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SYMPOSIUM: REGULATORY COMPLIANCE AS A DEFENSE TO PRODUCTS LIABILITY: Reassessing the Law of Preemption

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**BIO:**

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**SUMMARY:**

... Part of the explanation for such indeterminacy lies in the nature of preemption analysis. ... Thus, the Tenth Amendment protects the states so they can act as sovereigns, but the Supremacy Clause limits the effects of those actions if they conflict with federal law. ... The Court of Appeals had interpreted *Cipollone*, as Justice Blackmun did, to mean that the existence of the express preemption provision precluded conflict preemption analysis, which it characterized as an implied preemption doctrine. ... The Court held that the suit was preempted by a federal "military contractor defense" because "the procurement of equipment by the United States is an area of uniquely federal interest."

**TEXT:**

[\*2085] Notwithstanding its repeated claims to the contrary, the Supreme Court's numerous preemption cases follow no predictable jurisprudential or analytical pattern. Part of the explanation for such indeterminacy lies in the nature of preemption analysis. Because "'the purpose of Congress is the ultimate touchstone' in every preemption case,"<sup>n1</sup> the Court's preemption decisions necessarily vary across the different statutory schemes at issue. But although individual judgments may vary, surely the basic analytical framework should not differ across cases presenting essentially the same question: whether and to what extent federal law has displaced state law. Problems arise, and accusations of judicial activism or results orientation fly, when the Court professes adherence to established analytical frameworks or jurisprudential principles and yet renders judgments seemingly inconsistent with those frameworks and principles--as it often appears to do in preemption cases. This article seeks to make sense of the preemption mess by going back to first principles: by defining preemption and supremacy within the constitutional structure; by critically assessing the validity and meaning of core assumptions and principles the Court professes to follow in preemption cases; and by explaining how preemption analysis, properly conceived, can rationalize seeming inconsistencies between what the Court says and what it does in these disparate cases.

Because the Supremacy Clause<sup>n2</sup> prescribes that federal law trumps conflicting state laws, Congress in effect possesses "an extraordinary power in a federalist system"<sup>n3</sup> to displace state regulation. Moreover, given the Court's current interest in the distribution of power between federal and state governments, it is not surprising that recent decisions on federal preemption of state common-law torts emphasized federalism principles. Thus, Justice Stevens opened the analysis in *Medtronic, Inc. v. Lohr*,<sup>n4</sup> a medical devices case, by stating that "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt [\*2086] state-law causes of action."<sup>n5</sup> Relying on the oft-quoted "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,"<sup>n6</sup> the Court in both *Medtronic*<sup>n7</sup> and *Cipollone v. Liggett Group, Inc.*,<sup>n8</sup> the earlier cigarette labeling case, analyzed the relevant statutory regimes against a background presumption that preemption is disfavored. The actual strength of that presumption is a matter of considerable doubt, as the Court's parsing of the relevant statutes garnered only a plurality in both cases and, in *Cipollone*, prompted an accusation from the dissent that the plurality had ignored its own presumption.<sup>n9</sup> Addition-

ally, the precise meaning of the presumption when applied to various strands of preemption analysis is far from clear. n10 It is generally accepted, however, that these cases found in traditional federalism principles a presumption against federal preemption of state law.

In *Reassessing Regulatory Compliance*, Robert Rabin draws upon the Court's reliance on federalism in preemption cases to pose an important question:

If federalism considerations demand, as a constitutional matter, close and conservative scrutiny of defense claims for the preemptive effect of federal regulatory schemes, should not a state court in considering the relatively weaker regulatory compliance claim for deference as an option under common law take similar account of the argument for its own sovereignty? n11

More specifically, even absent congressional pronouncements as to preemption, "should the counterweight posed by federalism to uniformity considerations [\*2087] and other related arguments for recognizing a common law defense to tort--administrative expertise and so forth--be any less weighty because not encapsulated in statutory language?" n12

The analysis that follows suggests that the answers to these rhetorical questions are not obvious. Contrary to the prevailing wisdom and the unexplored assumptions of Supreme Court dicta, the constitutional structure of federalism does not admit to a general presumption against federal preemption of state law. Rather, proper preemption analysis requires careful application of different interpretive assumptions and substantive principles in specific contexts to determine whether state laws are displaced--in many cases by congressional enactments, but in others by judicial doctrines absent any affirmative action by Congress.

Part I grounds the concepts of preemption and supremacy in the constitutional structure. Part II places the core statutory preemption doctrines on a continuous spectrum with other mechanisms whereby federal law displaces state law. This analysis illustrates the illogic of a general presumption against preemption, explains the contextual nature of preemption analysis, and shows the quantum and type of showing necessary to justify federal preemption for particular doctrinal contexts. Part III applies the analysis to regulatory preemption under the National Traffic and Motor Vehicle Safety Act as an illustration.

## I. PREEMPTION IN THE CONSTITUTIONAL STRUCTURE

One need not pore very hard over the tea leaves of Supreme Court decision-making to appreciate that something is amiss with the Court's reliance on federalism principles in *Cipollone* and *Medtronic*. Justice Stevens, the author of both opinions, has dissented from every major federalism decision of recent vintage. n13 *Cipollone* drew a sharp dissent from Justice Scalia, accusing the Court of conjuring the "presumption against . . . pre-emption" from thin air, n14 and the Court's federalism vanguard n15 dissented from *Medtronic*. An easy explanation of this seeming anomaly may lie in an accusation of result orientation. The uncertain history of preemption analysis has witnessed early and frequent denunciations of "judicial legislation." n16 The dissenting justices did [\*2088] little to blunt the force of the implication that they were being unfaithful to their federalist principles; the dissenting opinions in both cases ignored the rallying cry of federalism and instead proceeded with garden-variety statutory construction analysis.

I think the dissenting justices were right to ignore the appeal to federalism principles, although they should have done more to explain the logic of their position. Because federal preemption dramatically displaces state law, concerns about the proper balance of state and federal power are, of course, relevant. However, specific constitutional provisions and interpretive principles separately address these weighty concerns. Therefore, resort to the constitutional structure of federalism does not support a general, systematic presumption against preemption or, as *Cipollone* would suggest, a clear-statement rule of preemption.

### A. PREEMPTION VERSUS SUPREMACY

It is first necessary to define the question properly. Whether federal law displaces state law depends on the division of federal and state legislative authority. Within this inquiry, the constitutional structure is straightforward: Article I, Section 8 enumerates the powers of Congress; Article I, Section 9 limits the powers of Congress; Article I, Section 10 limits the powers of the states; and the Tenth Amendment reserves to the states the legislative powers not delegated to Congress and prohibited to the states. Importantly, Clause 2 of Article VI, the Supremacy Clause, provides that congressional enactments consistent with the Constitution "shall be the supreme Law of the Land." n17 Although this provision in effect gives to Congress "an extraordinary power in a federalist system," n18 it is critically important to note the Supremacy Clause itself does not authorize Congress to preempt state laws. On its face, the Supremacy Clause only

prescribed a constitutional choice of law rule, one that gives federal law precedence over conflicting state law. If the Clause were meant to be an affirmative grant of congressional power, it would likely reside in the metropolis of congressional power, Article I, Section 8, n19 rather than in the suburbs of Article VI. n20

The history of the Constitutional Convention confirms this structural interpretation. n21 [\*2089] Early in the convention, on May 29, 1787, Governor Edmund Randolph proposed fifteen resolutions, primarily drafted by James Madison, which came to be known as the Virginia Plan. The sixth resolution dealt generally with the affirmative powers of Congress--the functional equivalent under the Virginia Plan of the Constitution's Article I, Section 8. n22 Among the powers allocated to Congress under this resolution was the authority "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union." n23 With some minor changes and exceptions, n24 on May 31 the Convention, assembled as the Committee of the whole House, adopted the sixth resolution (including the power to negative state laws) without debate or dissent. n25

With the Virginia Plan dominating the Convention, William Patterson on June 15, 1787, proposed nine alternative resolutions which became known as the New Jersey Plan or the Small State Plan. The sixth of Patterson's resolutions was in substance and concept, if not in form, similar to the current language of the Supremacy Clause. n26 Importantly, Patterson's sixth resolution differed from Randolph's power to negative state laws in that the former was not proposed as one of Congress' affirmative powers. All such powers under the Small State [\*2090] Plan were proposed in Patterson's second resolution. n27 The supremacy concept was instead offered as a separate resolution, distinct from legislative powers and listed after the fifth resolution establishing the federal judiciary. n28

Resolution of the competing proposals came when the Convention debated the report of the Committee of the whole House. As he had done throughout the debates, n29 James Madison warned against the "propensity of the States to pursue their particular interests in opposition to the general interest" and advocated "the negative on the laws of the States as essential to the efficacy & security of the Genl. Govt." n30 Governor Robert Morris of Pennsylvania opposed the congressional power to negative state laws with the telling explanation that "[a] law that ought to be negated will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. Law." n31 Randolph's proposal for a legislative power to negative state laws was thereafter defeated by a vote of three to seven. n32 The Convention then immediately adopted by unanimous consent an alternative proposal by Luther Martin which is in substance similar to Patterson's sixth resolution and in form almost identical to the current Supremacy Clause. n33 Consistent with the structure of Patterson's plan and Morris's explanation, the adopted text that became the Supremacy Clause does not mention any affirmative authority of Congress, but rather sets forth the hierarchy between federal and state laws. This enactment history thus confirms the plain text and structural interpretation of the Supremacy Clause, not as the repository of Congress's power to preempt state laws, but as a constitutional rule to resolve conflicts between state and federal laws.

