concluded that the AEA did not preempt Silkwood's compensatory damages action.[159] A majority of the Court held that the AEA did not preempt Silkwood's punitive damages claim either.[160] As to the compensatory damages action, the Justices agreed that such an award may have an "indirect" impact on a nuclear facility through its primary purpose to compensate,[161] but because the "Federal Government does not regulate the compensation of victims, and because it is inconceivable that Congress intended to leave victims with no remedy at all,"[162] the AEA was found not to impliedly preempt the action for compensatory damages.

The Court, in spite of its strong language to the contrary in *Pacific Gas & Electric Co.* suggesting the AEA's wide preemptive scope, did not rely on *Pacific Gas & Electric Co.*'s occupation of the field preemption analysis. Instead, the Court, after an additional review of the Act's legislative history, as well as an assessment of other congressional actions regarding the AEA,[163] was particularly moved by two pieces of evidence of congressional intent regarding the relationship between the AEA and state tort law: (1) "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct;"[164] and (2) "[T]he only congressional discussion concerning the relationship between the Atomic Energy Act and state tort remedies indicates that Congress assumed that such remedies would be available."[165]

Silkwood engages in its preemption analysis with these important assumptions about congressional intent: that Congress would not destroy traditional means of legal recourse without at least acknowledging it openly, and that, furthermore, Congress's silence on the topic suggests an assumption that traditional means of legal recourse indeed would remain. It simply did not occur to the Court at this time that Congress would intend, impliedly, the destruction of traditional state tort remedies simply by regulating in the nuclear power field, even though it was a field

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159. *Silkwood*, 464 U.S. at 251, 263-64 (Blackmun, J., dissenting), 275 (Powell, J., dissenting).

160. *Id.* at 256.

161. *See id.* at 263 (Blackmun, J., dissenting) (agreeing with majority opinion).

162. *Id.* Justice Powell, in dissent, even suggested that "[t]here is no element of regulation when compensatory damages are awarded, especially when liability is imposed without fault as authorized by state law." *Id.* at 276 n.3 (Powell, J., dissenting).

163. *Id.* at 249-51.

164. *Id.* at 251 (citation omitted). The Court further stated:

> Indeed, there is no indication that Congress even seriously considered precluding the use of such remedies either when it enacted the Atomic Energy Act in 1954 or when it amended it in 1959. This silence takes on added significance in light of Congress'[s] failure to provide any federal remedy for persons injured by such conduct.

Id.

165. *Silkwood*, 464 U.S. at 251.

fairly requiring comprehensive federal safety standard-setting.[166]

The Court concluded by recognizing the tension between Congress's occupation of the field of nuclear safety regulation and permitting state tort law remedies based on nuclear safety regulation failures.[167] The Court recognized the inconsistency of its prior finding of a federal occupation of the nuclear regulatory field with its finding of no preemption in *Silkwood*.[168] It concluded, nonetheless, that the preemption of damages actions is more properly evaluated under implied conflict or obstacle preemption, and it perceived no conflict or frustration in the case.[169] Given the Court's prior obstacle preemption cases in which preemption had been so routinely found, *Silkwood* was quite a departure.[170]

The Court's disagreement over application of obstacle preemption suggested the continuing difficulty with that doctrine. Perhaps of greater significance in *Silkwood*, though, is how the Justices evaluated the regulatory impact of state tort law damages actions and assessed Congress's intent regarding that impact. The disagreement between the Justices on this vital issue came distinctly into focus in *Silkwood*. The Court began to line up on both sides of that issue—the one side represented by the *Silkwood* majority which recognized the need to provide state damages remedies despite their incidental regulatory effect, and the other side, represented by the dissenting opinions, expressing the impropriety of permitting a

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166. The Court recognized the premise behind the AEA's exclusive regulatory authority in the NRC to be that

> the Commission was more qualified to determine what type of safety standards should be enacted in this complex area. As Congress was informed by the [NRC], the 1959 legislation provided for continued federal control over the more hazardous materials because "the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them during the foreseeable future."

Id. at 250 (citation omitted). Nevertheless, the Court found ample evidence that Congress did not intend to foreclose state law remedies. *Id.* at 251.

167. *Id.* at 256.

168. *Id.* at 249.

169. *Id.* at 256. The Court provided no citation for this position.

170. The dissenters recognized this. *See id.* at 258 (Blackmun, J., dissenting, joined by Marshall, J.), 274 (Powell, J., dissenting, joined by Burger, C.J., and Blackmun, J.). For example, the dissenting opinions make the case for considering punitive, not compensatory, damages awards to be regulatory in their effect and, therefore, included within the scope of the nuclear safety regulation in issue:

> The prospect of paying a large fine . . . for failure to operate a nuclear facility in a particular manner has an obvious effect on the safety precautions that nuclear licensees will follow. . . .
>
> The conduct that the jury's punitive damages award sought to regulate was the day-to-day safety procedures of nuclear licensees. . . . Authority for a State to do so, however, is precisely what the Court held to be pre-empted in *Pacific Gas*.

Id. at 261 (Blackmun, J., dissenting) (footnote omitted); *see also id.* at 283 (Powell, J., dissenting) (explaining that the jury can act as a regulatory medium).

jury to regulate in an area where Congress had already done so.[171]

During this time, the savings clause, a vehicle Congress used to preserve some areas of state authority, began to require attention in preemption doctrine, requiring the Court to focus as it had not before on congressional intent. The *Silkwood* Court might be expected to be receptive toward the notion that Congress does not preempt common law *compensatory* damages actions absent clear intent to do so, particularly if a clause in the legislation saves the operation of such actions. Nonetheless, the Court struggled with such language in a number of cases. The Court found that a savings clause did not save state wrongful death actions in *Offshore Logistics, Inc. v. Tallentire.*[172] The Death on the High Seas Act adopted a federal wrongful death action for certain maritime deaths, and Congress specifically saved the operation of state wrongful death actions.[173] The majority opinion, which never quoted the statute, considered it inconsistent to preserve state actions when Congress appeared to be seeking uniformity in this traditionally *federal* area of admiralty law.[174]

One year after *Offshore Logistics*, the Court dealt with a more modern savings clause in *International Paper Co. v. Ouellete,*[175] which presented the preemptive effect of the Clean Water Act on state common law nuisance actions based on water pollution.[176] The Court concluded that the Clean Water Act, which has a savings clause,[177] does not preempt common law nuisance actions so long as they are based on the law of the State of the source of the pollution.[178] Like *Silkwood* and *Offshore*

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171. Part of the Court's concern with the regulatory effect of punitive damages may also come from the Court's increasing concern with the constitutional implications of very large, unfettered jury awards in this area. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); *see generally* 2 DAVID G. OWEN, M.STUART MADDEN & MARY J. DAVIS, MADDEN & OWEN ON PRODUCTS LIABILITY § 18:7 (3d ed. 2000) [hereinafter 2 MADDEN & OWEN ON PRODUCTS LIABILITY] (discussing constitutional limits on punitive damages).

172. 477 U.S. 207 (1986).

173. *Id.* at 227. The Death on the High Seas Act, originally enacted in 1919, has a specific savings clause which states: "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." 46 U.S.C. app. § 767 (1994). The majority concludes that this provision saves the jurisdiction of the state courts only and not their substantive laws. *Offshore Logistics*, 477 U.S. at 222-23. Four dissenters, led by Justice Powell, argued that the Court paid insufficient attention to the language of the statute in its interpretation of the preemption provision. *Id.* at 236-39 (Powell, J., dissenting).

174. *Id.* at 222. As the dissent pointed out, however, while permitting state wrongful death actions to operate concurrently with a federal action might appear to undercut federal uniformity, "it is not the role of this Court to reconsider the wisdom of a policy choice that Congress has already made." *Id.* at 240 (Powell, J., dissenting).

175. 479 U.S. 481 (1987).

176. *Id.* at 483.

177. 33 U.S.C. §§ 1251-1387 (1994 & Supp.1999). The savings clauses are found at §§1365(e) and 1370 and state, respectively, that "[n]othing in this section shall restrict any right which any person or class may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief" and "nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

178. *Int'l Paper*, 479 U.S. at 487.

Logistics, the subject matter in *International Paper* had historically been treated as a matter within the federal domain and not one traditionally occupied by the states.[179] The 1972 amendments to the federal water pollution statutes specifically provided for a significant State role in preserving natural resources as evidenced by the savings clauses.[180] Nonetheless, the Court found ambiguity in the language of the clauses and concluded that "Congress [must not have intended] to undermine this carefully drawn statute through a general saving clause."[181] The Court instead compromised and concluded that common law actions based only on law of the source of the pollution are not preempted.[182] This conclusion was based on the Court's own understanding of the legislative goals of efficiency and predictability of standards implicit in the vastness of the regulatory scheme, and the Court's belief that Congress would not have intended to establish "such a chaotic regulatory structure" as would result if any state whose waterways were affected by pollution could control a nuisance action.[183] The Court was struggling with obstacle preemption doctrine, savings clauses, and discerning (and then believing) congressional intent.

The 1980s were a schizophrenic time for the Court and its preemption cases. The potential, from the 1960s, of a narrowly defined obstacle implied preemption, with a renewed presumption against preemption, was evidenced by *Silkwood* and the compromise position in *International Paper*. In later cases involving obstacle preemption, the Court found that the state regulatory actions in issue, including common law and statutory damages actions, did not frustrate the purposes of Congress, consistent with *Silkwood* and the notion that common law damages regulate only indirectly. In *English v. General Electric Co.*,[184] for example, the Court found that the Energy Reorganization Act of 1974, as it applied to the Atomic Energy Act of 1954, did not preempt plaintiff's state law intentional infliction of emotional distress claim based on her employer's conduct after she reported safety violations at defendant's nuclear fuels production facility.[185] The Court, consistent with *Silkwood*, concluded that while the state emotional distress claim might indirectly have an effect on safety decisions, this effect was insufficiently

179. *Id.* at 487-88 (noting that interstate water pollution issues had been resolved under federal common law principles).

180. *Id.* at 489-91. Indeed, the legislative history of the savings clause stated that "'[c]ompliance with requirements under this Act would not be a defense to a common law action for pollution damages.'" *Id.* at 493 n.13 (citation omitted).

181. *Id.* at 494 (footnote omitted). The Court notes also that similar savings clauses were included verbatim in several other pieces of environmental legislation, permitted the conclusion that they do not reflect "any considered judgment about what other remedies . . . continue to be available." *Id.* at 494 n.14 (citation omitted).

182. *Id.* at 500.

183. *Id.* at 496-97. The Court was influenced by the "elaborate" nature of Congress's regulatory scheme and, importantly, that under the Court's compromise, the plaintiffs were not left without a remedy given that state common law actions based on the law of the source state were not preempted. *Id.* at 497.

184. 496 U.S. 72 (1990).

185. *Id.* at 86.

substantial to support obstacle preemption.[186] The Court stated: "[W]e think the District Court failed to follow this Court's teaching that 'ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law.'"[187]

Similarly, the Court, while exploring the preemptive effect of federal administrative regulations, concluded in *Hillsborough County v. Automated Medical Labs, Inc.*,[188] that it would be inconsistent with federalism principles to permit a federal regulatory agency, here, the FDA, to preempt state or local regulations by simply entering a field, even one Congress had comprehensively regulated.[189] The Court reiterated the presumption against preemption of health and safety regulations in its discussion of whether the comprehensiveness of the federal regulatory scheme displayed an intent to preempt.[190] The Court focused on the specialized function of agencies to work with detail:

> Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt. . . . [W]e will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety.[191]

The Court concluded by finding no implied intent to preempt based on obstacle preemption since there was not "strong evidence" of a threat to federal goals.[192]

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186. *Id.*; *see also* Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185-186 (1988) (permitting an additional state workers compensation award against federally governed, but privately-owned, nuclear facility: "We believe Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not") (footnote omitted).

187. *English*, 496 U.S. at 89 (quoting California v. ARC Am.Corp., 490 U.S. 93, 105 (1989), where the Court concluded that state antitrust actions benefitting indirect purchasers could proceed, notwithstanding a federal rule limiting antitrust recovery to direct purchasers, because, in spite of a possible indirect effect on the operation of federal antitrust laws, no preemption exists solely because state liability is greater than federal liability); *see also* Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 593 (1987) (finding no implied obstacle preemption under variety of federal land use statutes, forest service regulations, and Coastal Zone Management Act where Congress's intent to prohibit States permitting authority not demonstrated in the independent or combined regulations).

188. 471 U.S. 707 (1985).

189. *Id.* at 717.

190. *Id.* at 715.

191. *Id.* at 718.

