

LEGISLATING COMITY: CAN CONGRESS ENFORCE FEDERALISM CONSTRAINTS THROUGH RESTRICTIONS ON PREEMPTION DOCTRINE?

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INTRODUCTION

The exponential growth of national legislative jurisdiction over the last century has caused many areas once regulated purely by local law to be invaded by the federal government.¹ Because the areas of concurrent federal and state jurisdiction have grown, there is a heightened concern for the proper federal-state balance of power. Consequently, the judicial, executive, and legislative branches have all begun to take notice. The United States Supreme Court has recently issued a series of opinions announcing a major shift in the Court's view of federalism.² In addition, the past few presidents have issued

* This article is dedicated to my mother, Jeanne Donze, who provided love and support throughout my lifetime. This article is but one of my many attempts to make her proud, and return that love and support in the days when it's most needed. Also, thanks to Melvyn Durchslag who provided needed pointers and constructive criticism on earlier drafts of this article.

1. I am speaking, of course, about the dramatic expansion of congressional power under the Commerce Clause. See U.S. CONST. art. I, § 8, cl. 3.

2. See *Printz v. United States*, 521 U.S. 898 (1997) (prohibiting Congress from requiring state and local law enforcement officers to participate in administration of federally enacted regulatory schemes); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (limiting Congress's remedial power under Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (requiring federal commerce legislation regarding social concerns to have jurisdictional nexus). Taken together, these cases suggest that the Court has begun to take federalism issues more seriously than it had in previous years. See Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1638 (1999); see also Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 69-74 (1999) (discussing Supreme Court's recent federalism decisions, such as *Lopez*, *Printz*, *Boerne*, and cases involving Eleventh Amendment issues, as attempts to engage in substantive downsizing to restrict scope of national power). The Court also addressed federal preemption of state laws in its most recent term. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *United States v. Locke*, 529 U.S. 89 (2000); see also discussion *infra* Part I.E.

several executive orders demanding that executive agencies take state interests into account when issuing rules in areas that invoke federalism concerns.³

Similarly, Congress itself is addressing the effect of its growing federal legislative jurisdiction on the states' abilities to exercise their own police powers. Groups representing local interests have intensely lobbied Congress to reform the manner in which it passes laws that affect state and local governments. In response, both the House and Senate are considering federalism bills⁴ that seek to clean up a lot of the mess created by the entrance of federal statutes and regulations into the state legislative sphere. This article will illuminate the necessity and effectiveness of the federalism bills in light of the concerns they seek to address.

Although it is surprising that these federalism bills went as far as they did in the legislative process, it is not surprising that they were proposed.⁵ In short, the bills represent self-imposed limits on Congress's exercise of its preemption power.⁶ As the area of legislative jurisdiction "reserved" to the states gets smaller and smaller with each new encompassing statute passed by Congress, the need for some way to control congressional expansion increases. The proposed federalism bills place significant burdens on Congress's ability to legislate in "state" areas, thus helping to keep the states' legislative jurisdiction from shrinking unjustifiably. Accordingly, the most vocal proponents of these federalism bills are state and local governments and their representative organizations.⁷ Environmental, labor, and business groups, however, strongly oppose any federalism legislation that

3. Reagan, Bush, and Clinton have all issued executive orders aimed at obtaining and preserving the proper balance between federal and state legislation. *See infra* Part II.B.2.

4. The following bills were introduced in the first session of the 106th Congress: Federalism Accountability Act of 1999, S. 1214, 106th Cong. (1999); Federalism Act of 1999, H.R. 2245, 106th Cong. (1999); Federalism Preservation Act of 1999, H.R. 2960, 106th Cong. (1999).

5. "Similar bills were submitted in 1991, '94, and '96, but they never made it beyond their introductions. This is the first time federalism legislation has been voted on at even the subcommittee level." Ron Eckstein, *Federalism Bills Unify Usual Foes*, *LEGAL TIMES*, Oct. 18, 1999, at 1.

6. Preemption is what happens when the federal government moves into a substantive legal area; states lose their ability to legislate in a particular area when the federal law is construed to supercede state law. *See infra* Part I.A.

7. The bills' most vocal supporters are the "big seven": the National Governors' Association, the National Conference of State Legislatures, the National League of Cities, the Council of State Governments, the National Association of Counties, the U.S. Conference of Mayors, and the International City/County Management Association. *See* Eckstein, *supra* note 5, at 1.

would make it harder for Congress to exercise its Article I powers. Environmental and labor groups “fear the measures would undermine federal agencies’ authority to enforce nationwide regulations and standards, setting back the clock on hard-won health and environmental protections.”⁸ Businesses rely on preemptive uniform federal laws to save them the burden of complying with the local laws of every area in which they do business. Which side will win the battle of wills remains to be seen, but because the push for such federalism legislation is strong, the question as to its wisdom must be addressed.

Before considering the proposed bills and their possible effects, it is important to understand the legal doctrine they attempt to alter. The federalism bills are aimed specifically at the congressional preemption of state lawmaking authority, attempting to change not only the way Congress makes laws that have concurrent jurisdiction with the fifty states, but also the rules of construction that courts and agencies use when interpreting preemptive laws. Like federal commandeering of state legislative processes⁹ and state immunity under the Eleventh Amendment,¹⁰ federal preemption is a primary concern for states in the realm of federalism jurisprudence. Part I of this article outlines basic preemption doctrine and describes current problems associated with the way preemption jurisprudence has developed. Although this article is not meant to present a comprehensive discussion of the problems associated with preemption doctrine,¹¹ it does summarize the debate in order to present a clear picture of Congress’s impetus to propose federalism legislation. With this foundation laid, Part II introduces the federalism bills that Congress is currently considering and explains how the bills propose to alter the current law of preemption. This part also considers whether congressional legislation is the best mode for accomplishing the goals of the federalism bills’ proponents, and whether the legislation will achieve those goals.

8. *Id.*

9. *See, e.g.,* *Printz v. United States*, 521 U.S. 898 (1997).

10. *See, e.g.,* *Alden v. Maine*, 527 U.S. 706 (1999).

11. For excellent discussions of the inconsistencies and other problems associated with preemption doctrine jurisprudence, see generally Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994); Susan Raeker-Jordan, *The Pre-Emption Presumption that Never Was: Pre-Emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379 (1998); David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125 (1999); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69 (1988).

I

PREEMPTION

A. *General Description of Preemption*

Preemption “means (a) that states are deprived of their power to act *at all* in a given area, and (b) that this is so *whether or not* state law is in conflict with federal law.”¹² Preemption is a court-created doctrine that gives Congress the ability to replace state laws in a particular area when this area falls within Congress’s authority under Article I, even if Congress has not actually exercised such authority.¹³ After the federal government is found to have acted preemptorily, a state can be precluded from regulating below federal standards or can even suffer the complete loss of power within a field of law. While preemption is conditioned upon the existence of a clear congressional purpose to preempt state lawmaking power, such intent may be either expressly stated in a preemption provision of a statute or implied through the stated object and purpose of the statute in conjunction with the effects of certain provisions of the law.¹⁴ Statutes with express preemption provisions can be interpreted so as to result in either the nullification of a particular state statute or the reservation of an entire field to federal regulation, no matter how “local” the field may once have been.¹⁵ Statutes that do not contain express preemption provisions may also be construed by the courts to preempt entire fields of legislation because either Congress’s intent to preempt was implied or congressional purpose would be thwarted by any state regulation in the field.¹⁶

12. Gardbaum, *supra* note 11, at 771.

13. *See* Friedman, *supra* note 11, at 343-44.

Preemption refers to the ability of Congress to displace state lawmaking power in any area in which Congress has regulatory authority, whether or not Congress ever has exercised its authority [T]he Supreme Court has held that Congress can—again, within its broad enumerated or implied powers—decide that in any given area the state’s ability to regulate should be curtailed.

Id. (citations omitted).

14. Congress’s intent to preempt state law is assumed or inferred contextually in a startlingly large number of preemption cases. *See* discussion *infra* Part I.C.

15. *See id.*

16. *See, e.g.,* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (citing Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm’n, 461 U.S. 190 (1983); Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta, 458 U.S. 141 (1982)).

B. *General Advantages of Preemptive Legislation*

Although states lose some of their regulatory power, this does not mean that distinct advantages to preemptive legislation do not exist; the sheer number of preemptive statutes signal their success in at least some areas. Most notably, “[b]y removing state and local impediments to a nationwide economy, pre-emption enhances our economic liberty,”¹⁷ thus making it easier for today’s businesses to compete in a global market. Preemption creates a uniformity of legislation such that all regulations covering individuals exist in one place, a particular advantage to businesses whose activities could otherwise subject them to the varying regulations of several states. Whether or not one supports the nationalization of the country’s economy, nationalization has arrived, and uniformity in regulations helps solidify and simplify an economy that is primarily national in scope.

Additionally, many issues perceived to concern the nation “as a nation” are met with national legislation. Usually enacted pursuant to Congress’s Commerce Clause power,¹⁸ this national legislation often operates to preempt that of the states. Under this rationale, preemptive statutes have aided the federal government in enforcing standards in fields such as social legislation. Because many perceive the federal government to be one of the primary protectors of individual and social rights, federal action to ameliorate social dilemmas is perceived to have, and does have, much greater force than acts by individual states. For example, preemptive statutes such as the Civil Rights Act of 1964 set minimum standards that employers or service providers must meet to comply with the Fourteenth Amendment.¹⁹ While states can regulate above the standards, the Civil Rights Act preempts them from setting lower standards. Similarly, the perceived problems of organized labor and the need to protect the organized worker, a major na-

17. Robin Conrad & Jim Wootton, *Pre-Emption Under Attack: ‘Federalism’ Proposal Would Undermine Principle of Federal Law’s Supremacy*, FULTON COUNTY DAILY REP., Sept. 14, 1999, at 9.

18. See, e.g., Rachel F. Preiser, *Staking Out the Border Between Commandeering and Conditional Preemption: Is the Driver’s Privacy Protection Act Constitutional Under the Tenth Amendment?*, 98 MICH. L. REV. 514, 521 (1999) (arguing that Driver’s Privacy Protection Act, one preemptive law passed pursuant to Congress’s commerce power, is constitutional). Contrary to the assumptions of laypersons, the Civil Rights Act was also enacted pursuant to Congress’s commerce power, not its legislative power under the Fourteenth Amendment. See Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000h-6 (1994).

19. Civil Rights Act of 1964, tit. VI, 42 U.S.C. §§ 2000e to e-17 (1994).

tional issue in the 1920s, led to preemptive federal statutes placing labor law strictly within the domain of the federal government.²⁰

The genesis of preemption in pollution control provides an excellent example of how the federal government is spurred into preemptive action and of the positive effects preemptive laws may have. For many years, state regulation of pollution was thought to be adequate to control the problem. By the 1970s, however, the problem of pollution had reached such a significant magnitude and become such a national concern that public opinion supported Congress when it passed encompassing environmental laws.²¹ With Southern California, for example, having a layer of smog so thick that it could be seen from hundreds of miles away, it became clear that the time had passed for the “laboratories” of the states to reach a solution. It was time for the federal government to propose a uniform national standard that would immediately address the embarrassing pollution problem in a more effective way.

Today, when states regulate the environment they must do so under the direction of a congressionally created agency: the Environmental Protection Agency (EPA). Under the Clean Air Act, a model environmental statute, states are stripped of much of their autonomy, although they are still permitted, and actually encouraged, to regulate. Statutes charge states with the implementation of federal standards set forth in regulations issued by the EPA.²² If state programs do not measure up to the federal standards, or do not do so in an acceptable manner, then a state could face the loss of its federal highway funding.²³

20. For example, pursuant to its commerce power, Congress passed the National Labor Relations Act (NLRA) to remedy employers' egregious treatment of employees and their organized labor representatives. *See* National Labor Relations Act, 29 U.S.C. §§ 151–169 (1994).

21. Most people welcomed the federalization of environmental law because of the various states' dismal records in dealing with environmental issues and because of the multitude of water and air pollution issues affecting states other than the states from which the pollution originated. Having fifty different legislatures addressing the problem created a situation in which environmental concerns frequently led to a “race to the bottom” because, instead of seeking to reduce or eliminate environmental pollution, each local government sought to shift the costs of environmental pollution to others. *See* Spence & Murray, *supra* note 11, at 1136-37. The phrase, Not In My Back Yard (NIMBY), was coined to describe the trend in state environmental legislation. *See id.*

22. *See* Clean Air Act, 42 U.S.C. § 7410 (1994).

23. *See id.* § 7509.