So conceived, the Supremacy Clause is relevant only at the post-enactment stage, where a state law conflicts to some degree with a federal law; the clause specifies that the federal law would trump the state law in that event. n34 The power to preempt state law, if one exists, must be found elsewhere in the [\*2091] Constitution, most logically in the affirmative grants of power to Congress under Article I, Section 8. Therefore, should Congress legislate pursuant to its power, say, to regulate interstate commerce and further include a provision expressly preempting certain state laws, the authority for the preemption provision must come from either the Commerce Clause alone or perhaps the Commerce Clause with a helping hand from the Necessary and Proper Clause. Preemption is not a substantive power of Congress, but rather a method of regulation in furtherance of some other substantive congressional authority. The power to preempt, therefore, is necessarily pendant on some enumerated power to regulate under Article I, Section 8. n35 The Supremacy Clause comes into play to make a duly authorized preemption provision supreme over state laws that conflict with the provision--that is, state laws that come within the preemptive scope of the provision, just as it gives the substantive provisions of the federal statute precedence over conflicting state laws. n36

Congress can also demarcate the boundaries of state versus federal regulation by including a saving provision that preserves state laws that would otherwise be displaced because they conflict with a substantive provision of the federal statute. The saving clause achieves this result by telling the Supremacy Clause--or a court using the Supremacy Clause--that the state laws do not conflict with the federal statute. It does not, and cannot, tell a court to resolve the conflict in favor of the state laws; such a statement would be an amendment of the Supremacy Clause without following the appropriate procedures under Article V. Instead, the saving clause conceptually operates as a *non obstante* or notwithstanding clause that limits the operative effect of the substantive provisions to areas where there are no conflicting state laws. The saving clause thus [\*2092] eliminates the potential conflict between the state and federal laws so that the former would not be displaced by the Supremacy Clause.

## B. PREEMPTION AS STATUTORY CONSTRUCTION

Given this constitutional structure, to the extent there are questions of constitutional policy in preemption--questions about the relative power of Congress and of the state legislatures, "the Danger . . . that the national would swallow up the State Legislatures," n37 and the like--those questions were answered by the framers with the specific enumerations and limitations of federal legislative power in Article I and the inclusion of the Supremacy Clause in the Constitution. And, to the extent that other federalism questions remain--the wisdom of national regulation, the balance between regulatory uniformity and policy innovations, etc.--those questions are, by constitutional design, to be answered by Congress n38 and, pursuant to delegated power, by the executive branch. n39

When Congress has legislated consistent with its limited, enumerated powers, the question ceases to be one about the vertical distribution of powers between federal and state governments--after all, the Constitution gave Congress the power to legislate, and Congress has exercised that power. Rather, the question becomes one of the horizontal division of federal governmental functions among the three branches. Specifically, the task for the Court is to discern what Congress has legislated and whether such legislation displaces concurrent state law--in short, the task of statutory construction. If, in performing this task, the Court were to systematically favor one result over another, it would disrupt the constitutional division of power between federal and state governments, rewrite the laws enacted by Congress, or both. n40 Such actions, it seems to me, risk an illegitimate expansion of the judicial function. Thus, as a matter of constitutional structure, there should be no general systematic presumption against or in favor of preemption.

Positing that the federal structure does not support a general preemption presumption does not mean the Court cannot rely on specific interpretive canons based on core federalism principles. But, these presumptions operate as rapiers, not broadswords, and their substantive justification is more subtle than a casual [\*2093] invocation of the federal structure. Take, for example, the presumption against congressional abrogation of state sovereign immunity and the attendant rule requiring an "unmistakably clear" statement in a federal statute eliminating such immunity. n41 Such abrogation in effect "preempts" the common-law rule that nonconsenting sovereigns may not be sued in their own or another's courts. However, the substantive presumption leading to the clear-statement rule, which certainly implicates core federalism concerns, does not derive from preemption analysis. Rather, it derives from the Eleventh Amendment or, at least, from the longstanding common-law rule embodied in part in the Eleventh Amendment.

Similarly, consider the clear-statement rule of *Gregory v. Ashcroft*. n42 There, state judges argued that a Missouri constitutional provision mandating judges' retirement at age seventy violated the federal Age Discrimination in Employment Act. n43 There is no question that Congress had the power to enact the federal statute n44 and that the state mandatory retirement rule conflicted with the federal prohibition against age discrimination. Yet, the Court held that Congress had not done enough to show its intent to include state judges in the prohibition and thus to displace the state constitutional provision; it had to include a clear statement of such intent. n45 This is a very strong requirement indeed. Congress had already amended the statute to include explicitly state and local governments as covered employers, n46 but the Court found ambiguity in whether judges were "'appointee[s] on the policymaking level'" excluded from the definition of covered employees. n47 The strong requirement derives from core federalism principles: "this plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." n48 However, as in the abrogation cases, the presumption or "acknowledgment" leading to the clear-statement rule does not sprout from preemption analysis; n49 rather, its roots lie in the respect for state sovereign prerogative protected by the Tenth Amendment. n50 Although the Supremacy Clause permits Congress to "impose its will on the States," determining judicial qualifications "is a decision of the most [\*2094] fundamental sort for a sovereign entity." n51 *Garcia v. San Antonio Metropolitan Transit Authority* n52 limited the judicial capacity to invalidate federal intrusions into these core zones of sovereignty, but the same solicitude for the fundamental sovereign decisions of states gives rise to the clear-statement requirement. n53 At the very least, whether federal law can intrude into a core zone of state sovereignty presents a difficult constitutional question, and the doctrine of constitutional avoidance n54 favors a clear-statement rule when Congress treads into constitutionally suspect territory. n55

Can one identify a comparable source, extrinsic to the normal process of statutory construction, for a substantive presumption based on federalism principles for the Court to apply in preemption cases? I suppose that the most natural place to look for such an extrinsic justification would be the Supremacy Clause. However, the logic of and the principles animating the Supremacy Clause would seem to suggest, if anything, a bias in favor of preemption, not against. The text of the clause and the general concept of supremacy are decidedly pro-Union. Both exist to permit Congress to "impose its will on the States" and thus give the federal government "an extraordinary power in a federalist system." n56

A more fruitful, although in my view ultimately also unavailing, justification for a presumption against preemption would stem from the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by to the States, are reserved to the States respectively, or to the people." n57 On one view, the Amendment can be read simply as the flip side of the enumeration of congressional powers under Article I, Section 8; it makes clear that the enumeration of federal authority there and elsewhere in the Constitution is limited. As such, the amendment is only a clarification and does not have independent operating force. n58 This restrictive view of the Tenth Amendment is belied by the Court's contemporary federalism jurisprudence, which recognizes that the provision provides some protection for the states' core sovereignty, along the lines of *National League of Cities* and its progeny. The scope of this substantive protection is difficult to define, and the Court gave up trying in *Garcia*. The same principle, however, animates the prohibition on [\*2095] federal commandeering of state legislative n59 or executive n60 processes, and the clear-statement rule announced in *Gregory v. Ashcroft*.

However, it seems wrong to find in this principle a substantive justification for a presumption against preemption. Federal displacement of state law, of course, infringes on state sovereignty to the extent the enactment of state laws is an exercise of sovereign powers. However, displacing a state statute that conflicts with federal law is quite different from telling a state it must enact a particular statute, as in *New York*, or administer a federal regulatory regime, as in *Printz*. The Tenth Amendment prohibits the latter mandate because choosing what laws to enact or to administer are fundamental decisions of a sovereign *qua* sovereign. If these fundamental decisions can be directed by fiat from Washington, it is hard to conceive of states as anything more than political and administrative subdivisions of the national government. Preemption of state laws, on the other hand, speaks to the effect of these state legislative and executive actions from the script written in the Supremacy Clause. The difference is akin to not having a will of one's own, as opposed to having the free exercise of one's will but subject to correction within specified parameters. The former is protected by the Tenth Amendment, and the latter is prescribed by the Supremacy Clause.

Likewise, prescribing the retirement age of judges, as Missouri did in *Gregory*, goes to the organization of state government. Such decisions, while arguably not as fundamental to sovereign prerogative as deciding what laws to enact or to administer, nevertheless go to the structures of governance and thus implicate the Tenth Amendment's protection of state sovereignty. However, when the judges sit to decide cases, there is no question that they have to accord supremacy to federal law, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." n61 Thus, the Tenth Amendment protects the states so they can act as sovereigns, but the Supremacy Clause limits the effects of those actions if they conflict with federal law. There is no cause to infer from the sovereignty-protecting principle of the former provision any justification to limit the supremacy-conferring operation of the latter clause.

I realize that here I may be tipping sacred, albeit sometimes sleeping, cows. n62 [\*2096] Since *Gibbons v. Ogden*, n63 in which the Supreme Court held that Ogden's New York steamboat monopoly came "into collision" with and therefore was preempted by a federal license granted to Gibbons, n64 the Supreme Court has mentioned federalism concerns in virtually all its preemption cases. And this apparent solicitude for state interests has resulted in repeated assertions that congressional intent to displace state law is not lightly inferred. Thus, preemption analysis starts 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." n65 In the proper context, this assumption is perfectly legitimate, and the intuition behind it is certainly understandable. As Hart and Wechsler explained in the first through third editions of their influential casebook:

Federal law is generally interstitial in nature. It rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. . . . Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only in so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation. n66

In what context the assumption should apply, however, is a different matter. As explained above, constitutional text, structure, and history does not support the application of the assumption in all contexts as a general presumption against preemption. More practically, the assumption should not apply as a general presumption because the underlying intuition, as explained by Hart and Wechsler, may no longer be generally valid. The editors of the fourth edition of their casebook quoted the note from the first edition and added the following update:

In the 40 years since the First Edition was published, the process of expansion of federal legislation and administrative regulation noted in this discussion has continued if not accelerated . . . . Thus, today federal law appears to be more primary than interstitial in numerous areas. n67

[\*2097] The question thus posed is whether the shift in regulatory primacy from state legislatures to the federal government should occasion a reassessment of the traditional assumption that Congress generally does not intend to displace state law. More fundamentally, should the Court's preemption jurisprudence be dependent on the prevailing winds of legislative activity? I turn to these questions in the next part.

## II. STATUTORY PREEMPTION IN CONTEXT

Across a wide range of recent cases dealing with myriad preemption questions raised by numerous disparate statutory schemes, the Court has recognized two general principles. First, "we '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.'" n68 Second, "'the purpose of Congress is the ultimate touchstone' in every preemption case." n69 The analysis in the previous part has suggested that the attempt to translate the first of these principles into a general presumption against preemption is supported by neither the Constitution's text and structure nor substantive principles of federalism. This part moves the analysis to the second general principle--that preemption analysis rests ultimately on congressional intent--to illustrate two basic points.