192. *Id.* at 721. The record did not support a finding of a threat to the adequacy of the plasma supply or that the federal standards were intended to be anything other than a minimum. *Id.* at 721-22. *But see* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 168 (1989) (applying implied obstacle preemption to patent issue when the "strong federal policy favoring free competition in ideas" not meriting patent protection preempted a state statute which substantially interfered with enjoyment of un-patented design concept).

The Court continues to apply occupation of the field preemption, though in a narrow category of cases. *See* Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 310 (1988) (quoting N. Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 84, 91-92 (1963)) (explaining that the Natural Gas Act so

Given that in prior years the Court had regularly found implied obstacle preemption, the Court's contrary finding during the 1980s can perhaps fairly be explained as a reflection of the general desire to place regulatory authority in the hands of the states absent strong congressional intent to the contrary.[193] As the Court continued to explore the complexity of modern statutory schemes, and applied its modern preemption doctrine to old statutory schemes, the cases forced the Court's doctrine to go places it had not been before. The Court, at this time, seemed serious about its dedication to impliedly preempt based only upon clearly manifest congressional intent. Indeed, it was also during this time that express preemption provisions began to receive the Court's serious attention.[194]

E. The Focus on Express Preemption Doctrine and Cipollone v. Liggett Group, Inc.[195]

While federal statutes had always been interpreted to determine their preemptive scope, typically those statutes did not indicate clear enough intent to preempt so that implied preemption doctrine was utilized to determine the statute's preemptive scope. Rarely had federal statutes or administrative regulations directly addressed their preemptive effect and, when they did, the Court often found the provisions to be ambiguous and, thus, requiring the application of implied preemption principles anyway. Consequently, express preemption analysis was rarely used successfully to preempt state law, much less common law damages actions.

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dominated the field that Congress intended to occupy the field of regulation of natural gas companies even though "collision between [S]tate and federal regulation may not be inevitable"); California v. Fed. Energy Regulatory Comm'n, 495 U.S. 490, 496-99 (1990) (noting that the Federal Power Act of 1935 gives federal government broad role in promoting hydroelectric power and severely limits operation of state regulation).

193. For evidence of this general political desire see Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 2987), *reprinted in* 5 U.S.C. § 601 app. at 478 (1988) (President Reagan issued order to federal agencies to construe regulations to preempt state law "only when statute has express preemption provision or other palpable evidence compelling the conclusion that Congress intended premption").

194. *See, e.g.*, Wis. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) (holding that provisions in Federal Fungicide, Insecticide, and Rodenticide Act (FIFRA) did not expressly preempt local regulation of pesticide use; thorough assessment of text and legislative history revealed no implied preemptive intent). In discussing the use of legislative history to define intent and a reliance instead on the text, Justice Scalia, in concurrence, noted that terms of statute alone do not manifest intent to preempt: "[The Wisconsin Supreme Court's] only mistake was failing to recognize how unreliable Committee Reports are—not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction. We use them when it is convenient, and ignore them when it is not." *Id.* at 617 (Scalia, J., concurring).

195. 505 U.S. 504 (1992).

In the 1980s, as a "crisis" in the liability system was increasingly bemoaned,[196] more and more defendants in products liability actions sought total protection from liability based on the supremacy of federal regulation. Compliance with governmental regulations has always been relevant to the exercise of due care in tort actions, but it has never strictly been its measure[197] and the same is true for proof of product defect in strict tort liability actions.[198] Consequently, defendants had rarely been successful in arguing that the existence of a federal statutory standard totally preempted the plaintiff's state law based allegations of defectiveness or negligence.[199] Typically, regulations which contain standards of conduct do not address their preemptive scope, and it can be said with some certainty that one reason for such failure is that such standards are expected to state minimum and not maximum standards.[200] Even in 1991, the general consensus was that "[t]he general approach to tort claims against non-federal actors, . . . is to deny any preemptive or shielding effect unless there is some specific indication of a congressional intent to preempt state tort law."[201]

In the mid-1980s, the Court addressed a limited number of other products liability matters, reflecting a general bias in favor of limited tort liability.[202] The Court's preemption doctrine and its restrictive approach to products liability would collide in *Cipollone v. Liggett Group, Inc.*,[203] involving interpretation of the preemptive effect of the federal cigarette labeling and advertising laws on cigarette

196. *See generally* AMERICAN LAW INSTITUTE REPORTERS' STUDY, 1 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: THE INSTITUTIONAL FRAMEWORK 3, 266-70 (1991) (describing prevailing sentiment in the 1980s that something was "seriously amiss" in the tort regime and discussing significant increase in product liability case filings since 1975) [hereinafter 1 ALI ENTERPRISE LIABILITY REPORTERS' STUDY].

197. RESTATEMENT (SECOND) TORTS § 288C (1964); *see generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 (5th ed. 1984); 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 176, § 27:7; Symposium, *Regulatory Compliance as a Defense to Products Liability*, 88 GEO. L. J. 2049 *passim* (2000).

198. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4(b) (1998); 2 MADDEN & OWEN ON PRODUCTS LIABILITY, *supra* note 171, § 27:7.

199. *See* AMERICAN LAW INSTITUTE REPORTERS' STUDY, 2 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 84 (1991) [hereinafter 2 ALI ENTERPRISE LIABILITY REPORTERS' STUDY].

200. *Id.* at 91 ("Statutory preclusion of tort remedies is, however, a politically controversial topic: most regulatory statutes do not even address the issue. Many regulatory statutes contain provisions saving common law remedies.").

201. *Id.* at 94 & n.27.

202. *See* Mary J. Davis, *The Supreme Court and Our Culture of Irresponsibility*, 31 WAKE FOREST L. REV. 1075 (1996) (discussing the Supreme Court's products liability cases in the 1980s, particularly *East River S.S. Corp. v. Transamerica Delaval, Inc.*, and *Boyle v. United Techs. Corp.*, both of which limited the reach of tort liability in cases involving federal matters). A more recent discussion of this topic is found in this Symposium by Professor Anita Bernstein. *See* Anita Bernstein, *Products Liability in the United States Supreme Court: A Venture in Memory of Gary Schwartz*, 53 S.C. L. REV. 1193, 1200-08 (2002).

203. 505 U.S. 504 (1992).

products liability actions.[204] In *Cipollone*, the Court appeared to provide much needed clarity to preemption analysis by providing that when Congress had expressed the preemptive scope of a statute, and that provision provided a "'reliable indicium of congressional intent,'"[205] the express preemption provision controlled. The Court emphasized the presumption against federal preemption of matters historically within the states' police powers, and focused on discerning congressional intent.[206] *Cipollone*'s focus on the cigarette-labeling laws express preemption provisions is not surprising in light of the turmoil in preemption analysis in the 1980s and the quest for a limited role for implied obstacle preemption to preserve state authority.

All the Justices in *Cipollone* agreed that the preemption analysis should proceed by an interpretation of the scope of the express preemption provision.[207] Only a plurality of Justices agreed on how to interpret the particular preemption provisions in question, whether narrowly, based on the presumption against preemption, or facially based on the text alone.[208] The primary focus of all the opinions in *Cipollone*, therefore, was on how to determine the scope of the express preemption provisions.[209] The Court relied on two cases for this proposition which interpreted very specific express preemption provisions: *Malone v. White Motor Corp.*,[210] one of the first cases interpreting the all-encompassing ERISA preemption provision, and *California Federal Savings & Loan Ass'n. v. Guerra*,[211] interpreting an express anti-preemption provision from Title XI of the Civil Rights Act which very clearly expressed an intent *not* to preempt state employment practices absent

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204. *See also* Federal Cigarette Labeling Act of 1965, *amended by* Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331-1341 (2000).

205. *Cipollone*, 505 U.S. at 517 (citation omitted).

206. *Id.* at 516.

207. *Id.* at 516-17, 531 (Blackmum, J.,concurring in part and dissenting in part), 545-46 (Scalia, J., concurring in part and dissenting in part). The Third Circuit Court of Appeals had evaluated the express preemption provisions and concluded they did not include common law damages actions, but it then concluded that state common law damages actions were impliedly preempted because of the federal interest in uniformity. *Id.* at 511 (quoting Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986)) ("Congress'[s] 'carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy' would be upset by state-law damages actions based on noncompliance with 'warning, advertisement, and promotion obligations other than those prescribed in the [federal] Act.'") (alteration in original).

208. *Id.* at 523, 534-39 (Blackmum, J., concurring in part and dissenting in part), 544 (Scalia, J., concurring in part and dissenting in part).

209. *Cipollone*, 505 U.S. at 517. The Court stated:

> Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress'[s] enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. In this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond § 5 of each Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections.

Id.

210. 435 U.S. 497 (1978).

211. 479 U.S. 272 (1987).

an actual conflict.[212] Neither case involved preemption of common law damages actions.

The Court does not refer to its cases interpreting express preemption provisions as related to common law damages actions,[213] or its cases applying implied obstacle preemption doctrine regarding common law damages actions.[214] In *Cipollone*, the Court acknowledged the presumption against preemption and relied on it to require a fair but narrow reading of an express preemption provision.[215] *Cipollone* was doomed to be a blip on the radar screen of preemption because of this attempt to apply the presumption of preemption in a meaningful way. Given the Court's restrictive approach to products liability matters, and the history of broadly applied obstacle implied preemption analysis, the demise of *Cipollone* and its focus on express preemption was just a matter of time.

The plurality opinion used both the text of the provisions and the legislative history to preempt some, but not all, common law damages actions imposing liability.[216] The plurality opinion parsed the language of the preemption provisions[217] with particularity to conclude that the statute's preemption of "requirements or prohibitions imposed under State law" preempted certain common law causes of action, as well as positive enactments, based on cigarette advertising or promotion.[218] The plurality concluded that the statute "plainly reaches beyond such [positive] enactments,"[219] reiterating its position from *Garmon* that common law damages actions can have an indirect regulatory effect. Four Justices in the plurality found partial preemption of those damages actions whose predicate is a "requirement or prohibition based on smoking and health."[220]

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212. *Id.* at 282, 295 (Scalia, J., concurring) (describing preemption provision as an anti-preemption provision because it operates to preserve state law, not prohibit it).

213. *See, e.g.*, Goodyear Atomic Co. v. Miller, 486 U.S. 174 (1988) (dealing with workers' compensation safety standards as preempted by federal regulation of nuclear power facility); Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987) (interpreting preemption of common law nuisance action under Clean Water Act preemption provisions).

214. *See* English v. Gen. Elec. Co., 496 U.S. 72 (1990); Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984).

215. *Cipollone*, 505 U.S. at 518, 523. But the Court has so often bandied about the buzz words of preemption that there is support in its cases for just about any proposition. *Id.* at 532-33 (Blackmun, J., concurring in part and dissenting in part).

216. *Id.* at 521-24 (discussing the change to preemption provision from 1965 Act to 1969 Act and effect on interpretation of provision to preempt more broadly).

217. The 1965 Act's preemption provision stated that "'No *statement* relating to smoking and health shall be required [on cigarette packages or in advertising].'" *Id.* at 518 (citations omitted). The 1969 Act changed the preemption provision slightly to state that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law" regarding cigarette labeling or advertising. 15 U.S.C. § 1334(b) (2000). The use of the phrase "requirement or prohibition" was critical to the Court's analysis of whether common law damages actions were prohibited. *Cipollone*, 505 U.S. at 522-24.

218. *Cipollone*, 505 U.S. at 524.

219. *Id.* at 521. "The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules." *Id.*

220. *Id.* at 524.

Cipollone gave the Justices an opportunity to revisit their disagreement over the regulatory effect of common law damages actions. Justice Blackmun disagreed vehemently with the conclusion that common law damages actions necessarily are precluded under the statute because they constitute some general "requirement or prohibition."[221] Indeed, Justice Blackmun recognized that the Court's earlier cases assessing preemption of common law damages actions "have declined on several recent occasions to find the regulatory effects of state tort law direct or substantial enough to warrant preemption."[222] *Cipollone* marks an important move away from the somewhat solicitous treatment of common law damages actions within preemption analysis that had only recently been the Court's approach, evidenced by *Silkwood*, *Ouellette*, and *English*.

In its next preemption case, the Court analyzed the express preemption provision of the National Traffic and Motor Vehicle Safety Act (NTMVSA)[223] which provides that states may not maintain "motor vehicle safety standards" which conflict with federal performance standards on the same topic.[224] In *Freightliner Corp. v Myrick*,[225] the Court, in a unanimous opinion authored by Justice Thomas, concluded that since there was no federal standard in issue on the topic of anti-lock brakes for eighteen-wheel trucks, there was no express or implied preemption of state design defect claims based on the absence of such brakes.[226] The Court did not reach the question of whether the Act would preempt such claims if a federal standard did exist, but, in the course of its opinion, the Court raised a question about the scope of *Cipollone's* express preemption analysis:

> The fact 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 does not mean that the express clause entirely forecloses any possibility of implied pre-emption.... At best, *Cipollone* supports an inference

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221. *Id.* at 536 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun stated:

> More important, the question whether common-law damages actions exert a regulatory effect on manufacturers analogous to that of positive enactments... is significantly more complicated than the plurality's brief quotation from *San Diego Building Trades Council v. Garmon*... would suggest.
>
> The effect of tort law on a manufacturer's behavior is necessarily indirect.