The Clean Air Act is just one example of the many statutes that operate to preempt state laws.²⁴ Many preemptive statutes were passed by the last Congress,²⁵ and many more are on the present Congress's plate.²⁶ The success of some of this preemptive legislation²⁷ encourages hopeful environmental, labor, and business groups to lobby for the further growth and adaptation of federal laws.²⁸ Keeping national concerns under state jurisdiction could result in fifty different requirements to which these groups must adhere rather than one all-encompassing requirement. Such an obstacle would present serious implications for America's position in the global market.

24. In 1995, there were roughly fifty or sixty expressly preemptive statutes and many more statutes that the courts applied preemptorily. See Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 5 (1995). "Federal laws governing automobiles, railroads, lawn mowers, pesticides, medical devices, cigarettes, vaccines, poultry, meat, egg products, children's toys, flammable fabrics, and rechargeable batteries all contain express preemption requirements." Conrad & Wootton, *supra* note 17, at 9; see also William W. Schwarzer, *Federal Preemption: A Brief Analysis*, in 2 A.L.I.-A.B.A. COURSE OF STUDY MATERIALS: CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 453, 456-58 (1999) (providing examples of expressly preemptive statutes).

25. One recent preemptive statute that created a stir among the states was the Internet Tax Freedom Act (ITFA). Pub. L. No. 105-277, tit. XI, 112 Stat. 2681, 2681-719 (1998) (codified as amended at 47 U.S.C. § 151). ITFA imposed a three-year moratorium on measures affecting Internet commerce, creating at least a temporary preemption of state revenue laws. Continued state preemption would mean that states could lose upwards of twenty billion dollars per year. See *Federalism: Hearings Before the Senate Comm. on Governmental Affairs*, 106th Cong. 328 (1999) [hereinafter *Hearings*] (statement of John M. Dorso, Chairman, Law and Justice Committee of the National Conference of State Legislatures). Other recent examples of preemptive federal legislation include the National Securities Markets Improvement Act of 1996, the Farm and Rural Development Act of 1991, and the Telecommunications Act of 1996. See *id.* at 310 (statement of Governor Thomas R. Carper, Chairman, National Governors' Association).

26. As of this article's writing, preemptive bills such as the American Homeownership and Economic Opportunity Act and the Religious Liability Protection Act were pending in Congress. Preemptive legislation over the following areas was also pending: broadband Internet access, financial records privacy, financial services modernization, electric utility deregulation, electronic signatures, medical records privacy, and teacher liability. See *Hearings, supra* note 25, at 310-11 (statement of Governor Thomas R. Carper, Chairman, National Governors' Association).

27. The success of environmental legislation is a hotly debated subject, but very few would argue that encompassing federal legislation has not had some positive effects on the environment.

28. Labor unions operate on a national level, and benefit from statutes such as the NLRA, which regulates wages, hours, and other conditions of employment and preempts many state laws on the same subject. See National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994). Environmental groups support uniformity of legislation not only because of the far-reaching problems caused by pollution, but also because the businesses regulated by environmental laws are typically national in scope.

C. *Development of Preemption Doctrine*

Preemption doctrine arose out of the Supremacy Clause²⁹ as interpreted by the Marshall Court in such cases as *McCulloch v. Maryland*³⁰ and *Gibbons v. Ogden*.³¹ Those cases established the principle that federal law is supreme and invalidates conflicting state law. *McCulloch* is best known for its broad, milestone interpretation of the Necessary and Proper Clause: Congress has constitutional authority under the clause to decide the means by which it exercises its enumerated powers, so long as the end is “legitimate, . . . within the scope of the constitution, and [the] means . . . are appropriate, . . . plainly adapted to that end, . . . not prohibited, [and] consist with the letter and spirit of the constitution.”³²

But after establishing the bounds of congressional authority, the Court made several important statements regarding a state’s ability to tax a federal bank. The Court considered the issue as a question of supremacy because granting the states the right to tax the bank would render the Supremacy Clause “empty and unmeaning.”³³ The Court thought it clear that the sovereignty of a state does not “extend to those means which are employed by congress to carry into execution [its enumerated] powers.”³⁴ Instead, “[t]hose powers . . . are given . . . to a government whose laws, made in pursuance of the constitution, are declared to be supreme.”³⁵ Without more, these statements could do nothing but establish federal supremacy in areas of concurrent regulatory power. The Court later made clear in *Ogden*,

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

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

30. 17 U.S. (4 Wheat.) 316 (1819) (striking down state tax on operations of federally chartered bank, ruling that Congress not only had constitutional authority to incorporate bank as means to carry out its powers to lay and collect taxes, borrow money, regulate commerce, and so forth, but that states have no power to tax operations of Congress’s chosen means because, if they did, they would also be granted concurrent power to render such means ineffectual).

31. 22 U.S. (9 Wheat.) 1 (1824) (holding that existence of federal law regarding waterway licensing invalidated state law granting exclusive waterway rights for steamboats operating in interstate waters); *see also* Spence & Murray, *supra* note 11, at 1131-34.

32. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

33. *Id.* at 433.

34. *Id.* at 429.

35. *Id.*

however, that a finding of federal supremacy renders a state law *invalid*.³⁶ In that case, a state law found to conflict with a federal law regulating interstate waterways was not simply declared inapplicable: it was struck down.³⁷

Building on these statements, the Court announced what became known as preemption doctrine in *Southern Railway Co. v. Reid*.³⁸ In *Reid*, the railway failed to keep a schedule of tariffs, as required under the federal Interstate Commerce Act, and then violated state law by failing to ship certain freight.³⁹ The Court, addressing the issue of whether the state law applied in this federally regulated area, stated that between the power of the state and the power of the federal government lies the “[f]ederal exertion of authority which takes from a State the power to regulate the duties of interstate carriers or to provide remedies for their violation.”⁴⁰ Thus, *Reid* went one step beyond a simple affirmation of supremacy: In addition to declaring the conflicting state law invalid as it did in *Ogden*, the Court in *Reid* also removed from the state any power to pass such a law given that Congress had “taken control” of the subject matter.⁴¹

Since that time, the Court has formulated at least some permanent rules governing preemption. In *Cipollone v. Liggett Group*,⁴² an important, recent preemption case, the Court gave an excellent summary of the current law of preemption that is its mantra in similar cases:⁴³

Article VI of the Constitution provides that the laws of the United States “shall be the supreme Law of the Land; . . . any

36. *Ogden*, 22 U.S. (9 Wheat.) at 239.

37. *See id.* Another choice in this situation, rather than to strike down the law in all circumstances, is to strike it down only as applied to the conflicting situation.

38. 222 U.S. 424 (1912). Ms. Reid sought enforcement of a North Carolina law that, in an effort to alleviate discrimination, authorized penalties to be assessed against railways refusing to receive freight. *Id.* at 431; *see also* Gardbaum, *supra* note 11, at 803.

39. *See Reid*, 222 U.S. at 433.

40. *Id.* at 435.

41. *See id.* at 438-39.

It is evident, therefore, that Congress has taken control of the subject of rate making and charging. . . . [I]t becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination.

Id.

42. 505 U.S. 504 (1992) (plurality opinion).

43. Since the first preemption cases at the turn of the century, the Court has issued a great deal of important preemption opinions, some of which it mentions in the opinions of modern preemption decisions. But since the development of the preemption doctrine, as opposed to its current state, is not the subject of this article, many of these cases are not discussed.

Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” Art. VI, cl. 2. Thus, since our decision in *McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819), it has been settled that state law that conflicts with federal law is “without effect.” Consideration of issues arising under the Supremacy Clause “start[s] with the assumption that the historic police powers of the States [are] not to be superceded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Accordingly, “[t]he purpose of Congress is the ultimate touchstone” of pre-emption analysis. *Malone v. White Motor Corp.*, 435 U. S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U. S. 96, 103 (1963)).

Congress’ intent may be “explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” *Jones v. Rath Packing Co.*, 430 U. S. 519, 525 (1977). In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law or if federal law so thoroughly occupies a legislative field “as to make reasonable the inference that Congress left no room for the States to supplement it.”⁴⁴

On these general points, the Court generally exhibits consistency. From the beginning, courts have rested preemption doctrine on Congress’s intent to assume legislative jurisdiction over a certain area—an intent that must be “clear and manifest.” Although the clearest case of preemption is one where Congress includes a preemption provision in the statute, congressional intent to preempt may also be found where there is a conflict that makes compliance with state and federal law impossible⁴⁵ or where Congress has issued such pervasive regulations in a field that intent can be assumed.⁴⁶ Although in these latter cases the Court has allowed preemption based on an assumption of congressional intent to preempt, the Court has emphasized that the existence of a “clear and manifest” purpose to preempt nonetheless remains the touchstone:

[T]he clear and manifest purpose of Congress . . . may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state

44. *Cipollone*, 505 U.S. at 516 (alterations in original) (citations omitted).

45. *See, e.g.*, *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

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

laws on the same subject. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute.⁴⁷

D. Problems and Inconsistencies in Preemption Doctrine

1. Inconsistent Court Opinions

After reciting its mantra, the Court remains unclear in two important ways that profoundly affect the scope of preemption doctrine. First, the Court is unclear regarding the extent to which congressional intent controls a finding of implied preemption. Is it really a “touchstone” or just one consideration among many? Second, the Court is unclear regarding the nature of the role that implied preemption principles play in cases where an express preemption provision exists. Is the preemption provision the only inquiry, or can the “frustration of congressional purposes” alter the meaning of an express preemption provision?

Since the creation of preemption doctrine, the Court has recognized three categories of preemption: express preemption, field preemption, and conflict preemption.⁴⁸ The latter two represent instances of implied preemption: Even though Congress did not expressly state a preemptive purpose, intent to preempt can be inferred from the operation of the law. Writing for a unanimous Court, however, Justice Blackmun highlighted that the delineation of these implied categories of preemption is not entirely as it seems. The Court announced the three traditional forms of preemption, but mentioned by way of a footnote that conflict preemption and field preemption are, in fact, both species of conflict preemption: “Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress’ intent (either express or plainly implied) to exclude state regulation.”⁴⁹

When analyzing cases involving either of these two forms of implied preemption, the Court has made clear that preemption should *not* be assumed merely by the fact that national legislation exists.⁵⁰ Instead, preemption can be inferred only when the federal law touches upon “a field in which the federal interest is so dominant that the fed-

47. *Id.* (citations omitted).

48. See *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). The Court in *Cipollone* described these three forms of preemption. See *supra* text accompanying note 44.

49. *English*, 496 U.S. at 79-80 n.5.

50. The Court has reiterated this position in a number of preemption cases. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *Cipollone v. Liggett Group*, 505 U.S. 504 (1992).

eral system will be assumed to preclude enforcement of state laws on the same subject,"⁵¹ or where the state law makes it physically impossible to comply with both state and federal requirements⁵² or "frustrate[s] 'the accomplishment and execution of the full purposes and objectives of Congress.'"⁵³

The problem with this formulation of the rule is that implied preemption is only tangentially related to its touchstone: congressional intent. In fact, by looking closely at the Court's reasoning in some of its important implied preemption cases, it becomes clear that congressional intent is not a touchstone at all. Instead, the Court bases its determination on 1) the extent of the federal interest asserted; 2) the extent to which congressional purposes are frustrated; or 3) whether the effects of the state law create an irreconcilable conflict between federal and state regulation.⁵⁴ In *Hines v. Davidowitz*,⁵⁵ for example, the Court found preemption and stated that the congressional purpose included the desire to achieve a "complete system"⁵⁶ for alien registration so as to create a "harmonious whole."⁵⁷ The Court found that Congress "plainly manifested a purpose . . . to protect the personal liberties of law-abiding aliens through one uniform national registration system."⁵⁸ Thus, by interfering with the personal liberties of aliens, the state law frustrated this purpose.⁵⁹ Although the result is laudable, the displacement of state lawmaking authority was not based on Congress's intent to create a "complete system" or "harmonious

51. *Rice*, 331 U.S. at 230.

52. See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

53. *Freightliner*, 514 U.S. at 289 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

54. See Raeker-Jordan, *supra* note 11, at 1391.

[U]nder the doctrine as applied in *Rice*, once it is determined that state action would obstruct "federal purposes," Congress's intent to pre-empt magically becomes "clear and manifest." The result is pre-emption of the state law, *even if that law involves historic state police powers* and in spite of the caution against lightly inferring pre-emption of traditional state law domains. The effect of this approach is to eliminate any distinction between federal statutes that contain express language regarding the pre-emptive effect of the statute and statutes that contain no indication at all of Congress's pre-emptive intent.

Id.

55. 312 U.S. 52 (1941) (finding state alien registration act that imposed criminal sanctions on aliens without registration cards stood as obstacle to achieving purposes of federal Alien Registration Act, 1940, 8 U.S.C. §§ 451-460 (1940), one of which was to eliminate interception and interrogation of aliens by public officials).

56. *Id.* at 70.

57. *Id.* at 72.