First, the law of preemption should not be analyzed as conceptually discrete and distinctive doctrines, but rather can be properly assessed only as part of a spectrum of interrelated mechanisms whereby federal law displaces state law. The spectrum includes not only the core statutory preemption doctrines but also mechanisms whereby state law is displaced even without any relevant congressional action. Second, within this doctrinal spectrum, a general presumption against preemption has no place. Instead, the classic assumption that Congress does not lightly displace state exercise of historic police power is properly conceived simply as a particular contextual backdrop for congressional action and judicial interpretation--a common feature of garden-variety statutory interpretation and not an exalted canon of construction or even an interpretive presumption.

Let us begin with a brief review of the law. The various doctrinal mechanisms through which federal law displaces state law can be summarized in the [\*2098] following spectrum:

The placement of a particular doctrine along this spectrum depends on the relative presence or absence of congressional action related to the matter regulated by the displaced state law. Thus, at the left extreme of the spectrum, in express preemption cases, Congress has specifically legislated and defined the areas where state laws are displaced. At the right extreme of the spectrum, dormant Commerce Clause analysis displaces certain state laws absent any congressional action at all on the subject.

So organized, it makes very little sense to speak of a "presumption against preemption," at least in the sense that presumptions are generally understood--as a thumb-on-the-scale method of divining ambiguous statutory language and deciding close cases. To take the most extreme illustration, it is logically bankrupt to state--as the two general principles of preemption analysis have at times been interpreted--that the touchstone of preemption analysis is congressional intent and that there is a general presumption against such intent, but then to recognize that state law can be displaced without any relevant congressional action--as in federal common law or dormant Commerce Clause analysis. Even limiting the analysis to the first four points on the displacement spectrum--to the core statutory preemption doctrines--it makes little logical sense to insist on a presumption against preemption and yet to persist in finding that state law is displaced in field preemption cases--simply by the pervasiveness of congressional regulation in related questions or by the strength of the federal interest protected by the general federal legislative scheme. A true presumption with any operative weight would at least either permit state laws to regulate interstitially in areas not covered by the federal law--if they do not conflict with or otherwise frustrate the purposes of the federal law--or serve as an analytical counterweight to the purported federal interest.

Although commentators and the Supreme Court frequently discuss the various mechanisms on this spectrum as deriving from distinct doctrinal sources, the boundaries dividing these doctrines are not so clear. n70 But the preemptive effect on state law is similar across doctrinal lines. For example, although the statement in *Hines v. Davidowitz*, n71 that state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purpose and [\*2099] objectives of Congress," n72 is cited as the classic articulation of obstacle preemption, *Hines* may be better

understood as a field preemption case because the opinion relied on the uniquely national nature of regulating aliens to hold that state laws on the same subject are displaced. n73 Likewise, in crafting the government contractors' defense to state tort law liability, the Court in *Boyle v. United Technologies Corp.* n74 explicitly recognized the kinship its decision shares with traditional preemption analysis. n75 The point is not to suggest that the traditional doctrinal distinctions have no purchase whatsoever, but simply that all of the multifarious ways through which state law can be displaced are closely related to each other analytically and functionally. Thus, neither specific preemption doctrines nor general statutory preemption jurisprudence is an island, entirely of itself, but must be evaluated as part of a wider spectrum of federal displacement of state laws.

The fact that displacement by federal common law and the dormant Commerce Clause are on this spectrum--that state laws can be preempted without any congressional action--suggests it is not entirely correct to state that "'the purpose of Congress is the ultimate touchstone' in every preemption case." n76 That statement may be correct with respect to the first four points of the displacement spectrum, the core statutory preemption doctrines, but then the question remains as to what constitutes sufficient evidence of congressional purpose to preempt state law. Certainly such evidence would need to be quite strong--"clear and manifest"--if "the assumption that the historic police powers of the States were not to be superseded by the Federal Act" n77 were interpreted to apply generally as a negative presumption to all preemption cases. Also, such a general presumption would contradict displacement by federal common law or the dormant Commerce Clause, for those mechanisms do not require any evidence--let alone "clear and manifest"--of congressional purpose to preempt. Therefore, it seems to me, the two overriding principles of preemption analysis can be reconciled with preemption doctrine as summarized in the overall displacement spectrum only by characterizing the "traditional assumption," our sacred cow, as a recognition of particular contexts (those implicating "historic police powers of the States") where concern for state regulation properly plays a role. In other contexts, state regulation may not come into play.

Even where such concern is relevant, the quantum of evidence of congressional purpose to preempt varies. Furthermore, the kind of evidence may vary [\*2100] and, as in the case of preemption by federal common law or the dormant Commerce Clause, is not strictly limited to expressions of congressional intent. To illustrate and to examine further the quantum and type of showing necessary to justify federal preemption in different contexts, I examine below each doctrinal progression on the displacement spectrum.

#### A. EXPRESS PREEMPTION

Congress legislates according to one of its enumerated powers, such as the Commerce Clause. Such legislation includes a provision preempting all state laws within a defined scope. The Supremacy Clause then makes clear that the preemption provision takes precedence over conflicting state laws, just as any other federal law provision would; all state laws within the defined scope of the preemption provision are by definition in conflict with it, and the latter is supreme. The work of the Supremacy Clause here is quite limited; it gives effect to the express preemption clause and tells state and federal judges to prefer the congressional enactment to all contrary state laws. The work of the Court is likewise limited and rather straightforward: to interpret the express preemption clause and determine whether the state law at issue falls within the preemptive scope. This is neither constitutional law nor Supremacy Clause jurisprudence; it is statutory construction, plain and simple.

Actually, statutory construction is anything but plain and simple. The meaning of legislation can rarely, if ever, be ascertained in an abstract void. Perhaps such an interpretive feat could be accomplished if language were sufficiently advanced such that a court could put any statutory text against a blank slate and divine a precise meaning that was universally accepted as correct. But ours is not that utopian world, and the meaning of statutes, at least those that come into litigation, is a matter of considerable dispute. Unless adjudicating these disputes is solely a matter of judicial whim and fiat, courts depend on a variety of familiar tools of statutory construction when interpreting statutes. That is the heavy lifting demanded of canons of statutory interpretation--to serve as the background norms against which courts will interpret statutes and in turn as the background norms against which Congress legislates, and so on. Some of these background norms derive from the rules of grammar and logic. Others, like the rule of lenity n78 and the presumption in favor of judicial review of agency actions, n79 reflect substantive values external to the statutory scheme but are sufficiently important that they should be incorporated into the interpretive [\*2101] process. n80 Among these substantive canons are presumptions based on extrinsic federalism principles embodied, for example, in the Tenth or Eleventh Amendments. However, as discussed in Part I, no such extrinsic substantive justification exists to support a presumption against preemption.

Even so, Congress does not legislate in a vacuum, and the Court can discern the meaning of ambiguous or conflicting statutory language only with some knowledge of the background against which Congress legislates. Thus, returning to our sacred cows, it is perfectly sensible for the Court to assume "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" n81 and that "the exercise of federal supremacy is not lightly to be presumed." n82 This assumption simply states the background for congressional action; when Congress legislates in areas traditionally governed by the states--for example, through their historic police powers--it stands to reason that Congress would proceed more cautiously and provide an interstitial rather than a comprehensive or primary set of regulations. Thus, a party seeking to invoke preemption bears an initial burden to show a clear and manifest Congressional purpose to displace concurrent state law--a requirement that is amply met by an express preemption clause given traditional primacy of statutory text in interpretation. n83

But it is quite a dramatic leap to extrapolate from this background assumption a general, systematic presumption against preemption whenever the question arises. The Court took just this approach in *Cipollone*, imposing a clear-statement or narrow construction rule rather than looking more broadly to legislative intent. The background context against which Congress legislates may change in ways that make federal displacement of state law not an extraordinary but an expected action; insisting on a general presumption even in these contexts hamstring the Court into overcoming the presumption with specious evidence, predictably leading to doctrinal confusion or casual accusations of result orientation. Taking such a background presumption to new heights by translating it into a clear-statement or narrow construction principle rests on a preference for textualism in statutory construction. Reliance on the constitutional structure of federalism without more (for example, a defense of textualism or some independently operating substantive principle extrinsic to the statutory analysis) n84 does not provide adequate justification for this preference. More fundamentally, it is rather incongruous for a clear-statement or narrow construction principle to coexist alongside all the other mechanisms [\*2102] through which state law can be displaced without any statement from Congress or with only a tangential conflict with some broad federal purpose.

## B. CONFLICT PREEMPTION

Consider in this regard, then, the case where no express preemption clause exists. Absent such a clause, a state law may still conflict with a substantive provision of the federal statute; if it does, the Supremacy Clause gives precedence to the federal provision. For example, in *Gibbons v. Ogden*, n85 David Ogden's New York monopoly, granting him exclusive rights to operate steamboats in New York waters, was preempted because it conflicted with Thomas Gibbons's federal license, granted under authority of an act of Congress, to operate in the same waters. n86 Conflict preemption thus represents the paradigmatic operation of the Supremacy Clause to resolve an actual conflict between state and federal law, where it is physically impossible to comply with both federal and state requirements. n87

Unfortunately, this basic observation is not always recognized and the distinction between supremacy and preemption is not always heeded. Justice Blackmun began his separate opinion in *Cipollone* by agreeing specifically with the Court's analysis that the pre-emptive scope of the statutes in question "is 'governed entirely by the express language' of the statutes' pre-emption provisions." n88 He further explained the analysis as follows:

Where, as here, Congress has included in legislation a specific provision addressing--and, indeed, entitled--preemption, the Court's task is one of statutory interpretation--only to "identify the domain expressly pre-empted by the provision." . . . We resort to principles of implied preemption--that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or *whether state law actually conflicts with federal law*--only when Congress has been silent with respect to pre-emption. n89

Confusion understandably ensued. In *Freightliner Corp. v. Myrick*, n90 at issue was whether the National Traffic and Motor Vehicle Safety Act of 1966 pre-empted a state tort law cause of action. Having concluded that the statute's express preemption provision did not displace the state common law, the Court addressed "the argument that we need not reach the conflict pre-emption issue at all." n91 The Court of Appeals had interpreted *Cipollone*, as Justice Blackmun [\*2103] did, to mean that the existence of the express preemption provision precluded conflict preemption analysis, which it characterized as an implied preemption doctrine. The Supreme Court, in an eight-to-one opinion, n92 reinterpreted *Cipollone* and explained that "at best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule." n93 This decision has been criticized recently as a retreat from the clear-statement rule announced in *Cipollone*. n94

Justice Blackmun's analysis and the confusion it engendered, however, rest on a fundamental misconception of the nature of preemption and how it relates to the Supremacy Clause. Recall that the legislative power to preempt derives from the enumeration in Article I, Section 8 and not from the Supremacy Clause. The latter is a constitutional choice of law rule specifying that federal law is supreme. So conceived, conflict preemption is not implied preemption--it is not even preemption at all. Rather, it is the quintessential application of the Supremacy Clause to resolve conflicts between state and federal law. If anything, express preemption is a special case of conflicts analysis, whereby the Supremacy Clause confers supreme status to a federal preemption provision where a state law conflicts with it--that is, falls within its preemptive scope. Therefore, whatever purchase a presumption against preemption may have or implications it may engender when combined with an express preemption clause with respect to the other mechanisms of federal displacement of state laws, it has absolutely no relevance when a state law directly conflicts with a federal law. In such cases, the Supremacy Clause gives precedence to the federal law regardless of whether Congress has exercised its preemptive power or, if it has, whether the state law is included within the preemptive scope.