Id. (citation omitted).

222. *Id.* at 537 (Blackmum, J., concurring in part and dissenting in part) (referencing Goodyear Atomic Corp. v. Miller,486 U.S. 174 (1988); English v. Gen. Elec. Co., 496 U.S. 72 (1990) and Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)).

223. The National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 15 U.S.C.§ 1381 *et. seq.* (1988) (current version at 49 U.S.C. §§ 30101-30169 (1994 & Supp. V 1999)).

224. *Id.* §§ 30101, 30103(b).

225. 514 U.S. 280 (1995).

226. *Id.* at 289-90.

> that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule.[227]

Myrick was a unanimous opinion, foreshadowing the limited usefulness of *Cipollone* and the resurrection of implied preemption doctrine. The reason for the short life of express preemption analysis' exclusivity may never be known, but the Court's subsequent cases on this issue reflect, as will be seen, an unwillingness by the Court to believe that Congress says what it means. The Court's skepticism in this important matter of discerning Congress's intent makes the Court's own motives in the assessment of implied obstacle preemption suspect.

The Court's next preemption opinion, *Medtronic, Inc. v. Lohr*,[228] involved the Food and Drug Administration's (FDA) pre-market notification approval regulations under the Medical Device Amendments of 1976 (MDA) and whether those regulations preempted common law design and manufacturing defect claims arising out of plaintiff's use of defendant's pacemaker which had been approved under the FDA requirements.[229] The Court was divided on whether the MDA preempted the plaintiffs claims, but again, all Justices agreed that the express preemption provision controlled the analysis.[230]

The Justices again stuck closely to the language of the express preemption provision, which stated that states may not impose "requirement[s] . . . different from or in addition to" any federal requirement related to safety or effectiveness included in a federal requirement.[231] The device in question had been approved under the pre-market notification method which did not include specific design requirements.[232] The plurality opinion, authored by Justice Stevens who wrote the *Cipollone* plurality opinion, concluded that common law damage actions based on design defects were not requirements in this context.[233]

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227. *Id.* at 288-89; *see also* CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 662 (1993) (finding that the Federal Railroad Safety Act does not preempt state common law damages actions; preemption provision specifically exempts concurring, non-conflicting, state regulations from its operation: "Even after federal standards have been promulgated, the States may adopt more stringent safety requirements 'when necessary to eliminate or reduce an essentially local safety hazard,' if those standards are 'not incompatible with' federal laws or regulations and not an undue burden on interstate commerce.").

228. 518 U.S. 470 (1996).

229. *Id.* at 474.

230. *Id.* at 484-85, 503-05 (Breyer, J., concurring), 509 (O'Connor, J., concurring in part and dissenting in part). Justice Stevens' plurality opinion suggested that actual conflict implied preemption analysis may be appropriate in certain circumstances even when an express preemption provision was in issue, and cited *Freightliner Corp. v. Myrick. Id.* at 503.

231. 21 U.S.C. § 360k (2000).

232. *Medtronic*, 518 U.S. at 480. This pre-market notification requirement, also known as the 510k notification process, permitted marketing of devices that were substantially equivalent to a device already on the market and did not contain the same rigor of the pre-market approval process that new devices to the market were required to undergo. *See id.* at 476-80 (describing the processes and their differences). *See generally*, Ausness, *supra* note 3, at 226-27; SUSAN BARTLETT FOOTE, MANAGING THE MEDICAL ARMS RACE: PUBLIC POLICY AND MEDICAL DEVICE INNOVATION (1992).

233. *Medtronic*, 518 U.S. at 493-94.

Justice Stevens reiterated the express preemption analysis articulated in *Cipollone*:

> [W]e have long presumed that Congress does not cavalierly pre-empt state-law causes of action. . . . [W]e "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." . . . [W]e used a "presumption against the pre-emption of state police power regulations" to support a narrow interpretation of such an express command in *Cipollone*. . . . That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.[234]

The plurality found no preemption of any of plaintiff's claims by interpreting the scope of the statute and governing FDA regulations narrowly, using the legislative history and the FDA's own interpretation against preemption as support.[235]

A majority of the Justices, four in dissent and Justice Breyer in concurrence, considered that common law damages actions generally do impose requirements and therefore are preempted under the statute if they differ from a federal requirement.[236] Justice Breyer's concurring opinion gave the Court its judgment in the case.[237] Justice Breyer would have interpreted the word "requirement" to include common law damages actions in particular circumstances.[238] More importantly, Justice Breyer confirmed the importance of congressional intent in determining the statute's preemptive scope and complained of the "highly ambiguous" nature of the preemption provision in issue, requiring that courts look elsewhere for help as to "just which federal requirements preempt just which state requirements, as well as just how they might do so."[239] Justice Breyer stated that express preemption provisions should be interpreted based on their "clear congressional command," if one exists. If none exists, courts may infer that the "relevant administrative agency possess a degree of leeway" to proscribe preemptive effect of its regulations.[240] Justice Breyer's frustration over Congress's inability to state unambiguously the scope of preemption provisions, and his obvious dissatisfaction with the task of interpreting ambiguous language, foreshadows the Court's return to a focus on

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234. *Id.* at 485 (citations omitted).

235. *Id.* at 488-89.

236. *Id.* at 503 (Breyer, J., concurring), 509 (O'Connor, J., concurring in part and dissenting in part). It is interesting that the Justices that find common law damages actions to be regulatory, imposing requirements on persons against whom liability is found, do not cite *Silkwood*, or *English*, which found such regulatory effect to be indirect only. Rather, they cite *Garmon* from 1959 which involved preemption of state court jurisdiction under the NLRA and not, technically, the damages action which supported it. *Id.* at 509-14 (O'Connor, J., concurring in part and dissenting in part).

237. *Id.* at 508 (Breyer, J., concurring).

238. *Id.* at 503-04 (Breyer, J., concurring).

239. *Medtronic*, 518 U.S. at 505 (Breyer, J., concurring).

240. *Id.*

implied preemption doctrine.[241] Justice O'Connor, in dissent, relies on the statutory text, "[B]ecause Congress has expressly provided a preemption provision, 'we need not go beyond that language to determine whether Congress intended the MDA to preempt' state law."[242] The only question remained one of statutory interpretation, which she conducted by textual analysis.[243]

Commentators have observed that the Court's preemption analysis after *Cipollone, Myrick* and *Medtronic*, was less and less a true express preemption analysis and more and more a veiled implied preemption analysis.[244] But in *Norfolk & Southern Railway Co. v. Shanklin*,[245] the Court continued its reliance on express preemption provisions,[246] this time under the Federal Railroad Safety Act.[247] The preemption provision states that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable,"[248] recognizing that state and local regulations may be necessary to insure that specific local needs are met. A state may regulate in an area, therefore, until the Secretary of Transportation prescribes a regulation; then the State is ousted from authority.

The Secretary of Transportation had made funds available for installing warnings at railway crossings and promulgated regulations regarding the adequacy of some, but not all, warning devices installed with federal funds.[249] Plaintiff was injured at a railroad crossing where warning signs were installed with federal funds which had been approved as part of several projects in Tennessee by the Federal Highway Administration (FHWA), but no particularized finding of warnings adequacy for the crossing had been made.[250] Plaintiff argued that the inadequacy of the warnings supported a negligence action regardless of the general federal

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241. The Court decided a number of other preemption cases during the mid-1990s which seemed not to involve quite the struggle that the preemption of products liability cases did. *E.g.*, Humana Inc. v. Forsyth, 525 U.S. 299 (1999) (holding that the McCarran-Ferguson Act which places regulation of insurance in state domain did not prevent operation of other federal laws, such as RICO, on insurers where that federal law does not directly conflict with state regulation or would not frustrate state policy); Atherton v. Fed. Deposit Ins. Corp., 519 U.S. 213 (1997) (finding that the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which defines a gross negligence standard for directors and officers, provides only a floor, not a ceiling, and does not prevent stricter state standard; no express preemption provision in issue).

The Court's ERISA preemption cases, though, continue to raise thorny issues under the express preemption provision. *E.g.*, Pegram v. Herdrich, 530 U.S. 211 (2000) (finding that ERISA does not reach HMO liability); Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316 (1997) (finding California wage law not preempted by ERISA); Boggs v. Boggs, 520 U.S. 833 (1997) (holding that ERISA preempts state community property laws).

242. *Medtronic*, 518 U.S. at 509 (O'Connor, J., concurring in part and dissenting in part) (citations omitted).

243. *Id.* at 509 (O'Connor, J., concurring and dissenting in part). Justice O'Connor was joined by the Chief Justice, and Justices Scalia and Thomas. *Id.*

244. *E.g.*, Raeker-Jordan, *supra* note 2, at 1418-19.

245. 529 U.S. 344 (2000).

246. *Id.* at 347-48, 352-56.

247. Federal Railroad Safety Act of 1970, 49 U.S.C. §§ 20101-20153 (1994 & Supp. V 1999).

248. *Id.* § 20106.

249. Shanklin, 529 U.S. at 348-49 (citing 23 C.F.R. § 646.214(b) (1999)).

250. *Id.* at 350.

approval of the warnings.[251]

The Court found that the federal regulatory scheme regarding railroad crossings expressly preempted the damages action because the crossing warnings were installed with federal funds, under FHWA approval and, therefore, the federal regulations "substantially subsumed" the subject matter consistent with the express preemption provision.[252] While adequacy of the warning sign had not been explored, the approval of the FHWA and the subsequent funding defeated any adequacy argument because of the plain meaning of the statute and its regulations.[253] The expressed desire for national uniformity in the railroad regulatory area[254] certainly affected the Court's conclusion. The result appears at odds with the presumption against preemption, however, as applied with some dedication in *Medtronic* and *Cipollone*.[255]

III. MODERN PREEMPTION DOCTRINE

The Court's struggle with express preemption and its meaningful search for congressional intent based on Congress's express language was soon to be resolved. One year later, the Court had an opportunity to clarify its express preemption analysis and the interpretive methods to be used under that analysis. In *Geier v. American Honda Motor Co.*,[256] the Court did not do so; rather, the Court failed to apply either a text-based statutory interpretation or a text-plus legislative history/administrative regulation guided interpretive approach. *Geier* represents the Court's first effort since *Ouellette*, involving the Clean Water Act,[257] at interpreting a savings clause, and certainly the first effort at interpreting such a clause under its focus on express preemption. Whether the Court will continue to focus on express language in an effort to discern congressional intent is no longer a question after

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251. *Id.*

252. *Id.* at 356, 358-59.

253. This result is entirely inconsistent with the traditional rule that compliance with government regulations is some evidence of due care, but not conclusive, particularly because the federal approval in this instance is devoid of any actual finding of adequacy or reasonableness.

254. For a discussion of the historically broad preemptive scope given to federal regulation of the railroad industry, see *supra* notes 36-43 and accompanying text.

255. The FHWA had supported the Court's reading of the preemptive scope of the statute in an earlier case, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), but changed its position in *Shanklin*, which appeared to the Court to be contrary to the regulation's plain text. *See Shanklin*, 529 U.S. at 355-56, 359-60 (Breyer, J., concurring) (noting that the federal government can change the preemption it previously sought by changing its regulation "to achieve the commonsense result the Government itself now seeks").

256. 529 U.S. 861 (2000). *Geier* was a five to four opinion; Justice Breyer wrote for the majority, and was joined by Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy. Justice Stevens, the author of both the *Cipollone* and *Medtronic* plurality opinions, dissented in an opinion in which Justices Souter, Thomas, and Ginsberg joined. The only surprise here is that Justice Thomas, who wrote the *Myrick* opinion and who sided with Justice O'Connor in her dissent in *Medtronic*, which would have found express preemption there, joined Justice Stevens' dissenting opinion.

257. *See* discussion *supra* notes 175-83 and accompanying text.

Geier—implied obstacle preemption void of any effort to discern congressional intent and reminiscent of the railroad cases of the 1910s has returned.