58. *Id.* at 74.

59. *Id.*

whole,” but rather on the actual effect of the state law. The Court certainly considered the intent of Congress in its ruling, but Congress’s “harmonious whole” did not decide the case. Alternatively, it was the Court, fulfilling its familiar duty to resolve conflicts, that considered the application of state prerogatives in conflict with federal objectives.⁶⁰

In *Rice v. Santa Fe Elevator Corp.*,⁶¹ another milestone preemption case, the Court’s conflicting reasoning is similar. The Court stated that an interpretation of the federal law that would not preempt state laws respecting unreasonable rates maintained by a federal license-holder “has great plausibility. It preserves intact the federal system of warehouse regulation, leaves the State free to protect local interests, and strikes down state power only in case what the State does in fact dilutes or diminishes the federal program.”⁶² Nonetheless, the Court went on to say that such an interpretation “would thwart the federal policy.”⁶³ The considerations that served to override this plausible interpretation were 1) the congressional purpose to make its Warehouse Act “‘independent of any State legislation on the subject,’”⁶⁴ and 2) the belief that a warehouseman, having obtained a federal license and having complied with the federal requirements, “did all that he need do.”⁶⁵ As in *Hines*, the Court framed the inquiry as if it were deciding whether Congress had intended the particular result, when in reality it was the Court interpreting and applying congressional policy.

60. See *id.* at 75 (Stone, J., dissenting). Justice Stone stated:

[I]t is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted.

Id.

61. 331 U.S. 218 (1947). In *Rice*, the federal United States Warehouse Act, 7 U.S.C. §§ 241–273 (1940), governed federal licensing of warehousemen, and Illinois state law, the Illinois Public Utilities Act, 111 2/3 ILL. REV. STAT. §§ 1–95 (1945), and the Illinois Grain Warehouse Act, 114 ILL. REV. STAT. §§ 189–326a (1945), imposed state penalties on warehouses that maintained unreasonable rates. See *Rice*, 331 U.S. at 220–21. Section 6 of the original federal act incorporated a requirement of compliance with state regulations, but an amendment to that section stated that, with respect to federal licensing, the Secretary of Agriculture’s authority was exclusive. See *id.* at 224.

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

63. *Id.*

64. *Id.* at 234 (quoting H.R. REP. NO. 2314, at 4 (1929)).

65. *Id.* at 236.

Justice Kennedy commented on this anomaly in his concurrence in *Gade v. National Solid Wastes Management Ass'n*.⁶⁶ There, the majority of the Court reiterated the rule that, when analyzing a conflict between state and federal law, the conflict must have a direct and substantial effect on the federal law in order to preempt the state law.⁶⁷ Justice Kennedy disagreed, however, and argued that conflict preemption should not apply at all. After highlighting the importance of the Court's preemption precedent, Justice Kennedy pointed out that "[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that preempts state law."⁶⁸

Secondly, in addition to its confusing application of implied preemption principles, the Court has issued a series of conflicting opinions in recent cases about the scope of its implied preemption analysis regarding statutes with express preemption provisions. In *Cipollone v. Liggett Group*,⁶⁹ the majority of the Court adopted Justice Kennedy's position in *Gade*: If Congress includes a preemption clause in the statute, then ordinary statutory interpretation principles apply, and courts should not infer a broader preemptive scope based on principles of implied preemption. The Court stated:

In our opinion, the pre-emptive scope of the . . . Act is governed entirely by the express language in . . . [the] Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," . . . "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. . . . Therefore, we need only identify the domain expressly pre-empted by [the Act].⁷⁰

But in *Gade*, the majority of the Court approved of applying these broader principles of implied preemption analysis to situations where Congress has included an express preemption provision in the

66. 505 U.S. 88, 109-11 (1992) (Kennedy, J., concurring).

67. See *id.* at 107 (finding that state law directed at workplace safety had direct and substantial effect on safety standard set forth in OSHA); see also *English v. General Electric Co.*, 496 U.S. 72, 85 (1990) (stating that effect of state law tort claim was "neither direct nor substantial enough to place petitioner's claim in the pre-empted field").

68. *Gade*, 505 U.S. at 111. Interestingly, despite his desire to avoid a conflict preemption analysis, Justice Kennedy concurred in this opinion because he found the federal statute to preempt expressly based on "the language, structure, and purposes of the statute as a whole." *Id.* at 112.

69. 505 U.S. 504 (1992).

70. *Id.* at 517 (citations omitted).

statute at issue. This is because the “ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole,” even in the case of express preemption.⁷¹ Although the Court in *Cipollone* cautioned that express preemption must be applied narrowly so as to preserve state power,⁷² this seems to be an empty statement when all-encompassing implied preemption could be applied at the drop of a hat. While proclaiming that express preemption provisions themselves determine the extent of preemption, the Court in *Cipollone* used implied preemption analysis to supplement what it thought to be an ambiguous preemption provision. Thus, the Court found preemption when a narrower application of the same principle would have produced a different result. Consequently, courts are split on the issue of whether implied preemption analysis may be used to analyze statutes with express preemption provisions.⁷³

After *Cipollone*, the Court did not address its apparent break with precedent. In *Freightliner Corp. v. Myrick*,⁷⁴ however, the Court “clarified” that its position on express preemption provisions in *Cipollone* did not establish any firm rule with respect to the interpretation of express preemption provisions:

The fact that an express definition of the pre-emptive reach of a statute “implies”—*i.e.*, supports a reasonable inference—that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption. . . . At best, *Cipollone* supports an inference that an

71. *Gade*, 505 U.S. at 9; *see also* *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987) (interpreting express preemption provision of Clean Water Act as interpreted *not* to preempt state law at issue, yet state law was nonetheless preempted because it upset delicate balance achieved by federal regulation).

The Court recognized that the federal Clean Water Act had not occupied the entire field of water pollution regulation. Nonetheless, the Court concluded that by setting up an elaborate permit system for the discharge of polluting effluents, Congress had established a delicate balance that should not be upset by the application of Vermont law.

Wolfson, *supra* note 11, at 78.

72. Justice Scalia commented that:

The statute that says *anything* about pre-emption must say *everything*; and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power. If this is to be the law, surely only the most sporting of Congresses will dare to say anything about pre-emption.

Cipollone, 505 U.S. at 548 (Scalia, J., concurring in judgment in part and dissenting in part).

73. *See* *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1, 9 (Tex. 1998).

74. 514 U.S. 280 (1995).

express pre-emption clause forecloses implied pre-emption; it does not establish a rule.⁷⁵

In *Medtronic, Inc. v. Lohr*,⁷⁶ the same confusing scenario regarding the proper interpretation of express preemption provisions unfolded. Lora Lohr filed suit in state court for negligence and strict liability when her pacemaker failed.⁷⁷ Medtronic removed the case to federal court and asserted, in defense, that the express preemption provision of the Medical Device Amendments of 1976 (MDA)⁷⁸ preempted both of the state law claims. Although the Court interpreted this provision of the MDA to preempt “few, if any, common-law duties,”⁷⁹ the Court reached its conclusion first by analyzing the statute’s language, and then by examining the legislative history to find that “nothing in the hearings, the Committee Reports, or the debates suggest[s] that any proponent of the legislation intended a sweeping pre-emption of traditional common-law remedies against manufacturers and distributors of defective devices.”⁸⁰ For this reason, the Court concluded that this “silence surely indicates that at least some common-law claims against medical device manufacturers may be maintained after the enactment of the MDA.”⁸¹

The implication is that, in applying such contextual clues to an ambiguous preemption provision, the Court *could* find sweeping pre-emption based on the statements of committee members in a hearing. Following the same confusing approach as it did in *Cipollone* and *Myrick*, the Court in *Lohr* stated that express preemption is to be interpreted narrowly, but then went on to import “implied pre-emption principles into its express pre-emption analysis, and finally to acknowledg[e] that courts can venture beyond the express language to find implied pre-emption even in the face of express language and a failure under that language to find pre-emption.”⁸² Thus, although the Court notes all the presumptions against preemption, the Court does not apply these presumptions when an express preemption provision is ambiguous. Instead, ambiguous preemption provisions appear to un-

75. *Id.* at 288-89.

76. 518 U.S. 470 (1996).

77. *Id.* at 481. The pacemaker allegedly failed due to a defective lead. *See id.*

78. Medical Device Amendments of 1976, Pub. L. No. 94-295, 90 Stat. 539 (1976) (codified as amended in scattered sections of 21 U.S.C.). These amendments provide that states should not “establish or continue in effect . . . any requirement” that is different from federal law, or that “relates to the safety or effectiveness of [a medical] device.” 21 U.S.C. § 360k(a) (1976).

79. *Lohr*, 518 U.S. at 502.

80. *Id.* at 491.

81. *Id.*

82. Raeker-Jordan, *supra* note 11, at 1422.

leash the Court to look to the “settled” principles of implied preemption, including frustration of congressional purposes.

2. *Effects of Overzealous Implied Preemption*

As a direct consequence of the Court’s failure to make a clear statement about the scope and application of implied preemption in its modern preemption cases, courts utilize a broad implied preemption analysis even in cases where Congress includes an express preemption provision. Using this broad analysis, “frustration of congressional purposes, and therefore implied preemption,” is easy to conclude.⁸³ As a result, implied preemption is applied far more often than perhaps it should be.⁸⁴ The court-created “doctrine of field preemption, which in effect holds that a comprehensive scheme of federal regulation automatically rebuts the presumption of nonpreemption, similarly ignores alternative interpretations of congressional intent in a way that potentially distorts the outcome that would be reached by a fair and unmediated reading of the statute.”⁸⁵

There is a real danger that courts will rule that federal laws preempt state laws in cases never intended by Congress, thus leaving some areas unregulated. Indeed, this is exactly what has happened; whether expressly indicated or not, preemption is applied on such a broad scale that state laws are preempted when their preemption serves no federal interest.⁸⁶ For example, citing uniformity as its goal,

83. *Id.* at 1385.

84. *See id.* at 1381; *see also* Gardbaum, *supra* note 11, at 812 (suggesting that doctrine of field preemption, one form of implied preemption, “is over-inclusive because (a) Congress may intend that states be allowed to supplement federal regulation . . . , (b) Congress may not have considered whether or not to preempt, or (c) Congress may have considered preemption without reaching any conclusion”).

85. Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 *TEX. L. REV.* 795, 829-30 (1996). Gardbaum also has noted that:

[N]either conflict preemption nor field preemption is justified from the perspective of ordinary statutory interpretation used to determine what Congress has actually done. In fact, these two doctrines divert attention from actual intent. Both in effect establish a form of “implied-in-law” intent to preempt, which in some instances operates to “preempt” a fair reading of the statute.

Gardbaum, *supra* note 11, at 808. This is exactly what the dissenters in *Gade v. Nat’l Solid Wastes Management Ass’n* cautioned against. Reminding the majority of principles of statutory construction, Justice Souter, joined by Justices Blackmun, Stevens, and Thomas, wrote: “If the statute’s terms can be read sensibly not to have a preemptive effect, the presumption [against preemption] controls and no pre-emption may be inferred.” *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 116-17 (1992) (Souter, J., dissenting).

86. *See* Stabile, *supra* note 24, at 22 (“Instead of uniformity being evaluated as a potential federal interest justifying preemption in a particular case, it becomes the

Section 514 of the Employment Retirement Income Security Act of 1974 (ERISA)⁸⁷ purports to preempt state laws “relating to” employee benefit plans.⁸⁸ This clause, though apparently clear at the time of enactment, has arisen frequently in litigation in arguments for the preemption of state common law claims.⁸⁹ Courts interpreting this clause have applied it so far beyond Congress’s original intent that areas not targeted by ERISA end up being preempted.⁹⁰ Primarily concerned with employee pension plans, Congress provided for thorough regulation of the content of these plans through ERISA but did not regulate other health and welfare plans.⁹¹ As a result of the courts’ broad application of ERISA preemption, including applying it to health and

source of overbroad language that trumps state law even when no federal interest is served thereby.”).

87. Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001–1453 (1994). Enacted to address perceived employer abuse of private pension plans, ERISA regulates employee benefit plans such as pension plans, health plans, and welfare benefit plans. *See id.* § 1001.

88. ERISA’s preemption clause “supercede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” *Id.* § 1144(a). Congress’s goal was to ensure that employers would not be subject to “‘conflicting or inconsistent State and local regulation of employee benefit plans.’” *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 105 (1983) (holding state human rights law, which prohibited pregnancy discrimination, could not be applied to state benefit plan that accorded pregnant women fewer benefits) (quoting 120 CONG. REC. 29,933 (1974) (remarks of Sen. Williams)).

89. *See Stabile, supra* note 24, at 37. Stabile, however, puts the blame squarely on Congress’s shoulders for putting a broadly drafted express preemption provision in ERISA at all, arguing that Congress should have left the preemption issue to the courts. *See id.* at 22.