### C. OBSTACLE PREEMPTION

Both express and conflict preemption involve an actual conflict between the state law and some federal statutory language, either the preemption provision or a primary provision. Implied preemption doctrines displace state law absent any actual conflict with some federal provision, and consequently, things start getting a bit more murky. Under frustration of purpose or obstacle preemption, a state law is displaced if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." n95 For example, the Court in *Felder v. Casey* n96 held that a state law requiring plaintiffs to file a notice of claim before suing governmental actors--and thus imposing a procedural [\*2104] hurdle to suit--was preempted because it stood as an obstacle to the congressional purpose behind 42 U.S.C. § 1983, which was to provide a remedy for constitutional violations. n97 Thus, state law can be displaced because it frustrates some broadly defined purpose of Congress--in the *Felder* case, "the compensatory aims of the federal civil rights laws." n98

The operation of obstacle preemption significantly differs from express or conflict preemption because there is no direct conflict with any federal law precisely on point--for example, either the preemption provision or a primary regulatory provision. Obstacle preemption thus moves the displacement analysis along the spectrum away from the direct action extreme by both relaxing the standard for conflict--from direct conflict to obstacle to accomplishment--and expanding the evidence of congressional intent--from statutory text to purposes and objectives. Such progression challenges the notion of a generalized presumption against preemption because both doctrinal alterations infuse more ambiguity into the analysis. n99 Yet, it is in this area of implied preemption that the Court most often invokes the presumption against preemption. n100 How does one explain this apparent logical incongruity?

In theory at least, even if 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" n101 were interpreted to state a full-dress presumption against preemption, it need not pose a logical conflict with the existence of obstacle preemption. Stating a presumption and even ascribing the weight of evidence necessary to overcome the presumption say nothing about the type of evidence acceptable to contradict the presumption. A strict textualist may well insist that only an express and clear statement of congressional intent suffices to overcome the presumption, but a more liberal approach to interpretive sources would permit reliance on other evidence of congressional intent to show the "clear and manifest purpose" to displace state law. Furthermore, a living or dynamic approach to statutory interpretation may expand the evidentiary universe even beyond nontextual sources of congressional intent to extrinsic sources of independent values animating the congressional action. n102 The choice of interpretive sources, of course, is a matter subject to vigorous debate with a paucity of consensus, but that debate proceeds independent of the [\*2105] preemption or Supremacy Clause analysis. The point is that the existence of a presumption, however strong, does not ipso facto demand a textualist rule, as the Court suggested in *Cipollone*.

In actual practice, however, the Court's application of obstacle preemption belies the insistence on a general presumption against preemption, of whatever weight. If *Felder v. Casey* n103 remains a correct statement of preemption law and a valid precedent for obstacle analysis, then there is very little to the notion of a presumption against preemption. The obstacle posed there by the state law rule is rather slight: before filing any suit against an official, a plaintiff must give notice of the claim to the official or agency. Much more substantial and substantive barriers to suit are rather commonplace in modern federal statutes aimed at protecting the civil rights of citizens. The state law in *Felder* conflicts, if at all, only tangentially with the federal statutory scheme. The "compensatory aims of the federal civil rights laws" n104 language in *Felder* is not even a statement of the purpose of the federal law at issue, but rather a recitation of the general goals of a broader framework of federal regulation. If this is all that is required to show a "clear and mani-

fest purpose" of Congress to displace state law, then the presumption is worth so little that it doesn't justify the name. It barely lives up to even the minimal status of a background assumption or initial burden to show some preemptive intent.

There must be something else at work here. Obstacle preemption stands at the midway point between conflict and field preemption. n105 Like conflict preemption, it displaces only those state laws that are inconsistent with federal law. Like field preemption, the relevant federal law is not a specific provision or even a statute, but rather some broad regulatory scheme or independent interests external to the Supremacy Clause conflict analysis. The "something else" animating obstacle analysis, therefore, seems to me to relate quite closely to the justifications behind field preemption, to which I now turn.

#### D. FIELD PREEMPTION

Field preemption displaces state law even where it may not frustrate any purpose of Congress or conflict in any way with some federal statutory provision. Interstitial state laws complementary to the federal scheme are displaced where Congress has--implicitly--marked the regulatory area as its own--in other words, has occupied the field. The Court will infer such intent to strip state legislative jurisdiction where Congress legislates: (1) in a manner "so pervasive as to make reasonable the inference that Congress left no room for the [\*2106] States to supplement it," n106 or (2) in "a field in which the federal interest is so dominant that the federal system (must) be assumed to preclude the enforcement of state laws on the same subject." n107

With respect to the first strand, it may seem odd at first blush that an analysis of the structural division of powers between two parties--here, federal and state legislatures--is dependent upon the aggrandizing actions of one of the two parties--Congress's pervasive legislation--and thus returns us to the initial query whether preemption jurisprudence should depend at all on the prevailing winds of legislative activity. Logic is stretched further if one grafts onto the structural analysis a general presumption against preemption--favoring the nonactive entity, the state. After all, a field preemption case, *Rice v. Santa Fe Elevator Corp.*, n108 gave life to our sacred cow--the oft-quoted "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." n109 Even if the clear and manifest purpose requirement can be said to have been met simply by the comprehensiveness and pervasiveness of federal regulation, a presumption against preemption at least would permit the States to regulate interstitially rather than be displaced altogether.

The doctrine makes sense, however, if one considers the traditional assumption not as a dice-loading, ambiguity-resolving presumption, but rather simply as the background in which Congress legislates and therefore against which courts interpret the legislation. This background can change across contexts in a number of ways, one of which is the pervasiveness of congressional action. Thus, when Congress legislates initially in an area where states have traditionally regulated, it cannot be lightly inferred that Congress has taken the dramatic action of displacing concurrent state laws of long standing. But, as Congress passes more and more legislation in that area, what had initially seemed to be an extraordinary inferential leap becomes a rather natural step, simply because a congressional decision to displace state law is not as dramatic given its pervasive substantive regulations in the area. n110 Federal law on the matter thus changes from interstitial to primary in nature and makes easier the inference that Congress intended to displace concurrent state law in the field. Note that this progression is not a shift in the division of authority. The question is not whether Congress has the power; rather, the question is whether and to what extent Congress has exercised that power.

[\*2107] Likewise, with respect to the second strand of field preemption, displacement of state law by a finding of uniquely federal interests makes sense only if the traditional assumption operates not as a presumption against preemption but as a background interpretive norm. A presumption with any operative effect would resolve statutory ambiguity against preemption. That Congress has legislated in an area the Court deems to be of "peculiarly federal" interest tells us very little about whether Congress has exhibited a "clear and manifest purpose" to displace state law, and certainly not enough to resolve the ambiguity so that the presumption is rendered inoperative. But it speaks volumes about the background in which Congress legislates. Areas of peculiarly federal interest are simply the converse of areas of traditional state regulation. When Congress legislates in the former context, it need not--and is not expected to--tread carefully; rather, it can be assumed to exercise its powers broadly, including the power to preempt state law, thereby fully protecting the federal interest by occupying the regulatory field. Note that this change in context is not equivalent to a shift in presumption; quite apart from the way that federalism principles would justify such a shift, field preemption by federal interest displaces even traditional state regulations--a result that would be rather messy under a regime of competing or shifting presumptions.

Consider in this regard *Hines v. Davidowitz*. n111 Pennsylvania required aliens to register with state authorities, a requirement that is more stringent than a similar federal law provision. n112 The Court held that the state requirement

was preempted by the federal statute. Congress's action here touches on immigration, naturalization, deportation, and a number of international treaties and thus "is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority." n113 Importantly, the Court stated that "Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," thus indicating that obstacle preemption derives from the same stock as field preemption. n114 The Court gave preemptive effect to the federal law, even though the state registration requirement is an exercise of the state's traditional police power. n115

#### E. PREEMPTION BY FEDERAL COMMON LAW

From this point it is only a small step to displacement of state law by federal common law. The review thus far summarizes the various strands of preemption analysis, but it does not complete the picture of federal displacement of state law. Preemption displaces state laws that stand in conflict, however tangentially, [\*2108] with some congressional enactment. n116 However, state law can be displaced even without any legislative action whatsoever. In *Boyle v. United Technologies Corp.*, n117 the plaintiff brought a state tort law suit based on design defects by a military contractor. n118 The Court held that the suit was preempted by a federal "military contractor defense" because "the procurement of equipment by the United States is an area of uniquely federal interest." n119 The Court directly rejected the plaintiff's argument that there must be "legislation specifically immunizing Government contractors from liability for design defects" to establish such a defense and to displace state law:

In most fields of activity, to be sure, the Court has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription or a direct conflict between federal and state law. But we have held that a few areas, involving "uniquely federal interests," are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts--so-called "federal common law." n120

Thus, as in field preemption, a uniquely federal interest can substitute for legislative action to form the predicate federal law necessary to displace state law. But, unlike field preemption, the mere existence of strong federal interests does not suffice to displace state law. The Supremacy Clause comes into play, and state law is thereby displaced, only where there is some conflict with the federal policy or interest. The scope of displacement depends on the legal rule necessary to protect the federal interests: "In some cases, for example where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules. In others, the conflict is more narrow, and only particular elements of state law are superseded." n121 State civil liability conflicts with the uniquely federal interest in the procurement of equipment--the discharge of federal governmental functions--and the tort claims are preempted because they seek to impose liability for the product design specified by federal procurement officials to government contractors.