A. *The New Implied Preemption Doctrine*: Geier v. American Honda Motor Co.

In *Geier*, the Court was asked to analyze the effect of the express preemption provision in the National Traffic and Motor Vehicle Safety Act (NTMVSA)[258] on a lawsuit alleging that a 1987 Honda was defective in design because it did not have a driver's side air bag.[259] The NTMVSA contains a preemption provision, at issue in *Myrick* also, which states that whenever a federal motor vehicle safety standard, which is defined elsewhere in the statute as a minimum safety standard,[260] is in effect, states may not establish or continue any "safety standard applicable to the same aspect of performance" which is not identical to the federal standard.[261] The statute also provides the following "savings clause:" "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."[262]

The Department of Transportation issued a federal motor vehicle safety standard (FMVSS) in 1984, after a tortured administrative history, which permitted automobile manufacturers beginning in 1987 a choice of passive restraints, culminating in the requirement in 1989 that all cars have a drivers side air bag.[263] Ms. Geier's 1987 Honda did not have a drivers side air bag.[264] The Court concluded that the express preemption provision did not preempt plaintiff's action,[265] but it conducted no textual analysis of the statute's language. The Court also concluded that the savings clause did not save the plaintiff's common law damages action, but that "ordinary pre-emption" principles apply so that the action is preempted because it "conflicts with the objectives of FMVSS 208."[266]

Justice Breyer, who complained of the ambiguity in the preemption provision of the MDA in *Medtronic*, wrote for the majority in *Geier*, and articulated a three-part preemption analysis. First, does the express preemption provision pre-empt the

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258. The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (1988) (current version at 49 U.S.C. §§ 30101-30169 (1994 & Supp. V 1999)).

259. *Geier*, 529 U.S. at 864-65.

260. 49 U.S.C. § 30102(a)(9) (stating that a safety standard is a "minimum standard for motor vehicle performance, or motor vehicle equipment performance").

261. *Id.* § 30103(b)(1).

262. *Id* § 30103(e).

263. 49 C.F.R. § 571.208 (1984) (referred to as Standard 208). For a discussion of the tortured administrative history, see *Geier*, 529 U.S. at 875-77, 889-92 (Stevens, J., dissenting); *see also* Ralph Nader & Joseph A. Page, *Automobile-Design Liability and Compliance with Federal Standards*, 64 GEO. WASH. L. REV. 415 (1996).

264. *Geier*, 529 U.S. at 865.

265. *Id.* at 867.

266. *Id.* at 866.

lawsuit?[267] If not, "do ordinary pre-emption principles nonetheless apply?"[268] If so, does the lawsuit "actually conflict" with the federal statute?[269] Of primary importance is how the Court used the notion of "actual conflict" preemption very broadly to include not only actual conflict but obstacle preemption as well. Because the Court did not interpret the scope of the express preemption provision, it concluded that "ordinary," also known as "implied," preemption principles continue to apply, relegating *Cipollone* and *Medtronic* to a footnote in the history of preemption doctrine.[270]

The majority's analysis of the express preemption provision and the savings clause is disappointing in two ways. First, there is no meaningful analysis of the scope of the provision's language, in the way that the Court engaged in such an analysis in *Cipollone* and *Medtronic*. Consequently, the Court fails to clarify the manner by which such provisions are to be interpreted, whether narrowly as in *Cipollone* or by reference to legislative and administrative history. Second, the Court's interpretation of the meaning of the savings clause is inconsistent with its analysis of such clauses in its prior cases; indeed the Court does not even refer to any such cases.

The Court does not discuss the language of the NTMVSA preemption provision to determine its scope—for example, what does "standard" mean in the context of the statute, its legislative history, and purpose. Nor does the Court assess what the use of "standard," as opposed to "requirement" or some other term, means, as it did in *Cipollone* and *Medtronic*. Instead, the Court concludes, with little fanfare, that the "savings clause" makes that exercise unnecessary.[271] The Court says that it does not matter whether "standard" should be read to include common law damages actions because the savings clause assumes "that there are some significant number of common-law liability cases to save."[272] The Court thus concludes that the presence of the savings clause requires a narrow reading of the express preemption provision, excluding common law damages actions from its operation, to give actual meaning to the savings clause.[273]

Had the Court engaged in a textual analysis, it would have seen that "standard" is defined in the statute as a "minimum," giving some indication of what Congress intended under the preemption clause.[274] The legislation consciously uses "liability

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267. *Id.* at 867.
268. *Id.*
269. *Id.*
270. *Geier*, 529 U.S. at 886.
271. *See id.* at 868-74.
272. *Id.* at 868
273. *Id.*
274. 49 U.S.C. § 30102(a)(9). The references to "safety standard" in these sections, definitions and preemptive effect, are so distinctly different from the use of "liability under common law" in the savings clause that it is clear on the face of the statute that the two terms describe different concepts. *See* Nader & Page, *supra* note 267, at 419-25 (giving a thorough legislative history of NTMVSA provisions; assessment of statutory provisions "leads inexorably to the conclusion that [the savings clause] was meant to preserve the possibility of automaker liability in tort despite compliance with a federal standard").

under common law" in the savings clause in a very different way from "standard," suggesting that the preemption provision is limited to legislatively or administratively enacted positive features of automotive performance. The savings clause, then, would logically mean that even if an entity complied with the federal standard, which is a minimum, a common law action based on that compliance would be permitted nonetheless.

The Court's failure to assess the language of these two provisions consistently with one another, based on their plain meaning, is at the least, curious and, at the most, directly contrary to controlling precedent.[275] The Court turns to the savings clause, without focusing on its language, and asks whether it forecloses the operation of ordinary preemption principles. One of those principles, of course, is that we seek the intent of Congress and, where it is clearly expressed, that language serves to define the inquiry.[276] The majority opinion never mentions the presumption against preemption.[277] Indeed, the Court suggests that a broad reading of the preemption provision in issue might be appropriate in some circumstances, but that "[w]e have found no convincing indication that Congress wanted to preempt not only state statutes and regulations, but also common-law tort actions."[278] The Court uses the existence of the savings clause as its sole support for this conclusion. The Court relies on the savings clause to assist in the interpretation of the preemption provision and speaks in terms of "possible" broad interpretations, which it concludes are not correct,[279] rather than interpreting the language, history, and purpose of the provisions.

The Court does not refer to the legislative history nor to the purposes of the statute in its express preemption analysis. Perhaps this is to be expected of a Court that tends toward text-based construction of statutes, as in *Cipollone* and *Medtronic*. That makes all the more puzzling the majority's inadequate interpretation of the statute as written.[280]

In *Geier*, Justice Breyer complained about the highly ambiguous nature of many congressional preemption provisions, yet in the face of a seemingly unambiguous statute, he raises questions about Congress's purposes, saying: "It is difficult to understand why Congress would have insisted on a compliance-with-

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275. *Geier*, 529 U.S. at 867-68 "[W]e need not determine the precise significance of the use of the word 'standard,' rather than 'requirement,' however, for the Act contains another provision, which resolves the disagreement. . . . The saving clause assumes there are some significant number of common-law liability cases to save." *Id.*

276. *See supra* Part III.A.

277. In *United States v. Locke*, decided a few months earlier in the same term, the Court elaborates at length on the "assumption of nonpreemption" which is not triggered when the regulation in issue is in an area of "of significant federal presence," but which operates in areas of historical state regulation. 529 U.S. 89, 108 (2000) (citing Rice v. Santa Fe Elevator Co., 331 U.S. 218 (1947) and Medtronic, Inc. v Lohr, 518 U.S. 470 (1996)).

278. *Geier*, 529 U.S. at 868.

279. *Id.*

280. In *Locke*, the Court interpreted the preemptive scope of a savings clause in the Oil Pollution Act and did so based on a text-based interpretation significantly more detailed than that in *Geier*. *Locke*, 529 U.S. at 106-07. *Locke* was a unanimous opinion.

federal-regulation precondition to the provision's applicability had it wished the Act to 'save' all state-law tort actions, regardless of their potential threat to the *objectives of federal safety standards promulgated under the Act.*"[281] It is not difficult at all to understand why Congress would write a savings clause in a way that focuses on only those who comply with the federal regulation: because those who do not comply have no claim to federal protection in the first place. Congress can choose to provide that those who have obeyed a minimum federal requirement are, nonetheless, unprotected from traditional principles of common law compensation mechanisms. Indeed, as the Justices on many occasions have observed, the Court's task is to follow the intent of a congressional direction, not to re-write it.[282]

The Court stated in its analysis of the express preemption provision that it was not going to determine whether use of the word "standard" as opposed to "requirement" defined preemptive scope[283] and now we know why: "ordinary preemption principles" apply regardless of the scope of the express provision. The Court's prior preemption cases had been badly splintered on the nature of express provision analysis so it is not surprising that the Court would retreat to more familiar territory with application of implied preemption principles. If the Court had concluded that "standard" does not include common law damages actions in NTMVSA, it could not then easily have concluded, in the face of its purported focus on congressional intent, that the statute's purposes would be frustrated by permitting such actions. Further, if the Court had concluded that "standard" does include common law damages actions, then the savings clause may more clearly mean that Congress intended a narrow preemption and, thus, an implied preemption argument would seem an end-run around Congress's intent. So what did the Court do? It found ambiguity in the express preemption provision and failed to conduct the very analysis it had defined only eight short years earlier in *Cipollone*. It resurrected implied obstacle preemption doctrine shortly after its attempt to limit it in an effort to preserve traditional state authority.

One important explanation for this shift in preemption doctrine must be that the Court's distrust of products liability actions is greater than its interest in determining congressional intent or preserving traditional state authority.[284] For example, Justice

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281. *Geier*, 529 U.S. at 869-70 (emphasis added). After concluding that the savings clause removes common law tort actions from the operation of the express preemption provision, the Court concludes that nothing in the language of the clause suggests an intent to save state law tort actions that conflict with federal regulations. *Id.* at 868-69. One might wonder why Congress would need to save state law tort actions that do *not* conflict with federal regulations when state law tort actions that do *not* conflict with federal regulations are not covered by the federal regulation to begin with? Why would Congress write a savings clause to save something that does not need saving?

282. *See, e.g.*, Offshore Logistics, Inc. v Tallentire, 477 U.S. 207, 240 (Powell, J., dissenting) ("[I]t is not the role of this Court to reconsider the wisdom of a policy choice that Congress has already made.").

283. *Geier*, 529 U.S. at 867.

284. *See* Davis, *supra* note 202, at 1081-1139 (explaining the Court's products liability cases in the 1980s and early 1990s which evince a desire to retract common law products liability doctrines).

Breyer, for the majority, goes on at length about the regulatory effect of "jury-imposed safety standards" yet his analysis of the express preemption provision has no hint of what "standard" means.[285] The majority relies on the "careful regulatory scheme" established under NTMVSA to support the operation of implied preemption principles, while recognizing that Congress intended there to be some nonuniformity in the system it created.[286] The Court's distrust of common law damages actions in the regulatory sphere is apparent:

> Insofar as petitioners' argument would permit common-law actions that "actually conflict" with federal regulations, it would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect. To the extent that such an interpretation of the saving provision reads into a particular federal law toleration of a conflict that those principles would otherwise forbid, it permits that law to defeat its own objectives, or potentially, as the Court has put it before, to "'destroy itself.'"[287]

For this proposition, the Court cites a case decided in 1907 when the Court's preemption analysis was in its youth and when the Court was faced with congressional legislation entirely different from that it faces now.[288] In addition, the NTMVSA was written in 1966 when the operation of widely endorsed tort principles uniformly permitted tort actions to proceed even when the defendant complied with federal or state safety regulations. It is not unexpected that a Congress writing at that time would anticipate that such a long-standing rule would operate, and might even want to insure that it did.

But the Court concludes that the two provisions reflect a neutral policy toward the operation of implied preemption doctrine when an actual conflict exists.[289] Yet, when the Court applies implied preemption doctrine, it is obstacle implied preemption that it applies—that version that is unrelated to congressional intent, but rather is based on a general judicially-determined frustration of national purposes. The Court describes its precedent as defining only "terminological" differences in implied preemption categories, and "it has assumed that Congress would not want either kind of conflict."[290] The Court, thus,

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285. *Geier*, 529 U.S. at 871.

286. *Id.* at 870.

287. *Id.* at 872 (citation omitted).

288. *Id.* (citing AT&T v. Cent. Office Tel., Inc., 524 U.S. 214 (1998) (involving rate dispute under federal Communications Act); Texas & Pac. Ry. Co. v. Abilene Cotton Co., 204 U.S. 426 (1907) (involving railroad freight rate dispute).

289. *Geier*, 529 U.S. at 870-71.

290. *Id.* at 873.