90. *See id.* at 25 (citing variety of state common law tort claims that courts have found to be preempted by ERISA). One scholar made the following comment:

In the decade since *Pilot Life Insurance Company v. Dedeaux* and *Metropolitan Life Insurance Company v. Taylor*, the Employment Retirement Income Security Act of 1974 (ERISA) has swept with extraordinary force across the field of state common laws regulating relationships between those who seek to collect health, life, disability, or other job-related benefits and those who either sponsor such benefits or play some role in deciding benefit claims.

Troy A. Price, *Preemption “Between the Poles:” ERISA’s Effect on State Common Law Actions Other than Benefit Claims*, 19 U. ARK. LITTLE ROCK L.J. 541, 541 (1997); *see also* Jolee Ann Hancock, *Diseased Federalism: State Health Care Laws Fall Prey to ERISA Preemption*, 25 CUMB. L. REV. 383, 393-402 (1995); Nicole Weisenborn, Note, *ERISA Preemption and Its Effect on State Health Reform*, 5 KAN. J.L. & PUB. POL’Y 147, 148 (1995) (describing some of Court’s expansive readings of ERISA’s preemption clause).

91. ERISA defines welfare plans to include “any plan, fund, or program maintained for the purpose of providing medical or other health benefits for employees or their beneficiaries ‘through the purchase of insurance or otherwise.’” Weisenborn, *supra* note 90, at 147 (quoting Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1002(1) (1988)).

welfare plans under the “relate to” language, the entire welfare context has been described as a “regulatory vacuum.”⁹²

ERISA is a prime example of how inclusion of an express preemption clause does little to limit the scope of preemption. The words “relate to” have been interpreted so broadly that, as the above case illustrates, state citizens are unable to sanction employers who deny benefits and then assert preemption as a defense.⁹³ This void has not gone unnoticed by the Court, however. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,⁹⁴ the Court indicated that the past approach to ERISA’s preemption clause

92. Stable, *supra* note 24, at 35. “[B]ecause ERISA does not regulate the substance of welfare plans and preempts states from doing so, the preemption clause has left a sizable regulatory void within which employers are virtually free to create and administer their welfare plans as they see fit.” Troy Paredes, Note, *Stop-Loss Insurance, State Regulation, and ERISA: Defining the Scope of Federal Preemption*, 34 HARV. J. ON LEGIS. 233, 239 (1997); see also Erik Nelson, Comment, *A Poststructural Analysis of the Power and Class Behind the Formalistic Application of ERISA Preemption of State Law*, 11 ST. THOMAS L. REV. 175, 179 (1998) (“Congress not only accomplished its goal of insulating ERISA plans from inconsistent state regulation, but also preempted the claims of many aggrieved plaintiffs who seek damages beyond the exclusive ERISA remedy of benefits to which they are entitled under the plan . . .”). See generally Paredes, *supra* (describing ways to structure welfare plans to minimize crippling effect of ERISA preemption on litigants). This is not to say that common law claims relating to pension plans central to ERISA’s purpose are not also needlessly preempted. See, e.g., *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (state law claim of wrongful termination preempted because employer’s discriminatory action was triggered by vesting of employee’s pension plan).

93. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987) (finding that ERISA preempted state law claim for denial of disability benefits from back injury sustained at work). In *Dedeaux*, the Court found that ERISA “clearly” indicated Congress’s intent to preempt employee welfare benefit plans. Because ERISA did not impose restrictions on these plans, however, the plaintiff in *Dedeaux* had no remedy. See *id.* Similar decisions have been handed down relating to other types of employee plans. See, e.g., *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992) (holding that ERISA preempts state law requiring certain benefits be available to those receiving workers’ compensation); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (preempting state law mandating minimum mental health benefits as applied to ERISA plans); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (holding that ERISA preempts state law requiring pregnancy to be included in disability plans). Scholars have expressed their concern with this situation:

Think back on any number of stories of health insurance atrocities: the Texas man whose employer was allowed to slash his AIDS coverage as he was dying of the disease; the retiree whose “lifetime” insurance was suddenly canceled; the woman with advanced breast cancer unfairly denied coverage for the only treatment that might save her life. All these cases have one unexpected thing in common: the monumentally boring, complex, far-reaching law called ERISA.

Nina Martin, *ERISA, The Law That Ate Health Care Reform*, CAL. LAW., May 1993, at 40, 41.

94. 514 U.S. 645 (1995).

had gotten out of hand.⁹⁵ Instead of focusing on the broad potential available under the “relate to” language, the Court purported to place more emphasis on principles of federalism and presumptions against preemption.⁹⁶ Just as in other preemption cases, however, the Court applied this rationale by reference to the aforementioned implied preemption principles, looking at whether the state law at hand squared with the object and purpose of the statute as a whole.⁹⁷ This being the case, the promise of *Travelers* may be an empty one. Even though the Court stressed limitations on ERISA preemption, these are the same illusory limitations it stressed in the preemption cases previously discussed.⁹⁸

E. *United States v. Locke and Crosby v. National Foreign Trade Council: The Court’s Answer to the Preemption Problem*

Recently, the Court decided two cases on preemption grounds, opening up the possibility of some resolution to the problems created by its past preemption decisions. Unfortunately, as the discussion below indicates, neither case sheds light on the extent to which congressional intent controls in cases of implied preemption or on the role implied preemption principles should play in express preemption cases.

95. *Id.* at 655. Specifically, the Court stated:

If “relate to” were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for “[r]eally, universally, relations stop nowhere.” But that, of course, would be to read Congress’s words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality. That said, we have to recognize that our prior attempt to construe the phrase “relate to” does not give us much help drawing the line here.

Id. (citation omitted).

96. *See id.*

97. *See id.* at 656; *see also* California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., 519 U.S. 316 (1997) (holding state wage regulation not preempted and engaging in analysis similar to that used in *Travelers*).

98. *See* Nelson, *supra* note 92, at 196 (describing Court’s treatment of ERISA preemption as one in which “the Court creates the appearance of deferring to Congress, while actually taking an active role in statutory development”). *But see* Paredes, *supra* note 92, at 275 (“The Court’s opinion [in *Travelers*] suggests that the presumption against preemption will play a more important role in future ERISA preemption cases, and that the Court will accordingly be more deferential to state law.”).

1. *United States v. Locke*

In 1967, a large oil spill off the coast of England alerted Congress and the State of Washington to the need for protective legislation.⁹⁹ Washington enacted the Pilotage Act,¹⁰⁰ and Congress enacted the Ports and Waterways Safety Act of 1972 (PWSA).¹⁰¹ In *Ray v. Atlantic Richfield Co.*,¹⁰² the Court declared many portions of the Pilotage Act invalid in light of the uniform national standards and comprehensive scheme sought by the PWSA.¹⁰³ Twenty years later, the oil spill near Prince William Sound, Alaska, by the *Exxon Valdez* not only released fifty-three million gallons of crude oil, but also spurred a vigorous movement for more protective state and federal legislation.¹⁰⁴ Washington created the Office of Marine Safety, which demanded that large oil tankers achieve the “best achievable protection” (BAP) against oil spills,¹⁰⁵ and Congress strengthened the PWSA with new provisions covering tanker liability for oil spills.¹⁰⁶ The validity of Washington’s more stringent requirements was immediately challenged in court against the backdrop of protests by intervening environmentalists. The International Association of Independent Tanker Owners (Intertanko), speaking for approximately eighty percent of the world’s independently owned tankers, claimed that the revised PWSA preempted the state regulations.¹⁰⁷

Although the district and appellate courts upheld the state regulations,¹⁰⁸ the Supreme Court reversed and remanded in *United States v. Locke* on the premise that *Ray* was still good law and that the “com-

99. *United States v. Locke*, 529 U.S. 89, 94 (2000). Washington’s Puget Sound is home to many endangered species of marine wildlife “of immense value to the Nation and to the world,” but it is also a major artery for oil tankers traveling to and from Tacoma, Washington and the port of Vancouver, British Columbia, Canada. *Id.* at 1141.

100. WASH. REV. CODE ANN. §§ 88.16.005–88.16.240 (West 1996).

101. Ports and Waterways Safety Act of 1972 (PWSA), Pub. L. No. 92-340, 86 Stat. 424 (1972) (codified as amended at 33 U.S.C. §§ 1221–1227 (Supp. V 1970), 46 U.S.C. § 391a (Supp. V 1970)).

102. 435 U.S. 151 (1978).

103. *See id.* at 158-68 (invalidating state law’s limitations on tanker size, tanker design, and construction rules).

104. *See Locke*, 529 U.S. at 94.

105. *Id.*

106. Oil Pollution Act of 1990 (OPA), 33 U.S.C. §§ 2701–2719 (1994); *see also Locke*, 529 U.S. at 97.

107. *Locke*, 529 U.S. at 97.

108. *Id.*; *see also* International Ass’n of Indep. Tanker Owners (Intertanko) v. Lowry, 947 F. Supp. 1484 (W.D. Wash. 1996). Under *Ray*, the appellate court did invalidate the one provision of the new law that required installation of certain navigation and towing equipment. *Locke*, 529 U.S. at 97; International Ass’n of Indep. Tanker Owners (Intertanko) v. Lowry, 148 F.3d 1053 (9th Cir. 1998).

prehensive federal regulatory scheme governing oil tankers” created by the PWSA preempted the regulations contested.¹⁰⁹ Additionally, the Court directed the lower court to consider on remand whether the PWSA also preempted other state regulations.¹¹⁰ Because of the extensive historical federal involvement in interstate navigation, the unanimous Court had little problem establishing the existence of a comprehensive federal scheme in maritime tanker law. Foremost, “embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution.”¹¹¹ Also, the pinnacle case of *Gibbons v. Ogden* involved operation standards for watercraft,¹¹² the first of many federal statutes, including the PWSA, enacted to regulate maritime tanker transports.¹¹³

With respect to specific conflicts between state and federal law, the Court reiterated its holding in *Ray* that, unless Washington’s additional regulations were due to peculiarities in its local waters, the comprehensive federal scheme completely preempts state regulations over the tankers and their crews.¹¹⁴ The Washington training and language proficiency requirements, navigation watch requirement, and duty to report marine casualties, however, were in no way peculiar to local waterways.¹¹⁵ The State attempted to rely on the savings clause in the 1990 amendments,¹¹⁶ but the Court rejected that argument for two reasons. First, statutory interpretation counseled that the intention of the savings clause was not to regulate tankers or their crews, but only to govern the state imposition of additional liability for oil spills.¹¹⁷ Second, giving the savings clause such a broad effect “would upset the careful regulatory scheme established by federal law.”¹¹⁸

With that statement, the Court embarked upon a discussion regarding the appellate court’s improper application of preemption prin-

109. *See Locke*, 529 U.S. at 94.

110. Since the United States did not participate in the case until appeal, the record before the Court was incomplete with respect to some of the challenged regulations. *See id.* at 116-17.

111. *Id.* at 99.

112. *See supra* text accompanying note 31.

113. *See Locke*, 529 U.S. at 99.

114. *See id.* at 109. (“Useful inquiries include whether the rule is justified by conditions unique to a particular port or waterway.”).

115. *See id.* at 114.

116. Title I of the 1990 Amendments to the PWSA, captioned “Oil Pollution Liability and Compensation,” includes a savings clause stating the Act does not preempt additional “liability or requirements” with respect to oil spills or pollution imposed by states. *Id.* at 102 (citing 33 U.S.C. § 2718(a) (1994)).

117. *See id.* at 104-05.

118. *Id.* at 106.

principles.¹¹⁹ Relying on *Rice*, the appellate court emphasized the need for a “clear and manifest purpose of Congress” to preempt,¹²⁰ but it failed to consider the qualifications placed on that statement and the “different approaches taken by the Court in various contexts.”¹²¹ The Supreme Court, on the other hand, placed great significance on the fact that *Rice* dealt with federal intrusion on traditional state areas. The Court explained that when the federal government newly enters a traditional state area, such action triggers the presumption against preemption, but when the state regulates an area in which the federal presence is significant, then this presumption is *not* triggered. In the case of maritime tanker regulation, where the federal presence is large, no presumption against preemption exists.¹²²

2. *Crosby v. National Foreign Trade Council*

The Court in *Locke* purported merely to correct the appellate court’s faulty interpretation of *Rice*, but in reality it introduced a major shift in preemption doctrine. The only hint the Court provided in previous cases that the presumption against preemption did not apply universally was when, after reciting the presumption, the Court seemed not to follow it.¹²³ Three months after the *Locke* decision, the Court decided another case on preemption grounds. In *Crosby v. National Foreign Trade Council*,¹²⁴ the Court had a chance to elaborate on current preemption doctrine but instead chose to gloss over its problems entirely.