Two relevant observations flow from *Boyle*. First, the analysis followed by the Court closely tracks the standard preemption and Supremacy Clause analysis offered above to explain the points on the spectrum leading up to the present [\*2109] context. The only differences are that the legislative action has been replaced by a common-law rule, and the reliance on congressional intent has been replaced by a showing of uniquely federal interests. Therefore, the doctrinal change leading to preemption by federal common law is really only one of degree, not in kind, from the previous progressions on the spectrum. The fashioning of a common-law rule from "uniquely federal interests" in the absence of any legislative action on point is but an extreme inference based on some congressional action and "peculiarly federal interests," as in the second strand of field preemption. Indeed, the Court divines uniquely federal interests in common-law analysis not only from constitutional structure and values but also from the "laws of the United States." n122 Second, any presumption against preemption obviously has no purchase in this context, for Congress has taken no action; state law is displaced by a judicially created rule predicated on uniquely federal interests. The federal common-law rule operated to displace even an exercise of state power in an area of traditional state regulation--the protection of the health and safety of its citizens through tort law.

#### F. PREEMPTION BY THE DORMANT COMMERCE CLAUSE

We arrive now at the final, and perhaps most complicated, piece of the puzzle, the dormant Commerce Clause. Simply put, state laws that discriminate against or otherwise burden interstate commerce can be displaced after judicial scrutiny even in the absence of any relevant congressional action. n123 Without any congressional (or judicial) action to create a federal legal standard, the Commerce Clause is interpreted to imply negatively that states cannot regulate in a

manner that discriminates against out-of-state interest or that otherwise burdens interstate commerce. The theory behind the doctrine is rather elusive. The original conception posited that Congress enjoyed exclusive jurisdiction over matters that "are in their nature national, or admit of one uniform system." n124 The problem with this conception is that the language of the Commerce Clause (and of Article I, Section 8 generally) does not suggest exclusivity. More practically, such jurisdictional exclusivity logically precludes the possibility of congressional delegation of regulatory authority back to the states. n125 The modern theory abandons the notion of exclusivity and thus [\*2110] permits Congress to delegate its plenary power to regulate commerce to the states. n126

Among the modern conceptual justifications offered for the doctrine is a notion that the Court is attempting to divine and implement the unexpressed intent of Congress. Congressional inaction is a form of regulation--so goes the justification--and congressional silence is evidence of such a silent regulation displacing competing state law that regulates interstate commerce. n127 Justice Scalia, rightly in my view, calls this the "least plausible" theory of dormant Commerce Clause doctrine: "There is no conceivable reason why congressional inaction under the Commerce Clause should be deemed to have the same pre-emptive effect elsewhere accorded only to congressional action. There, as elsewhere, 'Congress' silence is just that--silence." n128 As Dan Farber puts it, "Interpreting what Congress means when it has spoken is often difficult enough; to determine what Congress means when it has said nothing at all is impossible." n129

More plausible justifications for displacing state law in this area bespeak federal interests: "Preventing discrimination against outsiders who are not represented in the state's political process, and furthering the national interest in free trade among the states." n130 These interests derive from, among other things, the Privileges and Immunities Clause, the requirements of representative democracy, and constitutional structural values of national cohesiveness and a unified economy. n131 So conceived, dormant Commerce Clause analysis can be seen simply as an application of federal common-law analysis. The Court identifies a uniquely federal interest in maintaining national unity and uniformity in interstate economic regulation and fashions a common-law rule to the extent necessary to further those interests. It then compares competing state laws to the federal common-law rule to determine the level of conflict with the federal interests and policy. Those state laws that directly conflict with the rule--that is, regulations with discriminatory intent or effect on interstate commerce--are strictly scrutinized and in most circumstances displaced--even if they fall within the traditional state police power to provide for "the security [\*2111] of the lives, limb, health, and comfort of persons and . . . property." n132 Those that conflict only tangentially (that is, regulations which burden interstate commerce) are saved if the local interests they serve outweigh the national interest. Put another way, at the core of the federal policy of nondiscrimination, the common-law rule is one of primary and general federal jurisdiction, displacing all competing state laws. Outside this core, the federal regulatory jurisdiction is still primary but not general, and therefore permits interstitial state regulation justified by local interests. Congress is relevant to this picture to the same extent that it is relevant to any common-law rule; it may act to amend, repeal, or codify the common-law rule. The touchstone of the analysis is not the intent of Congress, but rather its authority to veto or consent to state jurisdiction to regulate matters within Congress's enumerated powers.

Alternatively, dormant Commerce Clause analysis can be seen as a variation on field and obstacle preemption. The field is interstate commerce, an area of peculiarly federal interest in which Congress has legislated with a general purpose to further the constitutional values of national cohesion and economic uniformity. Which state laws are displaced depends on whether they stand as an obstacle to the general purpose or fall within the regulated field of national interest. The difference between these doctrinal choices, as the analysis of all the points on the spectrum is meant to illustrate, is minimal because the progressions from left to right beyond express and conflict preemption are differences only in degree. The analytical inquiry remains the same across the spectrum; absent an express statutory provision on point--either a substantive regulation or a preemption provision--what else can substitute as a federal legal principle that displaces conflicting state law by operation of the Supremacy Clause?

The answer to this central question can be gleaned from the broader perspective afforded by the comprehensive interpretive picture. A general presumption against federal preemption of state law is obviously untenable because state law can be displaced in cases of congressional ambiguity and silence as one moves beyond express and conflict preemption. Even an assumption of nonpreemption as the background in which Congress legislates, and the norm against which its legislation is interpreted, does not fit entirely well, because state law can be displaced without any congressional legislation at all. Rather, a solicitude for state interests can find expression only as an initial burden for the party claiming preemption to show why displacement of state law is justified.

There are several ways to carry the burden. The simplest way is by reference to express statutory language--either a substantive regulation or a preemption provision--with which the state law conflicts; the Supremacy Clause resolves

such conflicts in favor of the federal law. The burden can also be carried, absent an express provision on point, by showing a state law conflict with more general [\*2112] characteristics of congressional activity in the same or related areas, such as the policy and objectives of Congress in obstacle preemption or the pervasiveness and comprehensiveness of the federal regulatory scheme in one strand of field preemption. The burden can be carried by showing a conflict with strong or uniquely federal interests--as in field preemption, federal common law, and the dormant Commerce Clause. Finally, the burden can be carried by a combination of general characteristics of congressional activity and a strong federal interest. Borderline or transitional cases such as *Felder v. Casey* and *Hines v. Davidowitz*, it seems to me, fall into this last category, but hints of the combination can be found elsewhere, as in *Boyle*.

The point is straightforward: federal displacement of state law cannot be divided into discrete, Euclidean doctrinal boxes, but instead fits onto a rather smooth continuum. Progression on this continuous spectrum involves a substitution of directness or pervasiveness of congressional action for a strong or uniquely federal interest as the showing necessary to displace state law. On this spectrum, a presumption against preemption has no place other than as a recognition, in specific contexts, of the background against which Congress legislates and thus against which courts interpret the meaning of such legislation.

### III. AN ILLUSTRATION

These rather abstract observations find expression in hard cases, such as the prominent example of the National Traffic and Motor Vehicle Safety Act of 1966, n133 which contains the following preemption clause:

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the federal standard. n134

It also contains a saving clause: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." n135

How to make sense of these provisions is the riddle that has befuddled a number of federal and state courts and that is currently facing the Supreme Court in *Geier v. American Honda Motor Co.* n136 Alexis Geier was injured when [\*2113] her Honda, which did not have an airbag, crashed into a tree. n137 Federal Motor Vehicle Safety Standard 208, in effect at the time Geier's car was manufactured, gave automakers the option of installing either an airbag or an automatic seatbelt with a warning light. n138 Honda chose the seatbelt, and Geier sued under state tort law alleging that an airbag would have prevented her injuries. n139 Honda raised preemption as a defense, arguing that tort liability for failure to install airbags was a safety standard that is "not identical to the Federal standard"--in this case, Standard 208, which permitted Honda not to install airbags. n140 The district court held that Geier's tort law claim was preempted and granted summary judgment for Honda, n141 the D.C. Circuit affirmed, n142 and the Supreme Court granted certiorari. n143

We can first clear away some underbrush. It is of no moment that Standard 208 is a regulation promulgated by the National Highway Traffic Safety Administration rather than a statutory provision enacted by Congress. Consistent with traditional administrative law principles, validly promulgated regulations authorized by the agency's organic statute have the force of law and thus trump conflicting state law by operation of the Supremacy Clause. n144 Also easily refuted is the argument that the preemption provision and the saving provision can be read in isolation and one or the other can take precedence. Both are words in the same statute and thus each should be given full meaning under ordinary interpretive principles. n145 Moreover, a preemption clause and a saving clause both serve the same function, to demarcate the boundaries of federal versus state regulation, and are but two sides of the same coin. n146 The two provisions thus stand together and must be reconciled to the extent possible. n147

Perhaps the most natural reading of the statute at first blush is that "safety standard" in the preemption provision does not include common-law tort liability. Such a reading would give operative effect to both the preemption clause--preempting legislative or regulatory standards--and the saving clause--preserving common-law claims. This reading, however, seems precluded by [\*2114] *Cipollone* and *Medtronic*. As the Court explained, the effect of tort liability on primary conduct is the same as a statutory prescription or regulatory standard. Violation of any legal rule--be it established by the legislature, executive, or judiciary--gives rise to liability, and such liability induces compliance with the rule. If the state legal rule is different from the federal standard, it conflicts with the preemption provision and thus is

displaced by operation of the Supremacy Clause. Moreover, differentiating between legal rules promulgated by the political branches and rules established by the judiciary leads to the rather absurd result where a state that has codified its tort law regime suffers displacement, while a neighboring state's common-law tort regime is preserved.