> sees no grounds, then, for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case. That kind of analysis, moreover would engender legal uncertainty with its inevitable systemwide costs . . . as courts tried sensibly to distinguish among varieties of "conflict" . . . when applying this complicated rule to the many federal statutes that contain some form of an express preemption provision, a savings provision, or as here, both.[291]

The majority specifically rejects any "special burden" on the proponent of implied preemption to make the necessary showing of frustration of federal objectives, but it does not describe what the required showing is.[292] Such a burden would seem to make sense if a party were trying to overcome a presumption against preemption. But the Court clearly is uninterested in that presumption. Nowhere is there a discussion of the history of the preemption provision or savings clause, or the legislative history or objectives of the federal statute under which the regulation was promulgated.[293] The Court in *Geier* pointed instead to the balancing of a wide

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291. *Id.* at 874. The Court found an actual conflict, elaborating at length about the frustration of purpose that would result if the common law tort action were permitted to proceed. *Id.* at 874- 86. The Court relies for its conclusion on the history of the 1980s era federal regulation and the Department of Transportation's comments on the purposes behind the regulation, a moving target at best and one certainly not tied to the statute's legislative history. *See id.* at 877-86. It has been persuasively argued that congressional intent in the area of motor vehicle safety has always been to permit the parallel operation of state common law to fulfill the federal objective of public safety. *See* Nader & Page, *supra* note 263, at 419-26.

292. The idea of a "special burden" stems from Justice Stevens' dissenting opinion in which he had argued that even if implied preemption doctrine somehow survives the express preemption analysis, the Court's application of obstacle preemption analysis is vastly over-broad given the existence of the express preemption provisions and the protracted political nature of the administrative process which produced FMVSS 208. *Geier*, 529 U.S. at 898-99 (Stevens, J., dissenting). Justice Stevens suggests that in the face of such express provisions, the Safety Act imposes a "special burden on a party relying on an arguable, implicit conflict with a temporary regulatory policy—rather than a conflict with congressional policy or with the text of any regulation—to demonstrate that a common law claim has been pre-empted." *Id.* (Stevens, J., dissenting).

Justice Stevens also comments on the fundamental nature of the case being "about federalism, that is, about respect for 'the constitutional role of the States as sovereign entities.'" *Id.* at 887. (Stevens, J., dissenting). Justice Stevens also comments: "[I]t is equally clear that the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States." *Id.* at 894 (Stevens, J., dissenting).

293. *See Geier*, 529 U.S. at 910-11 (Stevens, J., dissenting). Justice Stevens stated:

> Furthermore, the Court identifies no case in which we have upheld a regulatory claim of frustration-of-purposes implied conflict pre-emption based on nothing more than an *ex post* administrative litigating position and inferences from regulatory history and final commentary. The latter two sources are even more malleable than legislative history. Thus, when snippets from them are combined with the Court's broad conception of a doctrine of frustration-of-purposes pre-emption untempered by the presumption, a vast, undefined area of state law becomes vulnerable to pre-emption by any related federal law or

variety of considerations that the Department of Transportation conducted before it adopted FMVSS 208.[294]

Later that same term, the Court's opinion in another preemption case, involving regulation of foreign affairs, is telling:

> Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances. When Congress intends federal law to "occupy the field," state law in that area is preempted. . . . And even if Congress has not occupied the field, state law is *naturally preempted* to the extent of *any conflict* with a federal statute.[295]

The Court defines a sufficient "conflict" as "a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects."[296] For this proposition, the Court quotes *Savage v. Jones,*[297] a case finding preemption under the original Food and Drug Act and decided in 1912 during a time when the Court applied an expansive preemption doctrine.[298]

In the two years since *Geier*, the Court has re-written the preemption presumption in the negative, as "an assumption of non-preemption" that is not triggered in areas of significant federal presence.[299] The Court has placed very limited reliance on express preemption provisions,[300] and firmly placed the weight of preemption analysis in the arms of obstacle implied preemption.[301]

Geier represents a seismic shift in the Court's preemption doctrine. The Court has returned preemption doctrine to its early focus on federal exclusivity and turned away from any meaningful attempt at discerning congressional intent that has been

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regulation.

Id.

294. *Id.* at 874-86.

295. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) (emphasis added) (citation omitted) (explaining that Massachusetts' Burma law was impliedly preempted by foreign affairs power and congressional Burma Act) (relying on Charleston & W. Carolina R.R. Co. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915)). The Court recognized that "the categories of preemption are not 'rigidly distinct.'" *Id.* at 372 n.6 (citation omitted).

296. *Id.* at 373.

297. 225 U.S. 501 (1912).

298. For a discussion of *Savage v. Jones*, see *supra* note 44 and accompanying text.

299. U.S. v. Locke, 529 U.S. 89, 108 (2000) (involving preemption of state policies regarding Burma; foreign affairs exclusively federal; preemption found).

300. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (applying the express preemption provision of the cigarette labeling laws again and expressly preempting state advertising regulations).

301. *See, e.g.*, Buckman Co. v. Plaintiff's Legal Comm., 531 U.S. 341, 543-44 (2001) (finding that the MDA impliedly preempted the plaintiff's fraud claim based on the defendant's misrepresentations to the FDA to obtain device approval). In *Buckman*, the Court found that policing fraud against federal agencies is hardly "'a field which the States have traditionally occupied'" to warrant any preemption presumption. *Id.* at 347 (citation omitted). The Court applied implied obstacle preemption, relying on *Geier* and not *Medtronic*, and concluded that the MDA express preemption provision was not exclusive. *Id.* at 352-53.

"the ultimate touchstone" of preemption analysis since the 1940s. Preemption analysis is now organized not only to prefer federal law, but to presume its operation to the exclusion of state law that has even a minimal effect on the accomplishment of federal objectives.

B. Old Meets New: The Presumption in Favor of Preemption

The foregoing discussion of almost one hundred years of preemption cases suggests some important conclusions. First, there is no meaningful presumption against preemption. Others have suggested as much; the case analysis just concluded confirms it. In a very few cases in the 1970s and 1980s there was a glimmer that the presumption might be given some content, but that position was never strongly held and has certainly not carried the day. The focus on preserving areas of traditional state authority has given way to a focus on promoting federal authority and uniformity.

Second, over the years, the Court has consistently applied implied preemption doctrine broadly to support a finding of preemption. Early cases did so unabashedly, with no real concern for congressional intent, as a means of giving content and strength to the early congressional attempts to regulate commerce.[302] Later cases did so under the rubric of seeking congressional intent, as a means of balancing the federal/state interests at stake at a time of increasing federal legislative activity.[303] More recent cases did so as an accommodation of the perceived national needs expressed in the comprehensive consumer protection legislation of the 1960s, 70s and 80s.[304] It was only in the 1980s that skepticism, and perhaps frustration, took over as a possible reaction to the significant and ever-widening national control over so many aspects of our daily lives. At this time, with cases like *Silkwood*, *Ouellette,* and then to an extent in *Cipollone*, the Court seemed to be trying to give content to the states' continuing authority in traditional areas of health and safety, particularly by focusing on congressional intent in a more narrow way through express preemption provisions.[305] But that time in the life of preemption doctrine was short lived, as evidenced by the result in *Geier*.[306]

Third, express preemption provisions now are read broadly to preempt, though the Court says it is reading such provisions neutrally. If they cannot be read to preempt, they will be read narrowly to permit implied obstacle preemption to operate broadly to preempt. This conclusion stems directly from the Court's application of the preemption provision and savings clause in *Geier*.[307] This combination of preemption rules leads to the application of an implicit presumption in favor of preemption.

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302. *See supra* notes 24-46 and accompanying text.
303. *See supra* Part II.C.
304. *See supra* notes 88-194 and accompanying text.
305. *See supra* Parts II.D-E.
306. *See supra* Part II.F.
307. *See supra* Part II.F.

Fourth, there appears no meaningful way to overcome the presumption in favor of preemption, at least not as applied to state common law damages actions. Absent pellucidly clear evidence of congressional desire not to preempt such actions, the history of the Court's cases suggest it will find implied obstacle preemption.

The final element of the preemption learning is the most important. Explaining the Court's return in the late 1990s to a focus on the amorphous, unpredictable, impossible to duplicate implied obstacle preemption analysis, after such a relatively short time focusing on congressional intent under express preemption analysis, deserves some attention. In fact, the historical analysis suggests that implied obstacle preemption has always served a basic default function—when all other preemption doctrines seemed inapplicable, implied obstacle preemption served as a catch-all to preserve federal law's supremacy. The next section explores the explanations and justifications that might exist to support the Court's current focus on implied obstacle preemption doctrine.

IV. EXPLAINING THE PRESUMPTION IN FAVOR OF PREEMPTION

In the perfect world of preemption doctrine, where congressional intent really matters, there would be a presumption against preemption of historically state governed matters that required clear and convincing proof of congressional intent to rebut because of the federal nature of our system of government. The interpretation of express preemption provisions would be exclusive as a result; if Congress wanted to clarify the scope of those preemption provisions after a judicial determination of preemption, it could do so.[308] An express preemption provision would be interpreted, first, based on its language; second, with a view to the history and purpose of the statute; and, finally, with insight from legislative policy.[309] Implied preemption doctrines only based on occupation of the field and actual conflict would operate absent an express preemption provision. Support for this articulation of preemption doctrine comes from an interest in the displacement of few, if any, common law tort actions based on the need for the oversight of the tort system in defining responsible behavior.[310]

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308. *Contra* Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. DAVIS L. REV. 1, 28-29 (2001) ("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 objectives and amend the relevant preemption language accordingly.").

309. *See* Ausness, *supra* note 3, at 240-52 (discussing elements of a model of statutory interpretation of federal regulation for preemption purposes which includes an evaluation of text, history, and legislative policy).

310. I agree with the following statement of Judge Jack Weinstein:

> The American tradition of "bottom-up" protection through initiative of the injured and their lawyers by private law suits and a democratized litigation process are, in my view, guarantees that need protection under tort law. . . . Preemption by regulation is a doctrine that makes me nervous in a world of rapidly developing technological dangers and wonders.

Jack B. Weinstein, *The Restatement of Torts and the Courts*, 54 VAND. L. REV. 1439, 1442 (2001); *see also* Clayton P. Gillette & James E. Krier, *Risk, Courts and Agencies*, 138 U. PA. L. REV. 1027,

This perfect world does not exist. The Court has made it clear that the regulatory effect of common law tort actions is substantial, if not subversive.[311] The Court did not always take this position, but it does so today and can be expected to continue.[312] The Court is skeptical of the benefit of common law actions as a proper element of a regulatory regime and enamored by federal regulatory uniformity and the certainty and predictability for those regulated that comes with it.

While this Article has demonstrated that the Supreme Court is building modern preemption doctrine on the exclusivity cases of the early part of the twentieth century, it is important to note that a full-fledged return to that expansive preemption doctrine is not yet occurring nor likely to occur. The Court backed away from a blatantly expansive preemption doctrine in the 1940s as it became clear that to continue with such a doctrine would totally annihilate the operation of an enormous amount of state laws of a very wide variety, a result certainly inconsistent with the intent of any Congress legislating at the time. The Supreme Court, conscious at the time of the power of broadly defined preemption doctrine, sought a way to balance its obligation to further congressional objectives and to preserve the proper role of state authority. It chose the vehicle of defining congressional intent as the balancing mechanism.

The Supreme Court's recent preemption cases evidence a federal law preference very much like those early cases, but they do not evidence a wholesale return to that expansive preemption doctrine which would find preemption as a result of the very existence of federal regulation in a field. Instead, the Court evaluates the federal regulations presented to it broadly as to *purpose* to further the presumption of preemption in the particular case before it, but not broadly as to *scope* so that all state laws imaginably within the scope of those regulations are captured. In this way, the Court furthers its desire to promote federal uniformity of regulation in a wide array of circumstances but without obviously overstepping its role in the hierarchy of law-making authority. The Court, conscious of its role in this hierarchy, would naturally feel uneasy with a doctrine that overtly permits it to broaden so significantly the scope of federal regulation absent a finding of

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1064-68 (1990) (discussing industry capture of agency charged with regulating the industry); Peter L. Kahn, *Regulation and Simple Arithmetic: Shifting the Perspective on Tort Reform*, 72 N.C. L. REV. 1129, 1182-84 (1994) (arguing that administrative agencies have limited resources available to properly and fully police product risks within their scope); Nader & Page, *supra* note 263, at 435 (discussing concern that agencies can be captured by regulated industry); Teresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121, 1147-48 (1988) (discussing industry control of information needed by agency to regulate effectively hampers agency decision-making process). For a consideration of the proper role, see generally Richard C. Ausness, *The Case For a "Strong" Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1237-38 (1996) (discussing failures of preemption as method of promoting product safety).

311. Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 350 (2001) ("As a practical matter, complying with the FDA's detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing potential applicants—burdens not contemplated by Congress in enacting the FDCA and the MDA.").

312. *See* discussion of *San Diego Bldg. Trades Council v. Garmon*, *supra* notes 71-87 and accompanying text, and discussion of *Silkwood v. Kerr-McGee Corp.*, *supra* Part II.D.

congressional intent to preempt.

A. The Need for Uniformity

The perceived need for uniformity of standards is, and has always been, a critical factor to the Court in evaluating whether a state law stands as an obstacle to the accomplishment of federal objectives. The Court has found obstacle preemption in a wide variety of cases over the years and relies for this conclusion on its fear of inhibiting the regulatory scheme that Congress has devised to achieve national uniformity.

The Court relied on the need for uniformity in regulating railroad liability in *Winfield* when it found implied preemption of state damages actions under the Federal Employers' Liability Act in 1917.[313] The Court relied predominantly on the need for national uniformity of warehouse regulations in *Rice,*[314] even though the federal legislation was directed to a narrow category of warehouses. The Court relied on the need for national uniformity in *Garmon* when it concluded that state damages actions were preempted under the NLRA even though the legislation left significant room for the states to regulate labor relations.[315] The Court relied on the national need for uniformity of debt relief in *Perez* with little analysis of the federal regulation in issue on that need.[316] The Court relied on the need for national uniformity in admiralty, a traditionally federally regulated subject, when it rejected state wrongful death actions operating concurrently with the federal statutory action in *Offshore Logistics v. Tallentire.*[317]

In a very few cases has the Court *not* found the need for national uniformity of regulation to support implied obstacle preemption. *Silkwood*[318] and *Ouellette*[319] in the 1980s did not find implied obstacle preemption in two areas traditionally federally regulated, nuclear energy generation and clean water preservation, respectively. These cases stand out as the watershed of support for the preservation of state law, but now must be seen as anachronistic. After its foray into seeking congressional intent by interpreting express preemption provisions, the Court returned with a vengeance to implied obstacle preemption in *Geier*[320] where the

313. N.Y. Cent. R.R. Co. v Winfield, 244 U.S. 147, 149-50 (1917); *see* discussion *supra* notes 35-46 and accompanying text. *See generally* Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 920-21 (1996) (discussing the Court's expansion of liability under the FELA).

314. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 234-235 (1947); *see* discussion *supra* notes 55-70 and accompanying text.

315. *Garmon*, 359 U.S. at 240, 244; *see* discussion *supra* notes 71-87 and accompanying text.

316. Perez v. Campbell, 402 U.S. 637, 649-56 (1971); *see* discussion *supra* notes 119-29and accompanying text.

317. 477 U.S. 207, 217-33 (1986); *see* discussion *supra* notes 172-74 and accompanying text.

318. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984); *see* discussion *supra* notes 145-70 and accompanying text.

319. Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987); *see* discussion *supra* notes 175-83 and accompanying text.

320. Geier v. Am. Honda Motor Corp., 529 U.S. 861 (2000); *see* discussion *supra* Part III.A.

perceived need for national uniformity was discerned not from the legislation itself but from the administrative scheme which it fostered.

Geier involved a very specific federal standard which was held to establish the need for national uniformity to accomplish the standard's goal. More general standards have been held sufficient to impliedly preempt as well,[321] so it is not just the specificity of the federal standard that matters but whether it supports generally a need for national uniformity. That federal regulators have regulated at all would seem sufficient to wrap the subject in the cloak of "nationalism."[322] Whenever Congress has legislated, and a federal administrative agency acted under that legislation, one can argue that the purpose is "national" in nature and, therefore, state law is preempted. The presumption in favor of preemption identified in this Article is supported by this focus on the need for national uniformity that underpins implied obstacle preemption.

B. The Quest for Certainty

The Court's preemption doctrine and its silently operating presumption in favor of preemption is explained primarily by the Court's focus on a perceived need for national uniformity in the areas analyzed. Other explanations exist which are not based on the substantive subject matter regulated but on external factors. These influences operate naturally in the background of preemption doctrine, but they are not the central explanations with which this Article deals. One such explanation, however, is based on the Justices politics—the Justices are, for the most part, conservative and their conservatism is more fiercely directed *against* state tort law than *for* notions of federalism.[323] Another explanation is found in the social and cultural environment in which preemption cases arise. The onslaught in the late 1980s and 1990s of reports about excessive tort liability and run-away jury verdicts, however accurate or inaccurate, influenced society in ways we may not fully appreciate. If one were inclined not to trust the assessment of liability by juries, one might be very inclined not to trust juries after reports of irrational, unpredictable, and unreasonable litigation results.

The Court favors the value of certainty and predictability that results from a uniform federal rule over the value of preserving traditional state authority in our federal system at least as those values are implicated in preemption cases. Uniformity and the certainty that stems from it, for its own sake, of course, does not, as a principle operating alone, produce just or fair substantive results. We must

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321. *See* Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000) (applying federal railroad warning standards to preempt state common law damages actions based on a failure to warn).

322. *See Garmon*, 359 U.S. at 244 ("[R]egardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.").

323. *See* Spence & Murray, *supra* note 13, at 1128-29 (discussing effect of ideology and politics on preemption decisions); *see also* Hon. J. Harvie Wilkinson III, *Federalism for the Future*, 74 S. CAL. L. REV. 523, 536 (2001) ("[T]he course of modern jurisprudence has placed the states at the mercy of the Supreme Court.").

assume, however, that federal legislators and administrators act in good faith in the legislation and regulation they define. We must also assume, though, that they act within limits imposed on the legislative and administrative system—limits born of time pressures, heavy work loads, restricted sources of information, political influences and desires, and personal influences and desires.[324] Understanding the limits of legislative and regulatory decision-making, the Court has nonetheless chosen to exalt certainty and uniformity of regulation over a more balanced approach to accommodating state laws in the regulated areas.[325]

The benefits of certainty, therefore, require elaboration. For entities subject to federal regulation, the certainty that results from knowing that federal rules will govern over state rules, even where they do not actually conflict or, indeed, might be complementary, will have beneficial effects. Those entities will not need to consider state rules governing conduct in deliberation over choices in conduct. In areas of doubt, the regulated entities can, with a high degree of certainty, ignore the state law principles without fear of state sanction, damages liability, or other interference.

Those subject to federal regulation will know that the federal regulation in issue, whether seat belt design features, pesticide-warning labeling, hazardous material transportation regulations, or what have you, defines exclusively the standard to be achieved. The certainty that comes from that knowledge will permit those entities the freedom to forgo the struggle over whether to do something more, or different, than what the federal regulations require.

Whether product manufacturers *ever* do more than federal regulations require is unlikely. What they do have to do, however, is pay damages to tort plaintiffs in some cases, though by no means all, based on a failure to comply with a state common law standard of reasonable care of product defectiveness that required a different choice. The certainty that will come to product manufacturers from knowing they will not have to pay those damages will result in a decrease both in the expenses from damages liability and also in the expenses attributed to determining what level of tort liability must be anticipated, because none need be anticipated absent violation of a federal standard. Similarly, the expense of litigating some percentage of the cases that challenge the conduct of those subject to the federal regulation will be reduced as some potential plaintiffs simply choose to forego seeking tort liability because of the enormous likelihood that preemption will result. Fewer lawyers will take those cases because of the enormous likelihood of defeat on preemption. No tort damages will need to be considered by the companies

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324. *See* Ausness, *supra* note 3, at 236-38 (discussing purposivist approach to statutory interpretation, assuming legislators act reasonably; contrasting recent scholarship which suggests legislators action is based on interest group and election-seeking purposes which influence them); Scordato, *supra* note 308, at 22-29 (discussing limits on legislative process and need for preserving ability to compromise on legislative and administrative content as affecting preemption analysis).

325. *See* Schwartz, *supra* note 313, at 924-32 (explaining the need for uniformity and certainty in products liability and providing a balanced view of need for uniformity in products liability cases, which "seems huge," with the benefits from having such nonuniformity which, though confusing, produces benefits in product safety).

subject to the regulation as a cost of their products because the job of balancing the issues that would be raised in a tort action presumably will have been done by the administrators. The question of whether the job was done adequately, will, of course, not be reached.

Fewer plaintiffs will receive compensation. Potentially no plaintiffs will receive compensation, as a result of the regulated conduct. The compensation for injuries suffered as a result of the regulated conduct will be borne by the plaintiffs, their families, their employers, their health care providers and their health insurers, and the government if they are not able to cover their own expenses.

Persons injured by regulated conduct can also prevail on their legislators to address the wide preemptive effect of the Court's doctrine. Injured plaintiffs, through consumer, employer, or other interested organizations, can lobby their legislators as to specific legislation, or in general, regarding the wide preemptive effect of federal legislation and regulation. I recognize the unlikelihood of this result—injured plaintiffs rarely collect to effect change, but consumer groups and other "watchdog" agencies do. Encouraging people to engage the democratic process is a good byproduct of an unpopular legal doctrine.

Certainty of preemption may benefit our administrators. If the presumption in favor of preemption is seen for what it is, administrators will, it is hoped, consider the irrelevance of the tort damages system in regulating the conduct or product condition in issue. Administrators can choose to define the preemptive effect of their regulations, and this choice may likely influence the Court in its assessment of the preemptive effect of the regulation.[326] Administrators are considered to have the kind of expertise to regulate that lay persons do not[327] and are therefore relied upon by the Court for the use of that expertise in regulating. If administrators are knowledgeable about the presumption in favor of preemption and the certainty that will result, they may be inclined to consider the effect of reduced tort liability on the balance being struck regarding the product design or conduct choices of which they are in charge. If administrators do not consider themselves to be only one of the elements in a system of regulating conduct, but indeed the *only* element in that system, they may take a different view of the nature, and significance, of their task.

Certainty of preemption will benefit our legislators who may or may not know, nor pay attention to, how legislation is being treated preemptively. To articulate a legal doctrine, like the presumption against preemption, and then never give it content nor pay it heed is, at the very least, misleading to the legislators who may be relying on the Court to interpret and apply legislation based on it. Misleading our legislators into thinking their legislative action is presumed not to unnecessarily affect state authority is at least a hindrance to the legislative process.

On the other hand, requiring subsequent legislators to pay attention to the everlasting affects of their own legislation, much less prior legislation, would seem to be an unreasonable task to require of legislators. Consequently, unmasking the

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326. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) (discussing whether to give deference to federal administrators' view of preemptive effect of their regulations).

327. Geier v. Am. Honda Motor Co., 529 U.S. 861, 883-84 (2000).

presumption in favor of preemption may educate legislators with the knowledge of the wide preemptive scope of their legislation. The knowledge that any state laws that may conflict with the federal laws in future years will be preempted is powerful knowledge. Disabusing legislators of the notion that preemption is not presumed may increase the likelihood that legislators will try to write the clear, unambiguous preemption provision that will alter the presumption. If Congress wants to write a clear and unambiguous express preemption provision to prevent this result, it can do so. The Court will, of course, require a clarity of language heretofore unseen, and perhaps not known to humankind, but anything is possible. Recent Congresses have adopted preemption provisions based on implied obstacle preemption, thus endorsing that doctrine as they understand it.[328] This result would seem to suggest that Congress will continue to defer to the Court's default preemption position and, indeed, endorse it. It is particularly important, therefore, that the Court's presumption in favor of preemption be disclosed.

Finally, some commentators have suggested that the Court's preemption doctrine can be explained, and thus reconciled, by recognizing that the Court will apply statutory-interpretation principles to the various federal legislation without trying to follow any categorization of preemption cases.[329] It does not appear, however, that the Court applies its typical statutory interpretation model to these cases, as the discussion of *Cipollone*, *Medtronic*, and *Geier* suggests. Such an approach has some merit[330] but it is not, in fact, what the Court is doing, nor what it should do.

The Court has taken a significant number of preemption cases in recent years, and it is possible that the Court will interpret each statute *sui generis*. Such a result, though unlikely, would increase the unpredictability and uncertainty of preemption doctrine even more than already exists. It would also make the resolution of cases raising the preemption issue enormously expensive and protracted. Every case raising preemption would have to await resolution by the Court. Cases will take forever to resolve as the lower and appellate courts try to analyze each statute on its own merits, knowing that the Supreme Court will analyze the statute in its own way regardless. The parties will have no repose; litigants under similar statutes will have no certainty in the preemption analysis of the lower courts, and the parties will have no faith in the resolution of their cases. Like cases will not be treated alike until the Court answers the preemption issue as to each regulatory scheme. The

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328. *See* Hazardous Materials Transportation Act, 49 U.S.C. § 5125(a)(2) (1994) (noting that a requirement of a State is preempted if the "requirement . . . as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter"). This statute also includes provisions for publishing preemption determinations by the Secretary of Transportation and judicial review of those preemption decisions. *Id.* § 5125(d), (f).