In *Crosby*, the Court invalidated a Massachusetts law that penalized companies doing business with the country of Burma.¹²⁵ The appellate court had found the state law preempted by the federal Burma Act.¹²⁶ The Burma Act, the controversial and politically charged result of cooperative efforts of the legislative and executive branches, forbids all direct aid to Burma until the President notifies Congress that Burma has made significant improvements in democracy and human rights.¹²⁷ When Congress passed the Burma Act, just

119. *See id.* at 107.

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

121. *Id.*

122. *See id.* at 108 (“As *Rice* indicates, an ‘assumption’ of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence.”).

123. *See supra* Part I.C.

124. 530 U.S. 363 (2000).

125. *See* MASS. GEN. LAWS ch. 7 §§ 22G–22M, § 40F1/2 (1996).

126. *See* *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 52–55, 61–77 (1st Cir. 1999) (cited in *Crosby*, 530 U.S. at 371).

127. *Crosby*, 530 U.S. at 368.

three short months after the enactment of the Massachusetts law, the European Union, Japan, and the World Trade Organization lodged complaints with the United States and lent support to the parties challenging the Massachusetts law.¹²⁸ The Supreme Court affirmed the lower court rulings striking the Massachusetts law on preemption grounds because the state law presented an obstacle to the achievement of congressional objectives under the Burma Act.¹²⁹

The case for a conflict between the Massachusetts law and the Burma Act was a clear one. The Burma Act sought to 1) force the Burmese government to restore democracy and improve human rights practices via sanctions on all direct aid to Burma;¹³⁰ 2) give the President the authority to create additional sanctions such as forbidding business investment akin to the Massachusetts law;¹³¹ and 3) direct the President to develop a comprehensive multinational strategy aimed at achieving the statute's goals.¹³² The Court stated the conflict best in noting that "[t]he EU's opposition to the Massachusetts law has meant that US government high level discussions with EU officials often have focused not on what to do about Burma, but on what to do

128. *See id.* at 370, 383 & n.19.

129. *See id.* at 371, 388.

130. The Court noted that:

[The Act] bans all aid to the Burmese Government except for humanitarian assistance, counternarcotics efforts, and promotion of human rights and democracy. The statute instructs United States representatives to international financial institutions to vote against loans or other assistance to or for Burma, and it provides that no entry visa shall be issued to any Burmese government official unless required by treaty or to staff the Burmese mission to the United Nations.

Id. at 368 (citations omitted).

131. The Court described the Act as follows:

[The] Act authorizes the President to impose further sanctions He may prohibit "United States persons" from "new investment" in Burma, and shall do so if he determines and certifies to Congress that the Burmese Government has physically harmed, rearrested, or exiled Daw Aung San Suu Kyi (the opposition leader selected to receive the Nobel Peace Prize), or has committed "large-scale repression of or violence against the Democratic opposition."

Id. at 369.

132. The Court noted that:

[T]he statute directs the President to work to develop "a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." He is instructed to cooperate with members of the Association of Southeast Asian Nations (ASEAN) and with other countries having major trade and investment interests in Burma to devise such an approach, and to pursue the additional objective of fostering dialogue between the ruling State Law and Order Restoration Council (SLORC) and democratic opposition groups.

Id. (citations omitted).

about the Massachusetts Burma law,'"¹³³ thus clearly indicating that the Massachusetts law impeded the purpose of the federal law—to facilitate resolution of the political problems between the United States and Burma.

In its preemption analysis, however, the Court did not delve deeply into preemption doctrine. After introducing the two species of conflict preemption, Justice Souter, writing for the Court, said “[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.”¹³⁴ He went on to discuss both laws and their surrounding contexts in great detail, providing “evidence [that] in combination is more than sufficient to show that the state Act stands as an obstacle in addressing the congressional obligation to devise a comprehensive, multilateral strategy.”¹³⁵ Relegating all discussion regarding inconsistencies in preemption doctrine to the footnotes, the lack of clarity in the categories of implied preemption was glossed over,¹³⁶ as was the illusory nature of the presumption against preemption.¹³⁷

Although the majority did not address the categories of preemption, Justice Scalia’s concurrence, joined by Justice Thomas, highlights that not all members of the Court necessarily agree about the scope of implied preemption analysis. Justice Scalia lambasted the Court for, once again, going beyond the federal act to discuss the intent of legislators and sponsors, legislative history, and comments by executives and foreign officials as to the conflicting nature of the state law, when the conflict was “perfectly obvious on the face of the statute.”¹³⁸ The presumption against preemption, which until *Locke* had been the starting point for preemption analysis (together with the “touchstone” of congressional intent), functionally escaped Justice Souter’s opinion entirely. He wrote:

We leave for another day a consideration in this context of a presumption against preemption. Assuming, *arguendo*, that some presumption against preemption is appropriate, we conclude, based on our analysis below, that the state Act presents a sufficient obsta-

133. *Id.* at 384 (quoting Alan P. Larson, State and Local Sanctions: Remarks to the Council of State Governments 3 (Dec. 8, 1998)).

134. *Id.* at 373.

135. *Id.* at 374.

136. *Id.* at 372 n.6 (citing *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)) (“We recognize, of course, that the categories of preemption are not ‘rigidly distinct.’”).

137. *Id.* at 374 n.8.

138. *Id.* at 389 (Scalia, J., concurring).

cle to the full accomplishment of Congress's objectives under the federal Act to find it preempted.¹³⁹

United in its front against the Massachusetts Burma law, the Court presented preemption doctrine as if without problems. Rejecting the State's argument that by failing to expressly preempt state laws, Congress demonstrated implicit permission, the majority noted that "[a] failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply."¹⁴⁰ Needless to say, just because the Court presents preemption doctrine as if it were settled, that does not make it so.

II

FEDERALISM LEGISLATION AND ITS FATE

A. *Introduction*

Congressional will may be a touchstone, but it is also a scapegoat. Courts can easily make decisions based on what they thought Congress had intended—a course of action that absolves a court from the need to rely on its own principles of federalism. The courts' temptation to do this is easy to understand when one considers that, under our structure of government, if the federal government has any power at all to legislate in an area, then it may preempt that area completely. When differing or expanding applications of a federal law give rise to a question as to whether a particular state law was intended to be preempted, it may be easier to assume that Congress intended to extend the full arm of federal authority than to apply controversial concepts of federalism or constitutional law.¹⁴¹ The problem with this scheme is that it creates a huge accountability problem. For example, if Congress does not address the issue of preemption when it enacts a law (either via no expression of preemption, or an ambiguous preemption provision that may or may not apply in a particular case), but a court then resolves the problem by stating that Congress, in hindsight, would have preempted the state law under consideration, then the issue is never directly addressed. Thus, litigants cannot be fully heard because they are told it is all a matter of political will.

139. *Id.* at 374 n.8 (citations omitted).

140. *Id.* at 387-88.

141. See Wolfson, *supra* note 11, at 70 ("When it can do so, the Court usually bases its ruling on preemption rather than other constitutional provisions because preemption cases concern congressional intent, and therefore Congress can overturn the Court's interpretation if the Court is mistaken.").

As it stands, the Court places too much of the preemption doctrine problem on Congress's shoulders. Because the doctrine of preemption rests on courts' interpretations of congressional intent, Congress is effectively blamed for the problems of preemption and the confusion in preemption jurisprudence created by the courts.¹⁴² Furthermore, the "freewheeling judicial inquiry"¹⁴³ that Justice Kennedy warned about in *Gade* has now become reality through *Locke* and *Crosby*.¹⁴⁴ However, Congress is attempting to fix the mess with legislation. If congressional will is to be the touchstone of preemption analysis, then Congress wishes to make that will abundantly clear.

B. Federalism Legislation

In the past year, three bills relating to preemption have been introduced in the House and Senate. All three bills attempt to achieve a greater level of control over federal preemption of state laws by directly altering the courts' rules of construction in preemption cases and by demanding clear preemption statements from Congress and federal agencies. The Federalism Act¹⁴⁵ and the Federalism Accountability Act¹⁴⁶ set rigid requirements that Congress and federal agencies must meet in order to account for and justify the federal preemption of state laws. The Federalism Preservation Act¹⁴⁷ directs federal agencies to account for and justify their preempting rules, which may be based only on expressly preemptive statutes, but outlines no distinct mechanisms for agencies to follow.

1. Federalism Act and Federalism Accountability Act

The Federalism Accountability Act (FAA) and the Federalism Act (FA) have much in common and are quite complex. The meat of the FAA, the model for this analysis,¹⁴⁸ is contained in Sections 5, 6, and 7. Section 6 sets up the new rules of construction for preempting

142. For instance, Professor Stabile blames Congress entirely for the preemption problem because of its lack of clarity in preemption provisions. See generally Stabile, *supra* note 24.

143. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992).

144. One interpretation of these latest preemption decisions is that, in assuming an implied intent to preempt, absent indications to the contrary, the Court is deciding for Congress whether or not state law impedes federal objectives. See *supra* text accompanying notes 63-65.

145. Federalism Act of 1999, H.R. 2245, 106th Cong. (1999).

146. Federalism Accountability Act of 1999, S. 1214, 106th Cong. (1999).

147. Federalism Preservation Act of 1999, H.R. 2960, 106th Cong. (1999).

148. The two bills, in their operative sections, are virtually identical with the exception of a few words and phrases. Because the two bills are so similar and for the sake of simplicity this paper will analyze the bills using the Senate's Federalism Accounta-

statutes in the courts,¹⁴⁹ and Sections 5 and 7 set forth the guidelines Congress and federal agencies must follow when passing rules or laws having an impact on federalism concerns.¹⁵⁰

Section 6 attempts to give genuine effect to the Court's statement that Congress's intent to preempt must be "clear and manifest"¹⁵¹ before statutes are construed to preempt. Subsections (a) and (b) of Section 6 allow preemption *only* if the statute "explicitly states that such preemption is intended"¹⁵² or if there is a direct conflict between federal and state or local law "so that the two cannot be reconciled or consistently stand together."¹⁵³ Section 6(c) operates broadly to construe any ambiguity in the FAA or in any other federal law "in favor of preserving the authority of the States and the people."¹⁵⁴

Section 7 requires the head of each federal agency to designate an officer to manage implementation of the FAA and serve as a liaison between the agency and state and local officials.¹⁵⁵ The officer bears responsibility for consulting with public officials and governments that are potentially affected by any rule the agency intends to promulgate.¹⁵⁶ After this consultation, the agency must, if needed, prepare a "federalism assessment," evaluating the impact of the rule on state and

bility Act as a model, highlighting important differences in the House's Federalism Act in the footnotes.

149. See Federalism Accountability Act of 1999, S. 1214, 106th Cong. § 6 (1999).

150. See *id.* at §§ 5, 7. The corresponding sections of the Federalism Act are Sections 7, 8, and 9. Section 9 outlines the rules of construction; Section 7 outlines requirements for agencies; and Section 8 outlines the requirements for Congress. See Federalism Act of 1999, H.R. 2245, 106th Cong. §§ 7-9 (1999).

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

152. S. 1214 § 6(a)(1) ("No statute enacted after the effective date of this Act shall be construed to preempt, in whole or in part, any State or local government law, ordinance, or regulation, unless—(1) the statute explicitly states that such preemption is intended . . ."). The analogous section in the House counterpart is Section 9(a). See H.R. 2245 § 9(a).

153. S. 1214 § 6(a)(2). This also applies to rules via Section 6(b)(2) ("No rule . . . shall be construed to preempt . . . unless . . . there is a direct conflict between such rule and a State or local law, ordinance, or regulation so that the two cannot be reconciled or consistently stand together."). The analogous FA section is Section 9(b). See H.R. 2245 § 9(b); *cf.* Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 1987).

154. S. 1214 § 6(a)(2) ("Any ambiguities in this Act, or in any other law of the United States, shall be construed in favor of preserving the authority of the States and the people."); *cf.* Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 1987).

155. S. 1214 § 7(a)(2)(A) ("The head of each agency shall . . . designate an officer (to be known as the federalism officer) to . . . manage the implementation of this Act . . .").