If "safety standard" in the preemption clause includes common-law liability, then the only way to reconcile the two provisions and give effect to both is to identify a set of situations that would be preserved by the saving clause and not displaced by the preemption provision. The Ninth Circuit attempted to do just that when it found that a no-airbag claim similar to Geier's was expressly preempted in *Harris v. Ford Motor Co.*: n148

This does not render § 1397(k) a nullity. Liability still exists under common law for a variety of claims dealing with automobile safety. For example, [1] where no Federal safety standard exists, manufacturers may be liable under common law for design defects. [2] Other courts have ruled that, when manufacturers choose to install an airbag pursuant to Standard 208, they may be liable for defects connected with the design of an airbag as well as its manufacture. [3] In the absence of § 1397(k), manufacturers might claim that compliance with all Federal standards satisfies their common law tort duties as a matter of law, and that they should not be liable for a design or manufacturing defect even where no Federal standard exists. Section 1397(k) forecloses that argument; it does not vitiate pre-emption. n149

Upon close scrutiny, however, none of the three examples offered by the court work to give operative effect to the saving clause in light of the preemption provision. The first example is easy. When there is no federal standard in effect, the preemption clause does not come into operation and there is no conflict with any other substantive provisions of the statute; therefore, the saving clause is not needed. In order to reconcile the two provisions, there needs to be a situation where a claim would otherwise be displaced by the preemption provision yet is preserved by the saving provisions. The absence of a standard does not suffice. Likewise, the second example is just a variation on the first. Standard 208 regulates *whether* there should be airbags in cars, not *how* the airbags are designed and manufactured. With respect to these latter matters, there is no federal standard in effect, the preemption provision is not applicable, and tort liability is preserved independent of the saving provision.

[\*2115] The third example is more sophisticated, but ultimately also unfruitful. The idea is that the existence of some federal standards relating to auto safety and compliance with all of the standards may be interpreted to foreclose all tort liability relating to auto safety--in other words, the preemption provision may be thought to displace all state standards relating to auto safety. The saving clause thus operates as an anti-field preemption provision and preserves commonlaw liability when no standards are in effect. n150

There are several problems with this argument. First, the language of the preemption clause, read carefully, already accomplishes this result. That provision specifies that "whenever *a* Federal motor vehicle safety standard" is in effect, a state may not continue to effect any auto safety standard "which is not identical to *the* Federal standard." n151 The "the" at the end of the provision clearly refers back to the "a" at the beginning of the provision; n152 the provision thus displaces only specific state standards not identical to the specific federal standards in effect, not all state standards relating to auto safety generally. The saving clause has operative effect only to preclude the possibility that a court would transform the definite article into an indefinite article. This is a slim possibility, and it would take a uniquely prescient and careful Congress indeed to have anticipated and foreclosed that risk of judicial error.

Second, the language of the saving clause, read carefully, does not support the argument. That provision states that "compliance with *any*" federal standard does not vitiate common-law liability; it does not say compliance with "all" federal standards. n153 It would be rather creative for a lawyer to argue, and ludicrous for a court to agree, that compliance with one federal standard--say, the five-mile-per-hour bumper rule--exempts her client from common-law liability for all other aspects of the design and manufacture of the vehicle.

Finally, reading the two clauses in this manner would mean that only judicially created standards are preserved; any legislative or regulatory standards relating to auto safety would be preempted, even if they were a mere codification of the common law. This is a rather odd--perhaps even absurd--result.

We thus have reached a stalemate in the battle of the dueling provisions. The appellate court in *Geier* would resolve the impasse by resort to a familiar ally: "The presumption against pre-emption counsels against finding express preemption when the purpose of Congress is not clear from the statute's language." n154 However, in the next breath and without reference to the presumption, [\*2116] the court surveyed the regulatory regime and the history of Standard 208 and concluded that tort liability stands as an obstacle to the full achievement of the purposes of Congress because it

"would frustrate the Department's policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems." n155

The appellate court's analysis illustrates the error wrought by the presumption against preemption. First, the textual ambiguity at issue here resulted from a nullifying contradiction in the statute. As applied to common-law liability, the preemption and saving provisions perfectly cancel each other out and there is no way to give life to one without depriving the other of any operative purpose. A tie-breaking presumption does not fit well to resolve this situation, which in effect is a statutory void. Second, if the presumption works to resolve the textual ambiguity, then it should also work in the obstacle analysis--especially because, prior to *Cipollone*, the requirement of "clear and manifest purpose" was applied only in implied preemption analysis. Expanding the analysis to incorporate the other points on the spectrum of federal displacement of state laws illustrates that this requirement cannot logically stand as a general presumption against preemption alongside the willingness of the court to displace state law with little or no action from Congress.

It thus seems to me that the presumption against preemption has no relevance to the express preemption analysis or anywhere else on the displacement spectrum. In the context of obstacle preemption, respect for the traditional areas of state regulation finds expression as an initial burden on the party claiming preemption to show why displacement is proper, and also as a recognition of the background against which Congress legislates. This burden can be carried, as several circuits, including the D.C. Circuit in *Geier*, have held, by resort to the congressional purpose in enacting the statute and in authorizing the auto safety regulatory regime. State tort liability frustrating the purpose, policy, and operation of this regime is displaced because of congressional intent and federal interests, as both are gleaned from the regulatory structure. These judicial determinations of congressional purpose relating to the Act and airbags are prominently disputed, n156 but that debate is not relevant here. The point is that the textual deadlock cannot be resolved by a presumption against preemption, but rather by looking to other nontextual sources for the intent of Congress and the purpose of the regulatory regime.

This mode of analysis, incidentally, comports with the Court's interpretation of the statutes through nontextual means when a plain text reading would lead to an absurd result. n157 In the National Traffic and Motor Vehicle Safety Act, the [\*2117] three most plausible readings that give meaning to both the preemption and saving provisions would lead either to absurd results or to the conclusion that Congress included two provisions that canceled each other out. In such circumstances, it is consistent with traditional statutory analysis to resort to external sources such as structure and purpose to resolve the impasse. This happy convergence of the absurd results rule and the preemption analysis serves to illustrate further that the latter derives not from some special Supremacy Clause jurisprudence, but rather from the workaday methods of statutory and commonlaw analysis, with the Supremacy Clause serving as the rule of decision in conflicts with state law.

## CONCLUSION

This article sought to make sense of extant mechanisms whereby federal law displaces state law and argued that there is not much logic to a general presumption against preemption in this doctrinal framework. Because the point is to synthesize and rationalize, the argument makes no normative judgments concerning the propriety of the various displacement doctrines. n158 Nevertheless, the analysis offered here may well seem heretical to "Our Federalism" n159 and the principles that preserve and protect that delicate structure against the aggrandizing propensities of the national government. Many well-meaning and capable scholars have lamented the fact that expansive congressional power under Article I, Section 8, coupled with the displacing effect of preemption means that "the Danger . . . that the national will swallow up the State Legislatures" n160 has been realized in the modern regulatory state. The solution, it is advocated, comes in the form of a strong presumption against preemption or a clear-statement rule in order to counterbalance the awesome preemptive effect of the Supremacy Clause. n161 This solution seems to me to graft confusion on error. Properly applying the Supremacy Clause improves doctrinal coherence and permits the proper protection of uniquely federal interests.

Redefining the proper balance of legislative powers between Congress and the states is better accomplished directly, through an insistence on the limits of Congress's enumerated and limited powers under Article I, rather than circuitously and ineffectually through some vague and ill-conceived presumption against preemption under the Supremacy Clause. Recognizing the limits of [\*2118] Congress's power under, say, the Commerce Clause and the attendant authority to preempt state law properly recognizes the competency, legitimacy, and authority of states to regulate matters within their legislative jurisdiction. At the same time, it leaves Congress free to regulate, and displace state law if necessary, to protect national interests in areas within its legislative responsibility, as enumerated in the Constitution.

So fundamentally redefining the balance of legislative powers between Congress and the states, of course, requires a coherent theory of the limits of Congress's enumerated powers under Article I, Section 8. And such a theory would in turn call for a comprehensive assessment of legislative federalism--the division of powers between the federal and state legislatures and the mechanisms for maintaining such division. These broader questions are beyond the scope of this article. Suffice it to say here that attempting to patch jurisprudential cracks, caused by the want of such a solid theoretical foundation for legislative federalism, with preemption analysis is not only ineffective but may also be counterproductive. Returning preemption analysis to its proper place would provide doctrinal coherence, and at the same time free up intellectual and jurisprudential resources to design and construct the foundation essential for a proper balance of state and federal legislative authority.