329. *See* Scordato, *supra* note 308, at 31 (rejecting reliance on express preemptions or presumption against preemption and advocating case specific statutory interpretation to define scope of preemption of federal statutes); Dinh, *supra* note 3, at 2111-12 (advocating contextual preemption analysis).

330. *See* Ausness, *supra* note 3, at 234-51 (advocating a model of statutory interpretation in preemption cases based on the Eskridge-Frickey "practical reasoning" model).

Court is unlikely to want to continue struggling with these cases in such a way and is more likely to try implementing a preemption doctrine that will prevent it. The presumption in favor of preemption, coupled with a showing of need for national uniformity or national presence in the field, is more suited to apply broadly to a wide variety of federal regulation.

V. APPLYING THE PRESUMPTION IN FAVOR OF PREEMPTION

The Court's refusal in *Geier* to "distinguish among types of federal-state conflicts" and its significant concern about the legal uncertainty that results from such conflicts, coupled with its disregard for the presumption against preemption, leads to the inevitable conclusion that the Court has moved full scale away from seeking congressional intent to preempt toward presuming intent to preempt. This Part describes how the Court's presumption in favor of preemption may operate within the context of the Court's preemption doctrine.

A. Defining the Operation of the Presumption Against Preemption

The easy answer, of course, is that the Court will find preemption, particularly of common law tort actions, regardless of the preemption provision and the federal regulation in issue. The result in *Geier*, in the face of both an express preemption provision and a savings clause, supports such a conclusion. The Court continues to apply a limited express preemption doctrine, but, when preemption is not found under that doctrine, "actual conflict" preemption operates as a default position. The flexibility of the Court's "actual conflict" preemption, including as it does the amorphous obstacle preemption, would seem to support a finding of preemption in virtually all circumstances. There may be circumstances where federal preemption is not supported, even by the Court's very liberal application of that doctrine, but those circumstances are likely to be rare.

The presumption in favor of preemption is not an evidentiary presumption that one party need rebut and the other support. Rather, the Court, presuming preemption silently, seeks some support for the conclusion that federal law prevails over state law under the circumstances of the particular federal statute or regulation in issue. The Court will find such support in one of two ways: (1) a showing of need for national uniformity of regulation in the particular field, or (2) a showing of historic federal presence in the field, regardless of a need for national uniformity. Neither of these bases of support require a showing of congressional intent to preempt. The required showing need be only a minimal level of benefit from a nationally uniform regulation on the subject in issue, or a minimum level of prior federal presence in the field. Upon finding support in one of the two defined ways, the presumption has been supported and operates to preempt.

What is the minimum showing of need for uniformity or federal presence in the field necessary to support the presumption in favor of preemption? This question remains to be answered, but the answer can be predicted with some accuracy. Based on *Geier*, in which a temporary regulation resulting from political compromises

with the regulated industry was sufficient to support the need for national uniformity to support preemption, very little in the way of uniformity would seem necessary to support the presumption. The Court has considered the mere existence of a federal agency to regulate medical devices, with no showing of that agency's efforts to prevent fraud and misrepresentation by the regulated industry, enough of a federal presence to support preemption of fraud-on-the-agency claims.[331] These cases suggest, consistent with the Court's early preemption cases, that a minimal showing of need for uniformity or federal presence in the field will suffice.

Many federal statutory schemes remain to be interpreted by the Supreme Court as to their preemptive effect. Lower courts routinely struggle with attempting to follow the Supreme Court's "moving target" preemption doctrine, and the inevitable result is a split among the courts, state and federal, as to the preemptive scope of federal legislation.[332] A small sample of such legislation affecting products liability matters includes the Federal Food, Drug, and Cosmetic Act;[333] the Consumer Product Safety Act;[334] the Federal Insecticide, Fungicide, and Rodenticide Act;[335] the Flammable Fabrics Act;[336] and the Federal Boat Safety Act.[337] All of these statutes contain an express preemption provision which permits only state regulations that are "identical" to the applicable federal regulations, as did the statute at issue in *Geier*.[338] The language of these statutes is similar in that the state regulation is allowed if it is "identical to" the federal regulation, or if the state regulation is not "different from or in addition to" the federal regulation.[339]

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331. Buckman v. Plaintiffs' Legal Comm., 531 U.S. 341 (2000).

332. For a discussion of the split among the courts regarding the scope of preemption under the Federal Boat Safety Act, see *infra* Part V.B. For another collection identifying the federal statutes that may be the subject of preemption analysis, see 2 MADDEN AND OWEN ON PRODUCTS LIABILITY, *supra* note 171, ch 28; *see also* Ausness, *supra* note 3, at 200-34.

333. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-397 (2000).

334. Consumer Product Safety Act, 15 U.S.C. §§ 2051-2084 (2000).

335. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (2000).

336. Flammable Fabrics Act, 15 U.S.C. §§ 1191-1204 (2000).

337. Federal Boat Safety Act, 46 U.S.C. §§ 4302-4311 (1994 & Supp. V 1999).

338. National Transportation and Motor Vehicle Safety Act of 1966, 49 U.S.C. § 30103(b)(1) (1994 & Supp. V 1999).

339. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v(b) ("Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this sub-chapter."); Flammable Fabrics Act, 15 U.S.C. § 1203 ("[N]o State or political subdivision of a State may establish or continue in effect a flammability standard . . . unless the State or political subdivision standard or other regulation is identical to the Federal standard or other regulation."); Consumer Product Safety Act, 15 U.S.C. § 2075(a) ("[N]o State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements . . . which are designed to deal with the same risk of injury . . . unless such requirements are identical to the requirements of the Federal standard."); Food, Drug, and Cosmetic Act, 21 U.S.C. § 379r(a) ("[N]o State or political subdivision of a State may establish or continue in effect any requirement . . . that is different from or in addition to, or that is otherwise not identical with, a requirement under this [Act]."); Federal Boat Safety Act, 46 U.S.C. § 4306, ("[A] State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel . . . safety standard . . . that is not identical to a regulation prescribed under § 4302 of this title.").

B. Applying the Presumption to the Federal Boat Safety Act

This section of the Article thus applies the Court's current preemption analysis to one piece of federal legislation that needs preemption analysis, the federal Boat Safety Act (FBSA).[340] The Court granted certiorari in a case[341] involving the preemptive effect of the FBSA and so will soon be applying its current preemption doctrine to it.

The FBSA was enacted in 1971 to "'improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in which the Coast Guard is operating.'"[342] A number of boating accidents prompted Congress to establish a coordinated national boating safety program.[343]

The FBSA vests in the Secretary of Transportation the power to create regulations governing recreational boat design and performance.[344] The preemption provision forbids a State from establishing or enforcing a "law or regulation establishing a recreational vessel or . . . other safety standard . . . that is not identical to a regulation" under the Act.[345] The Act has a savings provision which states: "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law."[346]

The legislation also establishes the National Boating Safety Advisory Council to assist the Secretary in determining the need for the development of safety standards.[347] In 1988, the Coast Guard directed the Advisory Council to study the feasibility of, and need for, propeller guards on motor boats.[348] The Advisory Council conducted a study to determine whether recreational boats should be required to include propeller guards.[349] After studying the issue, the Advisory Council recommended in 1989 that "'the U.S. Coast Guard should take no regulatory action to require propeller guards.'"[350]

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340. 46 U.S.C. §§ 4302-4311 (1994 & Supp. V 1999).

341. Sprietsma v. Mercury Marine, 757 N.E.2d 75, 77 (Ill. 2001).

342. *Id.* at 78 (*quoting* S. Rep. No. 92-248 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1331,1333).

343. S. Rep. No. 92-248 (1971), *reprinted in* U.S.C.C.A.N. 1331, 1334-35. The bill's purpose is described in the Senate Report as a means "to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary." *Id.* at 1333.

344. 46 U.S.C. § 4302.

345. *Id.* § 4306.

346. *Id.* § 4311(g).

347. *Id.* § 4302(c).

348. Sprietsma v. Mercury Marine, 757 N.E. 2d 75, 78 (Ill. 2001).

349. *Id.*

350. *See id.* The letter from the Rear Admiral of the U.S. Coast Guard to the Advisory Council stated the Coast Guard's conclusions: "The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats." *See also* Ard v. Jensen, 996 S.W.2d 594, 596 (Mo. Ct. App. 1999) (stating the text of Admiral Nelson's letter to the Advisory Council).

In products liability cases alleging motorboat design flaws resulting from an unguarded propeller, defendant manufacturers have argued that the Coast Guard's decision not to require propeller guards preempts common law damages actions claiming the boats are defective in design without them.[351] A number of courts have analyzed the express preemption of the FBSA and applied implied preemption to the Act as well.[352] The regulation at issue in these cases is unlike those at issue in prior preemption cases because the regulatory agency deliberately chose *not* to regulate on the subject matter of the common law claims. The decision not to require propeller guards is now thirteen years old.

Some lower courts have found the claims not to be expressly preempted.[353] The preemption provision says that states may not require standards that are not identical to federal standards;[354] it would be hard to conclude that a state standard is not identical to a non-existent standard. As well, the savings clause, similar to the one in *Geier*, states that compliance with a regulation under the statute does not relieve a person from liability at common law.[355] As in *Geier*, it is unlikely that the Court will apply the express preemption provision and its savings clause to save all common law actions generally, even though that would be a neutral and textual reading of the language of the statute. Most lower court opinions analyzing the FBSA after *Geier* have applied implied obstacle preemption analysis to find preemption in these cases. This result is certainly consistent with *Geier* and its application of implied obstacle preemption regardless of the presence of an express preemption provision.

In *Lady v. Neal Glaser Marine, Inc.*,[356] the Fifth Circuit Court of Appeals found that a plaintiff's products liability claims were impliedly preempted by the FBSA.[357] The court of appeals looked closely at the history of the decision not to require propeller guards.[358] Consistent with *Geier,* it also countered plaintiff's arguments that the presumption against preemption should prevail where the police power of the state was involved.[359] The court found instead that since the "Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement" any different state requirement was impliedly preempted.[360] As to the savings clause, which expressly saves common law claims,[361] the court cites *Geier* for the proposition that a savings clause "precludes a broad reading of the express preemption provision," but the

351. Lady v. Neal Glaser Marine, Inc., 228 F.3d 598, 602 (5th Cir. 2000).
352. *Id.* at 601-02 (citing many courts that have considered this issue).
353. *Id.*
354. Federal Boat Safety Act, 46 U.S.C. § 4306 (1994 & Supp. V 1999).
355. *Id.* § 4311(g).
356. 228 F.3d 598 (5th Cir. 2000).
357. *Id.* at 602.
358. *Id.* at 602-06.
359. *Id.* at 606-08.
360. *Id.* at 615.
361. Federal Boat Safety Act, 46 U.S.C. § 4311(g) (1994 & Supp. V 1999) ("Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.").

savings clause "'does not bar the ordinary working of conflict preemption principles.'"[362]

The Supreme Court is preparing to review *Sprietsma v. Mercury Marine*,[363] in which the Illinois Supreme Court found that while the plaintiff's common law claims were not expressly preempted, they were impliedly preempted.[364] Plaintiff, of course, argued in favor of the presumption against preemption, particularly where, as here, there is no federal regulation in issue to preempt the state common law rules.[365] Mercury argued that the presumption does not operate at all where there has been a tradition of federal regulation, such as that regarding maritime law.[366]

The court decided that the federal interests at stake dictated that no presumption against preemption should apply.[367] As to whether the statute expressly preempted the plaintiff's claims, the court found that when one considers both the preemption provision and the savings clause together, it becomes clear that Congress did not intend to expressly preempt plaintiff's claims.[368] As to implied preemption, however, the court noted that a savings provision does not save a common law claim from implied preemption.[369] After closely investigating the Coast Guard's decision not to require manufacturers to install propeller guards, the court concluded that "the Coast Guard's failure to promulgate a propeller guard requirement here equates to a ruling that no such regulation is appropriate pursuant to the policy of the FBSA."[370] It found that the plaintiff's common law claims were, therefore, preempted as an obstacle to the accomplishment of federal objectives.[371]

When it reviews *Sprietsma*, the Supreme Court will apply the express preemption provision, together with the savings clause, to conclude that some claims are preempted but some are saved. Because express preemption does not cover the entire scope of preemption, the Court will move on with little hesitation

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362. *Lady*, 228 F.3d at 610-11 (citation omitted); *accord* Sprietsma v. Mercury Marine, 757 N.E.2d 75, 85-86 (Ill. 2001) (agreeing with preemption conclusion as in *Lady*). *But see* Ard v. Jensen, 996 S.W.2d 594, 600 (Mo. Ct. App. 1999) ("Congress chose broad language. Had Congress wanted to limit the type of common law claims to be allowed, it could have done so. We presume that Congress intended what the ordinary meaning of it statutes' language conveys.").