156. *Id.* § 7(a)(2)(B) (stating that designated officer shall "serve as a liaison to State and local officials and their designated representatives"). Public officials include "elected State and local government officials and their representative organizations." *Id.* § 4(2).

local governments.¹⁵⁷ The federalism assessment is a statement of the degree to which the rule preempts any state or local government law, ordinance, or regulation. The federalism assessment must also include an explanation of the reasons for preemption, an explanation of the extent to which the rule regulates a traditionally state-regulated area, and a description of any significant impact the rule might have on state and local governments.¹⁵⁸ Lastly, the federalism assessment must account for any measures taken which may serve to minimize the impact on state and local governments, including alternatives considered and consultation with public officials.¹⁵⁹

Section 7 applies only to federal agencies, however, and the FAA requires no federalism assessment from Congress. Section 5 requires merely that congressional committee and conference reports be accompanied by “an explicit statement on the extent to which the bill or joint resolution preempts State or local government law, ordinance, or regulation and, if so, an explanation of the reasons for such preemption.”¹⁶⁰ The federalism statement¹⁶¹ must “include an analysis of the extent to which the bill or joint resolution legislates in an area of traditional State authority” and, if enacted, “the extent to which State or local government authority will be maintained.”¹⁶²

157. *Id.* § 7(b). The Senate bill provides:

Early in the process of developing a rule . . . the agency shall notify, consult with, and provide an opportunity for meaningful participation by public officials of governments that may potentially be affected by the rule for the purpose of identifying any preemption of State or local government authority or other significant federalism impacts that may result from issuance of the rule.

Id. The bill gives the federalism officer the authority to decide whether a federalism assessment is warranted. *Id.* § 7(c)(1) (“[S]uch officer shall identify each proposed, interim final, and final rule having a federalism impact . . . that warrants the preparation of a federalism assessment.”).

158. *Id.* § 7(d)(1)-(5).

159. *Id.* § 7(d)(4)-(5).

160. *Id.* § 5(a).

161. To avoid confusion, “federalism assessments” will refer only to agency requirements, and “federalism statements” will refer to the unlabeled congressional requirements under the bill. House Bill 2245 is somewhat confusing in that it terms the impact statements for both the federal agencies and Congress as “federalism impact assessments” despite imposing different requirements in each case. Both bills, regardless of the labels chosen, impose almost identical requirements on Congress and the agencies.

162. S. 1214 § 5(b)(1)-(2).

2. *The Federalism Preservation Act*

Introduced a few months after the FAA and the FA, the Federalism Preservation Act (FPA)¹⁶³ simply codifies President Reagan's 1987 federalism order.¹⁶⁴ Executive Order 12,612 requires federal agencies to consider the federalism impacts of their rules.¹⁶⁵ First, the Order lists several fundamental federalism principles intended to guide the agencies, including: 1) the idea that states are more competent to regulate local matters because they are closer to the people;¹⁶⁶ 2) the importance of diversity and of the states serving as "laboratories" for legal development;¹⁶⁷ and 3) the limited reach of the federal government and of the Tenth Amendment.¹⁶⁸ Second, the Order reminds agencies as policymakers that only problems national in scope, as opposed to "problems that are merely common to the States," are properly regulated by the federal government.¹⁶⁹ In the case of proposed policies with sufficient federalism implications, the agency federalism official must complete and submit a federalism assessment to the Office of Budget and Management with the policy.¹⁷⁰ The assessment must identify the extent to which the policy is "inconsistent" with the federalism criteria summarized above and any additional costs or burdens it will create for the states.¹⁷¹ Third, the Order directs that federal statutes should

preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evi-

163. Federalism Preservation Act of 1999, H.R. 2960, 106th Cong. (1999).

164. Essentially, the Federalism Accountability Act and Federalism Act, introduced before the FPA, were also codifying this order. *See Hearings, supra* note 25, at 355, 358-61 (statement of Ernest Gellhorn, Professor of Law, George Mason University).
165. Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 1987).

166. *See id.* § 2(e) ("In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. . . . [T]he States are 'the most competent administrations for our domestic concerns and the surest bulwarks against antirepublican tendencies.'").

167. *See id.* § 2(f) ("The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the . . . states according to their own conditions, needs, and desires. In the search for enlightened public policy, individual states and communities are free to experiment with a variety of approaches to public issues.").

168. *See id.* § 2(c)-(d) ("The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment [T]he States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.").

169. *Id.* § 3(b)(1).

170. *Id.* § 6(b)-(c).

171. *Id.* § 6(c)(2)-(3).

dence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.¹⁷²

Noncompliance with the Executive Order, however, did not come with corresponding sanctions. Accordingly, compliance with President Reagan's directive by federal regulatory agencies has been absolutely dismal.¹⁷³ Of the 11,414 final rules issued by federal agencies between April 1, 1996 and December 31, 1998, only *five* indicated the completion of a federalism assessment.¹⁷⁴ Of these 11,414 final rules, only twenty-six percent mentioned the Order at all in their preambles, and most of those were simple "boilerplate" certifications with little or no discussion of why the rule did not trigger the Executive Order's requirements."¹⁷⁵

This lack of comity, as it were, prompted state and local governments to seek legislation. However, the big push for "protection" against preemptive legislation came when President Clinton threatened to replace President Reagan's anemic order with another order even less protective of local interests.¹⁷⁶ Wishing to avert such

172. *Id.* § 4(a).

173. Executive Order 12,612, which, in combination with the Unfunded Mandates Reform Act of 1995 (UMRA), was intended to make federal rulemakers and legislators consider federalism issues, was a dismal failure. *See Hearings, supra* note 25, at 397-99 (statement of L. Nye Stevens, Director, Federal Management and Workforce Issues General Government Division, General Accounting Office (GAO)). Executive Order 12,612 was mentioned in the preambles of only 26% of 11,414 final rules issued between April of 1996 and December of 1998. The Department of Transportation, for example, mentioned the order in 60% of its 4,000 rules, but the Environmental Protection Agency did not mention it in any of its 1,900 rules. *Id.*

174. *Id.* at 399. *See also Hearings, supra* note 25, at 335 (statement of John M. Dorso, Chairman, Law and Justice Committee of the National Conference of State Legislatures).

175. *Hearings, supra* note 25, at 397-99 (statement of L. Nye Stevens, Director, Federal Management and Workforce Issues General Government Division, General Accounting Office (GAO)).

176. In actuality, President Clinton *did* supercede Reagan's Executive Order 12,612 with another less protective order. *See* Exec. Order No. 13,083, 63 Fed. Reg. 27,651, 27,653 (May 14, 1999). Due to complaints that the president failed to consult with the affected parties before issuing the order, however, he suspended it soon after its creation. *See Hearings, supra* note 25, at 396 (statement of L. Nye Stevens, Director, Federal Management and Workforce Issues General Government Division, General Accounting Office (GAO)) (explaining that President Clinton voluntarily suspended order when state and local government organizations complained). Thus, Executive Order 12,612 remained in effect.

Even though Executive Order 13,083 was suspended, it was clear even then that a similar executive order would soon take its place. *See H.R. 2245, The Federalism Act of 1999: Hearings Before the Subcomm. on Nat'l Econ. Growth, Natural Res., Regulatory Affairs of the House Comm. on Gov't Reform, 106th Cong. 13-14 (1999)*

consequences, state and local representatives approached Congress seeking permanent legislation to protect their interests.¹⁷⁷

The FPA, along with the FA and the FAA, was introduced and scheduled for hearings. Unlike its siblings, however, the FPA is very simple. The only substantive requirement of the FPA is the compliance requirement: "The head of each Federal department and agency shall ensure that each activity carried out by the department or agency, respectively, is carried out in accordance with the provisions of Executive Order 12,612, as in effect on October 26, 1987."¹⁷⁸

C. *The Implications of Federalism Legislation*

The federalism bills do take a significant step toward a solution of the "preemption problem." There is no doubt that requiring federal actors to think seriously about the impact of their legislation on state and local governments will encourage "mutual accountability between and among the various levels of government," and that such accountability "is essential to the vitality of our federalist form of government and is in harmony with the vision our forefathers had for this country."¹⁷⁹ If Congress passes such federalism legislation, the federalism

(statement of Chairman David M. McIntosh) [hereinafter McIntosh Statement]. Interestingly, the day after a Senate Committee approved the Federalism Accountability Act of 1999, President Clinton issued the foreshadowed order. It is not, however, much less protective than the prior order as was feared. See Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999). The order is actually remarkably similar to President Reagan's order. Although some of the wording is changed, this new order lists the same federalism policy-making criteria, and it even adds some explanatory phrases. See *id.* § 1(f) ("One-size-fits-all approaches to public policy problems can inhibit the creation of effective solutions to those problems."). The exact same language governs preemption presumptions in the Clinton order as in Reagan's order, and the new order requires certification of consultation with state and local officials in addition to the federalism summary impact statement. See *id.* § 6(b)(2)(B).

177. McIntosh Statement, *supra* note 176, at 14.

178. Federalism Preservation Act of 1999, H.R. 2960, 106th Cong. § 2(a) (1999). Furthermore, this act nullifies President Clinton's subsequent Executive Order on federalism. See Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999). In doing so, the Act reinstates President Reagan's 1987 order, previously nullified by President Clinton's first order. See Exec. Order No. 13,083, 63 Fed. Reg. 27,651 (May 14, 1999).

179. *Hearings*, *supra* note 25, at 347-48 (testimony of Alexander G. Fekete, National League of Cities). Speaking in support of the bills, Susan Parnas, Senior Legislative Counsel for the National League of Cities, stated that House Bill 2245 and Senate Bill 1214:

[W]ould give cities a much-needed voice in the rule-making and legislative processes, and would promote federal accountability by requiring that committee reports and proposed federal agency rules be accompanied by detailed federalism impact assessments. Furthermore, these two bills would free the federal courts, comprised of unelected judges, from the

assessment requirement will make legislators and agency officials craft preemptive statutes and regulations more carefully, and the rules of construction will aid in limiting cases of unintended preemption like those involving ERISA. These benefits, however, do not come without significant costs. Thus, in an effort to solve one problem, Congress could potentially create others.

1. Express Preemption Provisions and Rules of Construction Related to Preemption

All three legislative proposals, in one way or another, impose a requirement that Congress expressly state an intent to preempt. The FAA and FA require that courts refuse to construe statutes to preempt unless the statutes contain express preemption provisions, and the FPA requires the same with respect to agency rules and agency interpretation of federal statutes. If a statute does not have a preemption provision, then Congress did not intend preemption. By requiring express preemption provisions, Congress not only tells the courts that they can no longer rely on congressional intent in cases of implied preemption, but also sets rules for Congress's own operation. Thus, a requirement of an express preemptive statement by Congress would necessarily alter the current judicial presumptions that rely so heavily on implied intent.

The FAA and the FA go further, however, to include sections that explicitly direct the presumptions a court should make when interpreting potentially preemptive rules and statutes. Section 6 of the FAA and Section 9 of the FA expunge the legal fiction that congressional intent to preempt is clear and manifest when that intent is wholly implied. If intent to preempt state law is not expressly stated, under the FAA and FA a court should presume that Congress did not intend to preempt state law, and err in the direction of preserving state authority. Judicial deference to congressional purpose in the field of implied preemption would no longer exist. The bills' sponsors hope that this rule of construction will minimize instances of implied preemption,

murky work of determining Congress's intent towards the states when a law is ambiguous. In so doing, these bills instruct the courts to decide against preemption unless Congress has specifically stated in legislation its intent to preempt, or unless there is a direct conflict between federal and state or local law.

Susan M. Parnas, *The Religious Liberty Protection Act: The National League of Cities' Perspective*, 21 *CARDOZO L. REV.* 781, 782 (1999).

thus avoiding the “expensive and adversarial litigation” caused by ambiguous or nonexistent preemption provisions.¹⁸⁰

The next logical question, then, is whether this demand for express preemption is really the answer, or, conversely, if implied preemption is really as destructive as the bills’ sponsors would lead us to believe. There are several reasons to suggest that it is not. The first reason is that requiring express preemption provisions in all cases may not even be feasible, and will not necessarily add clarity to preemption analysis.¹⁸¹ As for implied preemption principles, introducing a paradigm shift into an already confusing area of law would most likely serve only to further confuse court rules on implied preemption, rather than minimize its use.

Clear express preemption provisions are not easy to create. As with any other law, “[d]etailed express preemption provisions may be prone to overinclusiveness, displacing state law where such displacement is not truly necessary, or underinclusiveness, undermining the effectiveness of federal law by failing to displace antithetical state law.”¹⁸² Furthermore, requiring “Congress to identify in advance every section of every bill that is intended to be pre-emptive . . . is not only unworkable in practice, but could . . . lead to too much pre-emption.”¹⁸³ Though many express preemption provisions have not operated to create a considerable legal battle,¹⁸⁴ the issues previously discussed demonstrate that expressly preemptive statutes will not necessarily produce better results.¹⁸⁵

By asking for clear and concise express preemption provisions, Congress assumes that such forethought is possible. In reality, Congress cannot provide for every possible application of a law, or pro-

180. Section 6 “should not be interpreted as a prohibition of preemption,” but instead is meant to “minimize instances where the intent to preempt is not clear—thus avoiding expensive and adversarial litigation by limiting a court’s ability to find that an implied preemption exists.” *Hearings, supra* note 25, at 350 (statement of Alexander G. Fekete, National League of Cities).