#### FOOTNOTES:

n1 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963)); see also *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *id.* at 532-33 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 545 (Scalia, J., concurring in the judgment in part and dissenting in part).

n2 U.S. CONST. art. VI, cl. 2.

n3 *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

n4 518 U.S. 470 (1996).

n5 *Id.* at 485.

n6 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see also *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."); *Reid v. Colorado*, 187 U.S. 137, 148 (1902) ("It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested."). Surveying the preemption landscape, commentators have noted the Court's "overriding reluctance outside the Indian commerce context to *infer* preemption in ambiguous cases," LAURENCE TRIBE, *CONSTITUTIONAL LAW* § 6-28, at 1175 (3d ed. 1999), and that the Court increasingly did not find preemption "unless Congress clearly and explicitly provides for it by statute," Ronald D. Rotunda, *Sheathing the Sword of Federal Preemption*, 5 *CONST. COMMENTARY* 311, 317 (1988).

n7 518 U.S. at 485.

n8 505 U.S. 504, 516 (1992).

n9 See *id.* at 544 (Scalia, J., concurring in the judgment in part and dissenting in part) ("The life-span of this new rule may have been blessedly brief, inasmuch as the opinion that gives it birth in Part I proceeds to ignore it in Part V.").

n10 Although the assumption that Congress does not lightly preempt traditional state regulation has been invoked most often and applied most consistently in obstacle and field preemption cases, the Court in *Cipollone* stated that this assumption is a general interpretive presumption applicable also to express preemption cases and that, where an express preemption provision exists, no further inquiry into implied preemption is required. The doctrinal confusion wrought by *Cipollone* and the Court's attempt to explain it in *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-89 (1995), is discussed below. See *infra* Part II.B.

n11 Robert Rabin, *Reassessing Regulatory Compliance*, 88 *GEO. L. J.* 2049, 2057 (2000).

n12 *Id.* at 2060.

n13 See generally *Alden v. Maine*, 527 U.S. 706 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1998); *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).

n14 *Cipollone*, 505 U.S. at 546 (Scalia, J., dissenting).

n15 See generally Viet D. Dinh, *First Impressions: A Tribute to Justice Sandra Day O'Connor*, 21 *SETON HALL LEGIS. J.* 3 (1997) (applauding Justice O'Connor's leadership in federalism jurisprudence); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903, 904-07 (1994) (criticizing Justice O'Connor's leadership in federalism jurisprudence).

n16 See, e.g., William W. Bratton, Jr., Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 *COLUM. L. REV.* 623, 624 (1975) ("The Supreme Court, however, has not developed a uniform approach to preemption; its decisions in this area take on an ad hoc, unprincipled quality, seemingly bereft of any consistent doctrinal basis."); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 *STAN. L. REV.* 208, 208 (1959) ("Many of the Supreme Court's recent pre-emption decisions have been condemned as extreme examples of the unwarranted substitution of judicial wisdom for that of Congress.").

n17 U.S. CONST. art. VI, cl. 2.

n18 *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

n19 See *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419-21 (1819).

n20 For a discussion of the jurisprudential distinction between preemption and supremacy, see Stephen A. Gardbaum, *The Nature of Preemption*, 79 *CORNELL L. REV.* 767 (1994). For a thorough historical analysis of the Supremacy Clause as a *non obstante* provision, see Caleb Nelson, *Preemption*, 86 *VA. L. REV.* 225 (2000).

n21 For a general review of the constitutional debate, see KENNETH STARR ET AL., *THE LAW OF PREEMPTION: A REPORT OF THE APPELLATE JUDGES CONFERENCE* 5-8 (1991). For a broader history of preemption analysis, see generally *Nelson*, *supra* note 20.

n22 The relevant resolution read in its entirety as follows:

6. Resolved that each branch ought to possess the right of originating Acts; that the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.

1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (M. Farrand ed., rev. ed. 1937) [hereinafter Farrand].

n23 *See id.*

n24 Benjamin Franklin successfully proposed to permit Congress to negative all laws inconsistent with treaties of the Union, and the Committee postponed consideration of the last clause of the sixth resolution, which is not relevant here. *See id.* at 47.

n25 The vote was nine to zero, with Connecticut divided. *See id.*

n26 The complete text of the resolution is as follows:

6. Resd. that all Acts of the U. States in Congs. Made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding; and that if any State, or any body of men in any State shall oppose or prevent ye. carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth ye power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an Observance of such Treaties.

*Id.* at 245.

n27 *See id.* at 243.

n28 *See id.* at 244.

n29 *See id.* at 169 (June 8, 1787), 317 (June 19, 1787).

n30 2 THE RECORDS OF THE FEDERAL CONSTITUTIONAL CONVENTION OF 1787, at 27 (M. Farrand ed., rev. ed. 1937) [hereinafter Farrand 2].

n31 *Id.* at 28.

n32 *See id.*

n33 Luther Martin proposed

that the Legislative acts of the U. S. made by virtue & in pursuance of the articles of the Union, and all treaties made & ratified under the authority of the U. S. shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants--& that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.

*Id.* at 28-29.

n34 What degree of conflict suffices--including whether any federal legislation is needed at all--and how much state law is displaced are answered by the various strands of preemption analysis, to which I return below at *infra* Part II.

n35 Whether the breadth of the power to preempt is coterminous with the breadth of the substantive authority to regulate--in other words, whether the power to regulate necessarily implies the power to preempt--is beyond the scope of this article. Suffice it to note here that an expansive definition of the power to preempt needs to be distinguished from a general power to negative state laws, which the Framers rejected. One distinction may be that the power to preempt is narrower than the power to negative. Another may be that the rejection of a general power to negative nevertheless leaves room for specific powers to negative--that is, authority to negative limited by the specific enumeration of congressional powers under Article I, Section 8. For a general discussion on the relationship between Congress's power to regulate and to preempt, see William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769.

n36 *See* Gardbaum, *supra* note 20, at 774 ("The Supremacy Clause does not empower, but rather resolves a particular problem arising out of the powers granted by other parts of the Constitution: namely, conflicts resulting from concurrent state and federal powers."). Professor Gardbaum would draw a further distinction between supremacy and preemption: "Preemption is thus a jurisdiction-stripping--or 'jurispathic'--concept, unlike supremacy which deals with conflict resolution in particular cases." *Id.* at 771. This seems to me an unnecessarily broad definition of preemption. A preemption provision does not--and perhaps cannot, consistent with the Tenth Amendment--deprive states of the authority to enact legislation; it only provides that state legislation in certain areas, if enacted, would not be valid. Such a provision has preemptive effect only to the extent that the Supremacy Clause gives it precedence over conflicting state laws--in other words, state laws that seek to be valid within the scope prescribed by the preemption provision. Express preemption, therefore, is only a special case of true conflict preemption--that is, a special case of supremacy.

n37 Farrand, *supra* note 22, at 160.

n38 Congress may answer those questions in specific instances, by including preempting or saving language in particular statutes, or wholesale by changing the legislative background against which it will legislate. *See* Federalism Accountability Act, S. 1214, 106th Cong. (1999). For a discussion of the relevance of federalism principles to the Federalism Accountability Act, see Paul D. Clement & Viet D. Dinh, *Constitution Provides No Support for Opponents of Preemption*, 14 LEGAL BACKGROUNDER 42 (Washington Legal Foundation, Washington, D.C.), Nov. 12, 1999.

n39 The Executive may answer those questions in specific instances, through agencies interpreting statutes to have preemptive effect or giving preemptive effect to duly authorized regulations, or wholesale by defining the procedures through which such preemptive agency actions are undertaken. *See* Exec. Order No. 13,132, 64 *Fed. Reg.* 43,255 (1999).

n40 *See* Bratton, *supra* note 16, at 624-39 (tracing the historic oscillation of preemption doctrine between favoring federal interests and preserving state autonomy).

n41 *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

n42 501 U.S. 452 (1991).

n43 *See id.* at 456.

n44 *See EEOC v. Wyoming*, 460 U.S. 226, 231 (1983).

n45 *See Gregory*, 501 U.S. at 463-67.

n46 *See* Pub. L. No. 93-259, § 28(a), 88 Stat. 74 (1974) (codified at 29 U.S.C. § 630(b)(2)).

n47 *Gregory*, 501 U.S. at 465.

n48 *Id.* at 461.

n49 *See* Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study on the Failure of Textualism*, 33 *HARV. J. ON LEGIS.* 35, 44 n.38 (1996) ("If *Gregory's* 'plain statement' rule were applied to preemption, . . . entire bodies of preemption doctrine might be called into question.").

n50 *See National League of Cities v. Usery*, 426 U.S. 833, 861-63 (1976).

n51 *Gregory*, 501 U.S. at 460.

n52 469 U.S. 528 (1985).

n53 *See Gregory*, 501 U.S. at 464.

n54 See *Debartolo v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 329-30 (1936); Adrian Vermeule, *Saving Constructions*, 85 *GEO. L.J.* 1945 (1997).

n55 *Gregory*, 501 U.S. at 460-61.

n56 *Id.* at 460.

n57 U.S. CONST. amend. X.

n58 See, e.g., *New York v. United States*, 505 U.S. 144, 159 (1992) ("In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.").

n59 See *id.* at 144 (holding that Congress may not compel a state to enact laws to further a federal radioactive waste regulatory program).

n60 See *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating federal regulation that state law enforcement officers perform background checks).

n61 U.S. CONST. art VI, cl. 2.

n62 It is unclear to this city dweller whether cow-tipping is an actual activity or merely apocryphal myth. Compare Jackie Loohaus, *Jackie's Picks to Click*, MILWAUKEE J. SENTINEL, Apr. 8, 1999, at A11 ("The evil practice of 'cow-tipping' is the stuff of rural legend . . ."), with Scott Hester, Letter to the Editor, VILLAGE VOICE, Nov. 25, 1997, at 6 ("As someone who, in my younger, less enlightened days, did engage in cow-tipping, I can assure him that it is not an 'urban myth only gullible city-slickers believe.'"). However, it is apparently a rather dangerous activity, as cows sleep lying down and thus can be tipped, if at all, only while they are awake. See WIS. ST. J., June 27, 1999, at 1C ("We native Wisconsinites . . . know that cows sleep lying down, so you can't actually tip them over."); see also Rick Barrett, *Watching Cows, OK; Tipping, No Way: Dairy Expo Visitors Advised on Cow Etiquette*, WIS. ST. J., Sept. 30, 1998, at A1 (quoting the following advice from John Pukite, the author of *A Field Guide to Cows*: "Besides the obvious dangers of the sport (the cow may fall on you or gore you with its horns) cow tipping can be unhealthy for the cow"). In any event, virtual cow-tipping thrives in cyberspace. See *Virtual Cow Tipping* (visited Mar. 27, 2000) <<http://www.cyberstudio.com/mindcandy/cow/cow.html>>.

n63 22 U.S. (9 *Wheat.*) 1 (1824).

n64 *Id.* at 263.

n65 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

n66 PAUL BATOR ET AL., HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 533 (3d ed. 1988).

n67 RICHARD H. FALLON ET AL., HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 522 (4th ed. 1996).

n68 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice*, 331 U.S. at 230); see also *Cipollone v. Liggett Group, Inc.* 505 U.S. 504, 516 (1992); *id.* at 532-33 (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part); *id.* at 545 (Scalia, J., concurring in the judgment in part and dissenting in part).