363. *Sprietsma*, 757 N.E.2d 75 (Ill. 2001), *cert. granted*, 122 S.Ct. 917 (2002) (mem.); *U.S. Supreme Court Agrees To Hear Propeller Guard Preemption Case*, 30 PROD. SAFETY & LIAB. REP. 70 (2002).

364. *Sprietsma*, 757 N.E.2d at 81-82, 85.

365. *Id.* at 79.

366. *Id.*

367. *Id.* at 80.

368. *Id.* at 80-82. The court noted that several state and federal courts have found express preemption based on the provision in the FBSA. *Id.* at 81 (citing Carstensen v. Brunswick Corp., 49 F.3d 430, 433 (8th Cir. 1995); Moss v. Outboard Marine Corp., 915 F.Supp. 183, 186 (E.D.Cal. 1996); Shield v. Bayliner Marine Corp., 822 F. Supp. 81, 84 (D.Conn. 1993); Mowery v. Mercury Marine, 773 F. Supp. 1012, 1017 (N.D.Ohio 1991); Farmer v. Brunswick Corp., 607 N.E.2d 562 (Ill. App. Ct.1992); Ryan v. Brunswick Corp., 557 N.W.2d 541, 551 (Mich. 1997)).

369. *See id.* at 82.

370. *Sprietsma*, 757 N.E.2d at 85.

371. *Id.* at 87.

to apply its implied obstacle preemption analysis.

The Court will not refer to the presumption against preemption. If it refers to any presumption, the Court may mention "an assumption of nonpre-emption" that is not triggered in areas of significant federal presence.[372] The area of significant federal presence that will operate here is the maritime/admiralty area. The Court will be persuaded by the historic federal preeminence in this area, as it was in *Offshore Logistics, Inc. v. Tallentire*[373] regarding preemption of state wrongful death actions under the Death on the High Seas Act.[374] The Court there, in the face of a savings clause, said it would be incongruous to permit "widely divergent state law" when Congress sought uniformity in an "area where the federal interests are primary."[375]

The Court will derive additional support for finding implied obstacle preemption from the administrative process that resulted in the Advisory Council's recommendation against requiring propeller guards. The Court has been persuaded by the thoroughness of agency review and expertise, in cases like *Geier*, and can be expected to rely on that review and expertise to support the conclusion that national uniformity of standards is a federal objective with which any contradictory state laws conflict. The agency regulatory process, resulting as it did in a recommendation against a standard, supports a need for national uniformity just as much as a recommendation in favor of a standard. A contrary conclusion would permit the tort standards of juries in fifty different states to define the appropriate level of boating safety which the Court will find inconsistent with the desire for certainty and predictability in the regulatory process.

Even though there is no specific federal standard in issue to evaluate in the boat safety cases, the Court will nonetheless find support for implied obstacle preemption. Beginning with *Garmon*, the Court has found implied obstacle preemption even in the absence of federal regulation of the specific matter in issue. In *Garmon,* the Court found that even in the absence of the NLRB's determination that the bargaining-related conduct in issue was protected, state law affecting that conduct was prohibited.[376] The Court said, in support of its decision to preempt common law actions under the labor laws, "[T]he failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act."[377] In *Garmon*, it was not necessary to have a particular federal action

372. U.S. v. Locke, 529 U.S. 89, 108 (2000) (involving preemption of state policies regarding trade with Burma; foreign affairs exclusively federal; preemption found).

373. 477 U.S. 207 (1986).

374. *Id.* at 227; *see* discussion *supra* notes 172-74 and accompanying text.

375. *Offshore Logistics*, 477 U.S. at 229, 233.

376. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959).

377. *Id.* at 246. The Court continued:

> In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. . . . The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

to support implied preemption: the decision by the relevant administrative agency to decline federal jurisdiction over the issue was enough. The Court, consistent with its more modern cases, reflected its fear of non-uniformity: "Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left [unchanged]."[378]

The Court in *Garmon* dealt with national labor policy, a very important subject of the time in which national rules were considered paramount to achieve worker protection. That level of overarching national importance is not needed, however, under the Court's modern implied obstacle preemption analysis. Some lesser level of need for uniformity will suffice. *Geier* involved a very specific standard that was found to preempt based on a need for national uniformity regarding a subject much less significant to the welfare of the general public—automobile passive restraint design choice for manufacturers.[379] Other cases have relied on more general regulatory action to support a similar result.[380]

The Court may, but will not need to, refer to its earlier cases dealing with detailed waterways and vessel regulations promulgated by the Coast Guard and other agencies that were held to impliedly preempt state regulations.[381] The Court's earlier cases which reconciled state and federal regulations, finding some preempted and others not, will not hold sway in the case of the regulatory effect of common law damages actions. The Court is not persuaded of the positive value of common law actions in regulating conduct and so, it can be concluded, will find implied obstacle preemption here regardless of the non-existence of federal regulation.

Indeed, the Coast Guard's study of the issue, through the Advisory Council, would suggest just the type of administrative balancing of issues which the Court finds persuasive in finding obstacle preemption of potentially conflicting state damages actions. The Advisory Council's action, thirteen years ago, however, would seem limited in its usefulness as evidence of the need for national uniformity on this issue today. The Coast Guard's failure to regulate since then will likely be taken to imply continuing acquiescence in its earlier decision not to regulate. Further, the national interest in uniformity of regulation of matters even tangentially related to maritime commerce will likely be enough to support the presumption in

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Id. (citing Charleston & W. Carolina R.R. Co. v. Varnville Furniture Co., 237 U.S. 597, 604 (1912)).

378. *Id.* at 246.

379. *See* discussion *supra* Part III.A.

380. *See* Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344 (2000) (finding preemption based not on a particular regulation of the railroad crossing warnings in issue, but rather on the spending of federal funds to pay for the railroad crossing warning); Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001) (discussing that the need for flexibility in FDA regulatory scheme supported implied obstacle preemption of plaintiffs' claims based on fraudulent representations to FDA to obtain approval for medical device); Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) (holding that implied preemption not found in case where federal regulations for truck brakes were never properly promulgated; no evidence that federal regulators concluded that regulation was not appropriate).

381. U.S. v. Locke, 529 U.S. 89 (2000) (holding that assumption of non-preemption not triggered when state regulates in area where there has been history of significant federal presence; national maritime commerce in issue); Ray v. Atl. Richfield Co., 435 U.S. 151 (1978) (discussing partial implied preemption of waterways regulations).

favor of preemption.

The Federal Boat Safety Act may prove too easy a task for the Court's presumption in favor of preemption. As it involves both an area of traditional federal presence and a legislatively defined need for uniformity, the Court will have little difficulty finding implied obstacle preemption even though there is no specific federal regulation with which the state common law actions actually conflict. A more difficult task may lie ahead for the Court's preemption doctrine in other fields where the federal legislation has traditionally been found not to impliedly preempt state damages actions. The Court's focus on national uniformity of regulation and the certainty that comes with that national uniformity will, this Article predicts, be broad enough to include other subjects as well. Product safety regulations under the Consumer Product Safety Act are a subject of preemption confusion.[382] Regulations under the FDA that do not involve medical devices have long been held not to preempt state tort law actions,[383] but that conclusion must now be re-evaluated in light of the Court's presumption in favor of preemption.

VI. CONCLUSION

This Article has studied the Court's preemption cases since the early twentieth century in order to provide a comprehensive picture of that doctrine. The completed picture shows a Court dedicated to preemption of state regulations, including common law damages actions, from a very early time in the life of preemption doctrine. The reasons for this dedication to preemption may differ depending on the legal and social climate of the time, but one conclusion is inescapable: there is a presumption in favor of preemption.

The Court's treatment of the express preemption provision provided some recent support for the conclusion that the Court indeed was dedicated, as it has often said, to seeking congressional intent and applying a presumption against preemption in areas traditionally governed by the states. That time in the life of preemption doctrine is over, as the Court's recent cases make clear. The Court may continue to take cases involving preemption under the many remaining uninterpreted federal statutes and regulatory schemes, but this Article suggests that it will not. Once the Court concludes, as it is likely to do under the FBSA, that federal administrative non-regulation impliedly preempts state common law actions, the Court's work will likely be completed. The presumption in favor of preemption will have been applied

382. *Compare* Leipart v. Guardian Indus., Inc., 234 F.3d 1063, 1071 (9th Cir. 2000) (finding no implied preemption under glass shower door standards), Hittle v. Scripto-Tokai Corp., 166 F. Supp. 2d 142, 149 (M.D. Pa. 2001) (holding state tort claims against lighter manufacturer not preempted), *and* Colon v. BIC USA Inc., 136 F. Supp. 2d 196, 201-09 (S.D.N.Y. 2000) (finding no implied preemption under cigarette lighter standards), *with* Moe v. MTD Prods., 73 F.3d 179, 182-84 (8th Cir. 1995) (applying preemption through use of the Consumer Product Safety Act), *and* Frazier v. Heckingers, 96 F. Supp. 2d 486 (E.D. Pa. 2000) (finding implied preemption under power mower standards).

383. *See* Hill v. Searle Labs., 884 F.2d 1064 (8th Cir. 1989); Brochu v. Ortho Pharm. Corp., 642 F.2d 652 (1st Cir. 1981).

to most aspects of preemption doctrine, from express preemption clauses, to no preemption clauses, to savings clauses, to comprehensive administrative regulations, to limited administrative regulations, and, finally to no administrative regulations. There will not be anything else to cover.[384]

The Court's prior efforts to determine the preemptive scope of congressional legislation have presented persistent problems of consistency. Do express preemption provisions control, or not? Do implied preemption principles apply? If so, which ones, and how do they apply? What role does a presumption regarding preemption play? Do we seek congressional intent, clearly and manifestly, in implied preemption or not? Congress must rely, at some level, on the Court's legislative interpretation methods and, indeed, probably counts on them to resolve ambiguity that results from the difficult compromises that are inevitable in the legislative process. There are many reasons why Congress might fail to speak unambiguously to the preemptive scope of its legislation as regards common law damages actions. One important reason is the difficulty of achieving compromise on the policy choices inherent in such a conclusion. One more important reason is that it does not have to because it can rely on the Court to do that work.

If the presumption in favor of preemption is unmasked for what it is, Congress will have more clearly the information it needs to decide whether to rely on the Court to do that important work. Persons affected by the federal preemption of state common law actions will similarly have more accurate information to evaluate whether to spend their resources fighting preemption in the courts or in the legislature. When all the players in the preemption arena are informed of the true rules, that the work of preemption is being done by a silently operating presumption in favor of preemption, that information may prompt the players to spend their resources where the most can be done to change that result.

Professor Gary Schwartz recognized the tension between the desire for a vibrant state law tort system and the need for uniformity of product standards and described well the conflict between those two desires:

> Admittedly, the number and range of variations in products liability doctrine from state to state does suggest the vitality of decentralized decision making, a vitality that is enhanced by federalism. . . .
> Still, at some point this process of intellectual experimentation should produce whatever results it is capable of producing. The time for such experimentation runs out, and the time arrives for more mature and experienced decision making. After thirty years

384. Some have suggested that preemption doctrine may next be applied under federal common law and the dormant Commerce Clause. *See* Dinh, *supra* note 3, at 2108-12. The Court has not yet suggested that it will go so far as to find preemption of state law based on such notions. The thesis of this Article, however, that the Court is returning to preemption doctrine based on latent exclusivity of federal regulation, suggests that such a result may not be far off. Perhaps the clarity of doctrine that may result from unmasking the presumption in favor of preemption will prevent such overreaching.

> with products liability at the state level, that time has probably come.[385]

It would appear that the Supreme Court wholeheartedly agrees with Professor Schwartz' sentiment and finds that the time has come. The Supreme Court, desiring national uniformity of standards in products liability and other tort matters, and not able to achieve it through legislation, achieves it in the form of uniform regulation through federal preemption. The Court does so by using a presumption in favor of preemption, though it says something quite different.

Words have power. Words have power because they can clarify and illuminate, but they can also obfuscate. If our legal rules are defined by words that do not matter, we cannot understand them, apply them, teach them, or change them. If the legal system does not help make rules clearer, we all suffer. This Article has attempted to explain more clearly the rules that *actually* operate in the area of federal preemption.

385. Schwartz, *supra* note 313, at 930 (footnote omitted).