181. ERISA, for example, has an express preemption provision. *See supra* Part I.D.2.

182. Conrad & Wootton, *supra* note 17, at 9 (quoting Department of Justice). “Legislators will have to choose between making pre-emptive provisions hopelessly overbroad to cover all potentialities, or amending such provisions every time a new technology is developed or a new type of state law is passed. This is a prescription for substantial mischief.” *Id.* at 10.

183. *Id.* at 9.

184. Preemptive laws that have spawned the least litigation are those that 1) specifically identify the state law that is preempted; 2) specify a federal minimum; or 3) specify that preemption exists only in the case of a specific material conflicts. *See Stabile, supra* note 24, at 74-77.

185. *See id.* *See generally* Conrad & Wootton, *supra* note 17.

vide agencies with the tools needed to determine whether a statute does in fact authorize preemption, or to expressly justify their determination that it does.¹⁸⁶ Even if Congress is clear about preemption in a bill's legislative history, once a bill is passed into law it becomes an entity all its own; changes in the fabric of society and related legal doctrine can alter the meaning of a law already in force. When this change occurs, the judiciary is better equipped to analyze conflicts between state and federal law and to balance the effects of conflicts with principles of federalism because it is the role of the courts to judge the constitutionality of laws and apply current legal doctrine in light of changing social and legal situations.¹⁸⁷ Part of the allure of implied preemption doctrine is that it is supposed to give courts the "freedom to consider the existence and importance of legitimate state interests, and to balance those interests against Congress' purposes and objectives."¹⁸⁸

As the previous discussion shows, however, this kind of balancing is not happening.¹⁸⁹ Thus, the requirement that Congress expressly state when laws are to operate preemptorily could "apparently abolish the doctrine of field preemption":¹⁹⁰ There is no room for an implied congressional intent to preempt when that intent must be stated expressly. But this is not necessarily the case. Implied preemption may continue if it no longer rests on the foresight of Congress to preempt or not preempt in every conceivable situation.¹⁹¹ The federalism acts could ruin implied preemption doctrine only because the Court does not rest implied preemption on its own two legs: application of the statute in light of state law and established principles of federalism. The federalism legislation would require interpretation of statutes by means other than an implied congressional intent to preempt, an inquiry which is necessarily deferential and devoid of serious

186. It is also possible that Congress may believe a federalism impact assessment is unnecessary for a particular statute, while a court's later expansive reading of that statute renders the assessment necessary. Would such a situation violate the FAA and, if so, by which branch was it violated?

187. See *Stabile*, *supra* note 24, at 14-15.

188. *Id.* at 84.

189. Typically, when courts analyze preemption issues they concentrate only on congressional intent and not any balance of state and federalism issues. See *Wolfson*, *supra* note 11, at 88 (commenting that preemption cases more often rest on congressional intent than on federalism concerns).

190. *Hearings*, *supra* note 25, at 298 (statement of Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice).

191. The FAA, for example, *allows* for conflict preemption. See *supra* note 153 and accompanying text. As the previous discussion indicated, implied preemption is essentially a broad interpretation of conflict preemption: state regulations or provisions may conflict with federal provisions or with federal objectives. See *supra* Part I.D.

review. Without congressional intent to fall back on, analysis of express preemption provisions, as well as all other conflicts between federal and state law, would be forced to center on the effects of the law and its impact on principles of federalism. Thus, through federalism legislation, Congress could force the courts to place this inquiry where it belongs from a logical standpoint—as a balancing of state and federal interests.

This may be the positive outcome Congress seeks; however, requiring express preemption provisions is not the answer to weak implied preemption principles. The answer to weak implied preemption principles is strong ones. A law that seeks to circumvent a damaging judicial process cannot eliminate it, no matter how much federalism bill sponsors hope that their legislation will decrease the incidence of implied preemption. In fact, the Court may respond to the legislation, in part, by strengthening the difference between express and implied preemption via a separate litmus test. Most likely, this is what the latest preemption cases, *Locke* and *Crosby*, signify. The Court has drawn a line between cases of field preemption with significant federal involvement and areas of traditional state concern, noting that the analysis in each case is different. How different the analysis may become with subsequent cases is an open question, but the Court's treatment of its "dependable" implied preemption doctrine lends little credibility to the prediction that implied preemption will at all fall into disfavor, whether preemptive curbing legislation exists or not. Rather, the more likely outcome is that implied preemption may, in the wake of *Crosby* and *Locke*, eventually stand on its own two feet and become even stronger.

2. *Procedural Problems with Federalism Assessments*

Like the executive orders, all three bills require that Congress and federal agencies consider federalism interests before passing statutes or rules that may operate to curtail or preempt state legislative authority.¹⁹² The means by which the FAA and FA attempt to ensure that this meaningful inquiry occurs, however, is the federalism assessment, or "federalism impact assessment." The FPA, in its simplicity, requires the same sort of inquiry,¹⁹³ but it does not provide agencies attempting such an assessment with guidance or procedural aid.

192. The FAA and FA impose requirements on Congress directly, whereas the FPA imposes requirements on Congress indirectly via its directive to agencies to consider the preemptory effect of only expressly preemptive statutes. Thus, Congress must include express preemption provisions in all statutes regarding impact agencies.

193. See *supra* text accompanying note 170.

The procedural requirement of a federalism assessment would place significant burdens on Congress and federal agencies. The Budget Office voiced fears that the bill may have “unintended consequences” such as “burdening agency efforts to protect safety, health, and the environment by imposing new administrative requirements on their activities and by encouraging additional litigation” which would “divert scarce resources.”¹⁹⁴ Of course, proponents of the bill are quick to point out that “it is not our intent . . . in supporting S. 1214 to encourage frivolous litigation that would tie the federal agencies in knots,”¹⁹⁵ but such intent does not erase the possibility, even probability, that it will happen. Almost every single phrase of the proposed bills could conceivably spur litigation,¹⁹⁶ and there is no assurance that the bills would do anything more than require boilerplate federalism assessments by agencies and congressional committees already under stress due to scarce time and resources.¹⁹⁷

Through comparison with the National Environmental Policy Act (NEPA),¹⁹⁸ it becomes clear that the FAA may prove to be a stumbling block for new legislation and may sink agencies into costly litigation that makes the FAA’s demands even more impossible to meet. Passed in 1969, NEPA’s main purpose was to establish a continuing policy of environmental harmony.¹⁹⁹ The method by which NEPA sought to achieve this purpose was the Environmental Impact Statement (EIS). NEPA requires federal agencies to file a “detailed statement” with “every recommendation or report on proposals for

194. *Hearings*, *supra* note 25, at 292, 294 (statement of John T. Spotila, Administrator, Office of Information & Regulatory Affairs, Office of Management & Budget). Agencies are already under stress from many sources regarding the way in which they perform their functions. For instance, presidential executive orders have required that agency rules include cost-benefit and risk assessments, promote the President’s priorities, measure the impact of regulations on small businesses, and avoid adverse effects on family values. Agencies must also comply with the Paperwork Reduction Act of 1995, the Unfunded Mandates Reform Act of 1995, and the Small Business Regulatory Enforcement Fairness Act of 1996. *See id.* at 358-59 (statement of Ernest Gellhorn, Professor of Law, George Mason University).

195. *Id.* at 338 (statement of John M. Dorso, Chairman, Law and Justice Committee of the National Conference of State Legislatures).

196. Possible litigation-provoking phrases include “provide an opportunity,” “meaningful participation,” “federalism impact,” to name a few. *Id.* at 294-95 (statement of John T. Spotila, Administrator, Office of Information & Regulatory Affairs, Office of Management & Budget); *see also id.* at 361 (statement of Ernest Gellhorn, Professor of Law, George Mason University).

197. *See supra* text accompanying note 175.

198. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331-4332 (1994).

199. *See id.* § 4331(a) (declaring “that it is the continuing policy of the Federal Government . . . to create and maintain conditions under which man and nature can exist in productive harmony”).

legislation and other major federal actions significantly affecting the quality of the human environment.”²⁰⁰

Though the procedural requirements of NEPA are strict, in *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,²⁰¹ the Court concluded that NEPA contained *only* procedural requirements.²⁰² The Court stated that once an agency has made a decision subject to NEPA's procedural requirements, the “only role for a court is to insure that the agency has considered the environmental consequences.”²⁰³ Even relegated only to procedural requirements, NEPA has still spawned tremendous litigation over its requirements, such as what constitutes “proposals for legislation,”²⁰⁴ what constitutes “major federal action,”²⁰⁵ and the timing and scope of EIS preparation.²⁰⁶

The problems with NEPA are many, but it is debatable whether the environment would be better protected without NEPA. “[A]gencies know that they can take NEPA's goals rather lightly if they produce enough paperwork to satisfy NEPA procedures,”²⁰⁷ and NEPA plaintiffs (usually environmental groups) are discouraged from filing suits because of the minimal requirements imposed on agencies and the litigation costs associated with enforcing them.²⁰⁸ Despite these problems, NEPA has successfully made actors on the environment more accountable to the public and has helped to provide warnings about the “cumulative and secondary effects” of covered proposals on the environment.²⁰⁹ Interestingly, NEPA has been used successfully by environmental groups as a delay tactic: environmentalists are able to stall federal projects with major Environmental im-

200. *Id.* § 4332(C).

201. 444 U.S. 223 (1980).

202. *See id.* at 227.

203. *Id.*

204. *Andrus v. Sierra Club*, 442 U.S. 347, 361 (1979) (holding that requests by agencies for congressional appropriations do not constitute proposals for legislation within meaning of NEPA's EIS requirement).

205. *See, e.g., United States v. S. Fla. Water Mgmt. Dist.*, 28 F.3d 1563, 1573 (11th Cir. 1994) (government participation in negotiation and settlement agreement did not trigger federal action under NEPA); *Public Citizen v. United States Trade Rep.*, 5 F.3d 549, 552 (D.C. Cir. 1993) (holding that EIS is limited to those cases in which president has final constitutional or statutory responsibility for final step required before agency action directly affects parties); *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1243-44 (D.C. Cir. 1980) (holding that inaction is not federal action).

206. *See Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976) (holding that agency only needs to prepare EIS when agency actually proposes action, not when it is merely considering formulating possible proposals).

207. Michael C. Blumm, *The National Environmental Policy Act at Twenty: A Preface*, 20 ENVTL. L. 447, 452 (1990).

208. *See id.* at 453.

209. *Id.* at 453, 455.

plications for failing to comply with the procedures of NEPA, meanwhile mounting a political campaign to oppose the project.²¹⁰

Federalism assessments under the FAA, FA, or even the FPA could also prove useful as procedural delay tactics, but the federalism acts, unlike NEPA, are all intended to encompass substantive requirements as well. Federalism assessments could be attacked for failure to give sufficient weight to federalism concerns, even if all the procedural requirements are met. The federalism acts' requirements have even greater potential to tie agencies and congressional committees in knots than those of NEPA. Should one or more of the federalism acts also be construed to impose only procedural requirements,²¹¹ however, the potential for litigation would be lessened only slightly.²¹² Furthermore, without the positive secondary effects of NEPA caused by delay of environmentally damaging projects, the federalism bills could be doomed to miserable failure. The same potential for delay exists with federalism assessments or statements, but in the case of federalism, stalling important congressional bills would not necessarily lead to a positive outcome for any party. The federalism bills could stall important, beneficial legislation on a variety of subjects.

The FPA was introduced after hearings on the FAA and FA in both houses revealed the need for revision to curb a possible repeat of NEPA's history, but it is not certain that the FPA will avoid a similar fate.²¹³ In requiring a statement of federalism impact, the FPA does not spell out any particular procedures to be used, but the very lack of specific procedures could spawn litigation over what the FPA's federalism statement requires. Also, there is no assurance that the federalism statements required by the FPA will not end up as mountains of boilerplate paperwork, as has happened with the few agencies that have complied with the executive order it emulates.²¹⁴ Though the

210. In many cases, without any delay, environmentally damaging projects would be completed, and thus the damage would be done before a political campaign could gain enough momentum to be effective.

211. This interpretation is quite possible, as the FAA would require that agencies consider federalism impacts, just as NEPA requires that agencies consider environmental impacts. *Compare* Federalism Accountability Act of 1999, S. 1214, 106th Cong. § 7(d) (1999), *with* National Environmental Policy Act, 42 U.S.C. § 4332(C) (1988).

212. For example, the greatest potential for litigation does not rest with the substantive interpretation of the FAA, but rather with the exact procedures each phrase entails and whether or not a given situation is covered under the FAA.