n69 *Medtronic*, 518 U.S. at 485 (quoting *Retail Clerks Int'l Assn. v. Schermerhorn*, 375 U.S. 96, 103 (1963)); see also *Cipollone*, 505 U.S. at 516; *id.* at 532-33 (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part); *id.* at 545 (Scalia, J., concurring in the judgment in part and dissenting in part).

n70 See, e.g., *Palmer v. Liggett Group*, 825 F.2d 620, 624 (1st Cir. 1987) ("We are somewhat wary that these ready citations list, but do not describe, and catalog, but do not define, any real distinctions among the various types of preemption.").

n71 312 U.S. 52 (1941).

n72 *Id.* at 67.

n73 See *id.* at 66.

n74 487 U.S. 500 (1988).

n75 See *id.* at 509.

n76 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (quoting *Retail Clerks Int'l Assn. v. Schermerhorn*, 375 U.S. 96, 103 (1963)); see also *Cipollone*, 505 U.S. at 516; *id.* at 532-33 (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part); *id.* at 545 (Scalia, J., concurring in the judgment in part and dissenting in part).

n77 *Medtronic*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 313 U.S. 218, 230 (1947)).

n78 See *United States v. Bass*, 404 U.S. 336, 347-49 (1971). The rule serves separation of powers and due process concerns recognizing that activities can only be proscribed by the legislature in a manner sufficiently clear to provide general notice. See generally Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345 (1994); Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197 (1994).

n79 See *Traynor v. Turnage*, 485 U.S. 535, 542 (1988); *Abbott Labs. v. Gardner*, 387 U.S. 136, 139-41 (1967). The rule ensures agency fidelity to congressional intent. See LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 336-53 (1965).

n80 See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 275-306 (1994) (discussing interpretive canons in three categories: "Precepts of grammar, syntax, and logical inference (the textual canons); rules of deference to the interpretations others have placed on the statutory language (the extrinsic source canons); and policy rules and presumptions (the substantive canons).").

n81 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

n82 *New York State Dept. of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973) (quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952)).

n83 See generally *United States v. Providence Journal Co.*, 485 U.S. 693 (1988).

n84 See *supra* text accompanying notes 41-60.

n85 22 U.S. (9 *Wheat.*) 1 (1824).

n86 See generally *id.*

n87 See Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 *TEX. L. REV.* 1743, 1751 (1992).

n88 *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 532 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

n89 *Id.* (citations omitted and emphasis added).

n90 514 U.S. 280 (1995).

n91 *Id.* at 287.

n92 Justice Scalia concurred in the result without explanation. See *id.* at 290.

n93 *Id.* at 289.

n94 See Susan Raeker-Jordan, *The Pre-Emption Presumption That Never Was: Pre-Emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379, 1418 (1998) ("Another and more significant substantive problem flowing from the Court's clarification was that in clarifying, the Court eviscerated the good rule stated, but not applied, in *Cipollone*.").

n95 *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

n96 487 U.S. 131 (1988).

n97 See *id.* at 152.

n98 *Id.* at 141.

n99 Cf. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963) (noting the Court's reluctance to displace state law "in the absence of an unambiguous congressional mandate to that effect").

n100 See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 532 (1992) (Blackmun, J., concurring in part, concurring in the judgement in part, and dissenting in part) (noting that "many of the cases in which the Court has invoked such a presumption against displacement of state law have involved implied pre-emption").

n101 *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

n102 See ESKRIDGE, *supra* note 80. For an application of the Eskridge-Frickey approach to preemption analysis, see Richard C. Ausness, *Federal Preemption of State Products Liability Doctrines*, 44 S.C. L. REV. 187, 238-51 (1993).

n103 487 U.S. 131 (1988).

n104 *Id.* at 141.

n105 It is sometimes considered a looser version of conflict preemption, requiring a lesser degree of conflict than impossibility of compliance. See generally *Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88 (1992). Further, the classic statement of obstacle preemption actually served as the analytical foundation for core field preemption cases. See *Perez v. Campbell*, 402 U.S. 637, 649 (1971); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

n106 *Pennsylvania v. Nelson*, 350 U.S. 497, 502 (1956) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (holding a dominant federal interest precludes state intervention in proscribing advocacy of the overthrow of the United States government)).

n107 *Id.* at 504 (quoting *Rice*, 331 U.S. at 230).

n108 331 U.S. 218 (1947).

n109 *Id. at 230* (holding federal interest in establishing "fair and uniform business practices" supersedes state interest in regulating warehouse operations).

n110 Likewise, if Congress does not legislate pervasively over time, it can regulate comprehensively as an initial matter. In such an event, the background does not change but the completeness of the regulatory scheme suffices to change the interpretive perception of the congressional action.

n111 312 U.S. 52 (1941).

n112 *See id. at 59.*

n113 *Id. at 68.*

n114 *Id. at 67.*

n115 *See id. at 76* (Stone, J., dissenting).

n116 *See M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819)* (stating that "states have no power . . . to retard, impede, burden or in any other manner control the operation of the constitutional laws enacted by congress").

n117 487 U.S. 500 (1988).

n118 *See id. at 503.*

n119 *Id. at 507.*

n120 *Id. at 504* (citations omitted).

n121 *Id. at 508* (citations omitted).

n122 *Id. at 504.*

n123 Daniel Farber expertly puts the confusing doctrinal analysis in a nutshell as follows:

State regulations having a discriminatory effect on interstate commerce are subject to stringent judicial scrutiny even if the discrimination was inadvertent. On the other hand, regulations that burden interstate commerce without discriminating against it are subject to a less rigorous balancing test: a state law that burdens local and interstate commerce equally will be upheld if the law's local benefits outweigh the burden on commerce.

Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 *CONST. COMMENTARY* 395, 395-96 (1986).

n124 *Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) 299, 319 (1851).

n125 See *Wilkerson v. Rahrer*, 140 U.S. 545, 561 (1891) (upholding a federal law permitting local regulation of interstate commerce on the ground that Congress "has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States," but rather has adopted a federal law divesting articles in interstate commerce of their interstate commerce character).

n126 See William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 *STAN. L. REV.* 387, 410 (1983).

n127 See Noel T. Dowling, *Interstate Commerce and State Power*, 27 *VA. L. REV.* 1, 2-19 (1940).

n128 *Tyler Pipe Indus., Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 262 (1987) (Scalia, J., dissenting) (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987)); see also John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities"*, 64 *B.U. L. REV.* 737, 741 (1984).

n129 Farber, *supra* note 123, at 396 n.8.

n130 *Id.* at 396.

n131 See *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428-37 (1819); Richard B. Collins, *Economic Union as a Constitutional Value*, 63 *N.Y.U. L. REV.* 43, 43-47 (1988).

n132 *Leisy v. Hardin*, 135 U.S. 100, 108 (1890) (invalidating state statute prohibiting the sale of liquor without a license from the state's county court).

n133 Pub. L. No. 103-272, 108 Stat. 1379 (codified as amended in scattered sections of 15, 49 U.S.C.)

n134 15 U.S.C. § 1392(d) (1988) (repealed and replaced by 49 U.S.C. § 30103(b) (1994)).

n135 15 U.S.C. § 1397(k) (1988) (repealed and replaced by 49 U.S.C. § 30103(e) (1994)).

n136 *166 F.3d 1236 (D.C. Cir. 1999), cert. granted, 67 U.S.L.W. 3717 (U.S. Sept. 10, 1999) (No. 98-1811).*

n137 *See Geier, 166 F.3d at 1237.*

n138 *See id. at 1242.*

n139 *See id. at 1243.*

n140 *Id. at 1238.*

n141 *See id. at 1237.*

n142 *See id.*

n143 *See Geier v. American Honda Motor Co., cert. granted, 67 U.S.L.W. 3717 (U.S. Sept. 10, 1999) (No. 98-1811).*

n144 *See City of New York v. FCC, 486 U.S. 57, 63-64 (1988) (holding that FCC did not exceed its statutory authority by preempting state and local technical standards governing the quality of cable television signals); Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982).*

n145 *See South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 510 n.22 (1986).*

n146 *See supra* text accompanying notes 34-36.

n147 *Cf. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984) (stating that in the Atomic Energy Act, "Congress intended to stand by both concepts and to tolerate whatever tension there was between them").*

n148 *110 F.3d 1410 (9th Cir. 1997).*

n149 *Id. at 1415-16* (citations omitted).

n150 *See Timothy Wilton, Federalism Issues in "No Airbag" Tort Claims: Preemption and Reciprocal Comity, 61 NOTRE DAME L. REV. 1, 27 (1986).*

n151 *15 U.S.C. § 1392(d) (1988) (repealed and replaced by 49 U.S.C. § 30103(b) (1994)) (emphasis added).*

n152 The two articles are also linked to each other by the reference in the middle of the provision to "any safety standard applicable to the *same* aspect of performance." *Id.* (emphasis added).

n153 15 U.S.C. § 1392(k) (1988) (repealed and replaced by 49 U.S.C. § 30103(e) (1994)).

n154 166 F.3d at 1241.

n155 *Id.* at 1243.

n156 See Keith C. Miller, *Deflating the Airbag Pre-Emption Controversy*, 37 EMORY L.J. 897, 899 (1988); Ralph Nader & Joseph A. Page, *Automobile-Design Liability and Compliance with Federal Standards*, 64 GEO. WASH. L. REV. 415, 434-46 (1996).

n157 Cf. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 266 (1992) (looking to statutory history to narrow scope of literal statutory language because "the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades us that RICO should not get such an expansive reading").

n158 See, e.g., *Nelson*, *supra* note 20 (arguing that constitutional history and jurisprudence do not support obstacle preemption).

n159 *Younger v. Harris*, 401 U.S. 37, 44 (1971).

n160 Farrand, *supra* note 22, at 160 (statement of George Mason, June 7, 1787).

n161 See, e.g., STARR ET AL., *supra* note 21, at 40-42; Gardbaum, *supra* note 20, at 813-15; Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 828-30 (1996); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 565 (1997); Raeker-Jordan, *supra* note 94, at 1428-39; Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 103-14 (1988).