213. Ernest Gellhorn testified to the Senate that the current version of the FAA could spawn a great deal of litigation. His testimony prompted further amendments to the FAA and the introduction of the much simpler FPA. *See Hearings, supra* note 25, at 355 (statement of Ernest Gellhorn, Professor of Law, George Mason University).

214. *See* discussion *supra* Part II.B.

FPA avoids, by not specifying procedures, the procedural problems of the FAA and the FA, this very lack of specific procedures reduces its potential effectiveness.

3. *Invalidity Based on Federalism Principles*

Even without the problems of excess litigation and possible ineffectiveness, the very premise of a “federalism law” is wrought with problems. The basic function of these bills is to correct what Congress feels is an incorrect application of preemption principles—principles created by and applied by the courts. In addition to making a statement about the proper interpretation of preemption provisions and preemption doctrine, the federalism bills also make a strong statement about the proper balance between the federal and state governments. The fact that preemption doctrine rests heavily on congressional intent lends some legitimacy to the proposal, but it does not erase the possibility that the Court may, ironically, invalidate either of the federalism bills under principles of federalism. This section will examine whether federalism legislation “fits” within the Court’s modern federalism jurisprudence and whether the Court will permit such a strong federalism statement on the part of Congress.

The modern trend has been to take federalism constraints seriously. Rather than being an empty rhetorical argument supporting mythical federalism values, today’s federalism doctrine has the potential to exert real limitations on federal legislation. Early federalism doctrine considered the Constitution to be a real limitation on the territorial jurisdiction of the federal government, such that purely local concerns were simply not reachable by Congress. After the New Deal expansion of congressional power, however, this viewpoint became out of date, replaced by the current idea that the political process operates to control Congressional infringement on state authority.²¹⁵ Although states do have some political power by which to influence Congress, history has proven that their power was not enough to adequately protect their interests. Modern federalism doctrine recognizes this limitation, imposing a model whose primary purpose is to protect the autonomy of state processes.²¹⁶ But modern federalism doctrine

215. The process theory was argued by the Court in *Garcia*, and supported by commentary from Herbert Wechsler. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554-56 (1985); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544-45 (1954).

216. Federalism constraints and a nationalized economy are distinctly at odds, and modern federalism doctrine tries to reconcile those two interests. By protecting the autonomous processes of state government, modern federalism doctrine presents a

does nothing to limit federal power as territorial federalism did before it: this is not a reversion to the strict federalism constraints of earlier in this century.²¹⁷ Justice O'Connor's "process federalism"²¹⁸ doctrine looks favorably on, and even encourages, an expanded national legislative power.²¹⁹ Even under this new model of process federalism, however, the Court has invalidated, based on improper means, many federal statutes that previously seemed well within congressional power, means, and ends.²²⁰

The federalism bills seek to promote federalism values and meaningful review of preempting rules and statutes under federalism principles. Citing traditional federalism values, proponents of the federalism legislation claim that increased preemption inhibits state experimentation.²²¹ While uniformity of legislation is a laudable goal, our federalist system is intended to allow voters to choose among competing state jurisdictions. Because courts do not consider these issues when reviewing preemptive legislation,²²² the federalism bills wish to force these considerations by Congress and by the courts reviewing subsequent legislation. The political process theory of federalism completely overlooked the burdens placed on state innovation

stumbling block to nationalization. See H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 638-39 (1993).

217. See William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139, 153 (1998) ("[There is concern] that a revitalization of judicial enforcement of federalism could return the Court to its pre-1930s regime in which critical national legislation was invalidated on federalism grounds."); see also Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1324 (1999) (suggesting that recent federalism decisions do not operate to deny Congress any power, but simply make that power more difficult to exercise). Similarly, federalism legislation may impede national legislation, but only indirectly by adding additional hoops through which Congress must jump before passing legislation, and by adding procedural requirements to which agencies must adhere when passing rules with federalism impacts.

218. This autonomy of process federalism was argued by O'Connor, who persuaded the Court to join her view of federalism in *New York v. United States*, 514 U.S. 549 (1995) and *Lopez v. United States*, 505 U.S. 144 (1992).

219. See Friedman, *supra* note 11, at 355 ("For all its talk of deferring to state police regulations that provide nonprotectionist benefits to the state, in recent decisions the Court looks more toward ensuring national uniformity, a quite different approach and one far more devastating to state regulatory authority.").

220. The Court, in the last term, invalidated the Age Discrimination in Employment Act as exceeding congressional authority. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000); see also *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating Violence Against Women Act for reasons similar to those used in *Kimel*).

221. See Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 529 (1995).

222. See discussion *supra* Part I.

by federalization,²²³ however, and this burden remains with modern federalism doctrine.²²⁴ Additionally, Congress typically does not consider federalism concerns when passing legislation. Thus, “whether a matter will be federalized depends entirely upon its attractiveness, as a substantive political issue, to federal officeholders. At best, the federalism argument will enter the debate only as a secondary rhetorical point.”²²⁵

There is an argument that federalism concerns have never adequately protected federalism interests, because:

The doctrine lacks a coherent vision of when national authority or state authority should be exercised, as well as a clear understanding of the true worth of federalism. Instead, the doctrine is a set of indeterminate, largely incoherent rules that by and large permit ad hoc decisions by judges.²²⁶

Commentators have scorned applications of federalism principles for advancing just about every interest but federalism,²²⁷ even declaring the impossibility of an authentic federalism doctrine.²²⁸ Professor Cross concluded, based on empirical research, that “[t]he decision-making pattern makes clear that justices are, in general, influenced more by the ideological posture of the case at hand than by any interest in deferring to state courts.”²²⁹ The most important addition the federalism legislation makes to federalism doctrine is its attempt to

223. “The Court in [*Mississippi, Garcia, and South Carolina*] expressed a tolerance for burdens on state governments that would seem to undermine the states’ capacity for responsiveness, innovation, and so forth.” Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court’s “Unsteady Path”: A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1464-65 (1995).

224. Federalism values of “decentralization, participatory democracy, experimentation, diffusion of power, regulatory competition, and . . . ‘accountability’ . . . do not support a claim to exclusive state power over any particular field of legislation.” Neuman, *supra* note 2, at 1636-37 (citations omitted).

225. Marshall, *supra* note 217, at 144.

226. Friedman, *supra* note 11, at 324.

227. “The Court’s decisions about federalism rarely do more than offer slogans about the importance of autonomous state governments.” Chemerinsky, *supra* note 221, at 501. “[F]ederalism has been primarily a conservative argument used to resist progressive federal efforts, especially in the areas of civil rights and social welfare.” *Id.* In the 19th century it was used to retard judicial intervention with the slavery system. In the early 20th century it was used against federal child labor laws, minimum wage laws, and consumer protection laws. In the 1950s and the 1960s it was used to oppose civil rights laws. *Id.* at 499-500.

228. “An authentic and strong federalism doctrine is probably conceivable only in theory. . . . [T]he federal courts will never actually establish a principled doctrine of federalism that materially restrains federal power.” Cross, *supra* note 217, at 1313.

229. *Id.* at 1312.

give substance to these federalism values by way of concrete requirements that limit the use of ideological decision-making by judges.

Despite the appropriateness of Congress's goal of enhancing statements on federalism and federalism values, the Court may nonetheless consider the rules of construction and express preemption requirement an inappropriate means for Congress to employ in the wake of the Court's recent decision in *City of Boerne v. Flores*.²³⁰ In *Boerne*, the Court invalidated the Religious Freedom Restoration Act (RFRA) because Congress had usurped its power under the Enforcement Clause of the Fourteenth Amendment by challenging the Court's interpretation of the substantive protection of the Free Exercise Clause of the First Amendment.²³¹ In *Boerne*,

the Court referred to Congress's "right" and "duty to make its own informed judgment on the meaning and force of the Constitution," but only "[w]hen Congress acts within its sphere of power and responsibilities." The Court did not give any weight to the fact that Congress appeared to have decided that it *was* acting within that sphere.²³²

Like RFRA, the federalism legislation proposes a congressional interpretation of federalism and preemption that is drastically different than the Court's. This is not to say that Congress's interpretation of these doctrines is inadvisable or even wrong. Indeed, it is possible that the federalism legislation may ameliorate the confusion posed by preemption doctrine and give substance to the hollow claims of federalism. But Congress *is* making exactly the kind of statement that was disfavored in *Boerne*. Moreover, *Boerne* involved, through RFRA, a congressional interpretation of the Free Exercise Clause that was not only plausible, but had even been advocated by the four concurring or dissenting Justices in *Employment Division v. Smith*.²³³ Nonetheless, the majority showed no deference to a congressional interpretation of the substantive guarantees of the Free Exercise Clause.

The difference between preemption doctrine and the issue posed in *Boerne* is that in this case preemption doctrine is based on Congress's intent. Necessarily, then, preemption doctrine shows a star-

230. 521 U.S. 507 (1997).

231. "Congress enacted RFRA in direct response to the Court's decision in [*Smith*]" where the Court refused to apply the compelling governmental interest test to a law forbidding peyote use which impinged on the practice of members of the Native American Church. *Id.* at 512-14.

232. Tushnet, *supra* note 2, at 85-86 (alterations in original) (citation omitted).

233. *See Boerne*, 521 U.S. at 514 (citing *Employment Div. v. Smith*, 494 U.S. 872, 894 (1990)); *see also* Neuman, *supra* note 2, at 1641 n.86 (noting that Justices O'Connor, Breyer, and Souter argued for re-examination of *Smith* in *Boerne*).

ting deference to Congress. This is quite the opposite in the case of legislation protecting Fourteenth Amendment guarantees, where the Court has time and again seen itself as the bastion of Equal Protection jurisprudence. With that in mind, the Court would be right to distinguish the self-imposed procedural limitation of the proposed legislation and substantive legislation enforcing a congressional interpretation of individual rights that surpasses that of the Court. Furthermore, though the Court has “the authority and responsibility to review congressional attempts to alter the federal balance,”²³⁴ it is also true that “Congress does have substantial discretion and control over the federal balance.”²³⁵ The structure of our government as three separate branches was meant to ensure that important concerns, such as the federal-state balance, were not left to one branch alone.²³⁶

To the extent Congress is making a statement about the federal-state balance, this is well within Congress’s sphere of influence. The federalism acts do more than this, however. In addition to making adjustments to its own operation, Congress tells the courts how to review federal legislation. Congress may mandate that its intent be taken a certain way, but it cannot use that as a tool to mandate a particular interpretation of legal doctrine. Even though congressional intent plays a role in preemption analysis, so do important principles of federalism and the Supremacy Clause of the Constitution. Under *Marbury v. Madison*,²³⁷ “[i]t is emphatically the province and duty of the judicial department to say what the law is” and that includes an instance when “two laws conflict with each other, [where] the courts must decide on the operation of each.”²³⁸ *Boerne* reemphasizes this fundamental tenet of legal interpretation: Congress cannot be the final word on the constitutional law or legal interpretation. Viewed in this light, all three acts, in their reorganization of preemption doctrine, violate this fundamental principle.

CONCLUSION

Preemption is an insult to state autonomy: States are either told that they cannot regulate at all, or that they must regulate in a specific way. Senate testimony cited both the increasing incidence of preemption as barring states “from legislating in policy areas of great impor-

234. *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring).

235. *Id.* at 577.

236. *See id.* at 575-78.

237. 5 U.S. (1 Cranch) 137 (1803).

238. *Id.* at 177.

tance,”²³⁹ and the manner in which preemption jeopardizes funds from state taxes, state banking laws, and state securities laws.²⁴⁰ Moreover, via regulatory requirements, the cost of many of these preempting federal laws is passed on to the states and their citizens.²⁴¹ Naturally, state and local governments want to curb the incidence of preemption. Though implied preemption is wrought with problems in a doctrinal sense, when combined with these political cues the destructive nature of implied preemption becomes more real. As this discussion shows, however, the solution to these political and legal problems is not congressional legislation on federalism.

239. *Hearings, supra* note 25, at 326 (statement of John M. Dorso, Chairman, Law and Justice Committee of the National Conference of State Legislatures).

240. *See Hearings, supra* note 25, at 314-21 (statement of Governor Thomas R. Carper, Chairman, National Governors’ Association).

241. “The cost of federal regulation on the economy is estimated as exceeding half a trillion dollars annually. Much of this cost is borne by state and local governments.” *Hearings, supra* note 25, at 355 (statement of Ernest Gellhorn, Professor of Law, George Mason University). *But see* CLYDE WAYNE CREWS JR., COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL POLICYMAKER’S SNAPSHOT OF THE FEDERAL REGULATORY STATE 1, 10-11 (1999) (noting that most of \$754 billion burden imposed in 1998 by federal government to “police the regulatory state” was absorbed by public and that average family of four spends extra 20% of its after-tax income on these hidden regulatory expenses), *available at* <http://www.cei.org/PDFs/tenthou99.pdf>.

