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# Congress's Power to Preempt the States

Stephen Gardbaum\*

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## I. INTRODUCTION

In *The Nature of Preemption*<sup>1</sup> and *Rethinking Constitutional Federalism*,<sup>2</sup> published in 1994 and 1996 respectively, I thought I had written everything I had to say about the topic of preemption. Rereading subsequent cases and academic commentary in preparation for this symposium, however, convinced me both that this thought was premature and that part of what I had already said might perhaps bear, if not repeating, reformulation.

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\* Professor of Law, UCLA School of Law. This Article is a substantially expanded version of my presentation at the Pepperdine University School of Law Symposium on Federal Preemption of State Tort Law, held on April 9, 2005. I would like to thank Dean Kenneth Starr for his gracious hospitality during the symposium, fellow panelists and participants for stimulating discussion, Courtney Lang, Pepperdine Law Review Symposium Editor, for superb organization, and Kevin Gerson, reference librarian at the UCLA School of Law Library, for excellent research assistance.

1. Stephen Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994).

2. Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEXAS L. REV. 795 (1996).

Preemption remains a notorious doctrinal labyrinth and will, in my view, continue to do so until its conceptual and constitutional foundations have been given more attention. In particular, what must be more widely appreciated are the following: (1) that preemption and supremacy are separate and distinct concepts; (2) that although both involve the displacement of state law, they displace different types of state law and do so in different ways; (3) that consequently, the Supremacy Clause is largely a red herring in preemption analysis; and (4) that the key issues are the nature, source, and limits of Congress's power to preempt the states. In other words, the law of preemption is not only about interpreting what Congress has done, but also includes threshold conceptual and constitutional issues about what it has the power to do. This neglected dimension must be moved to center stage if preemption doctrine is to have a coherent and principled framework.

In this Article, I will build upon my earlier work<sup>3</sup> to explain and justify the four above claims and to propose such a framework. The result of my analysis is a radical simplification of preemption law. Congress has the power to preempt the states but can only do so expressly; there is no such thing as implied preemption. Where Congress has not spoken directly to the issue of preemption in the statutory text, there is no second set of principles—implied preemption—permitting courts to infer preemption from the nuances of congressional silence, as at present. In the final section, I illustrate the practical workings of my recast preemption doctrine by applying it to the leading cases of recent years.

## II. PREEMPTION AND SUPREMACY

Supremacy and preemption are distinct constitutional concepts, each of which regulates the relationship between concurrent federal and state powers in a different way.<sup>4</sup> Although both may be said to result in the displacement of state law, failure to distinguish them (either at all or properly) has had serious consequences for the law of preemption.<sup>5</sup>

Supremacy is an attribute of federal law, specifying its hierarchical status vis-à-vis state law. It is, moreover, an attribute that automatically or inherently attaches to all federal law by virtue of the Supremacy Clause<sup>6</sup> and, like other such attributes—for example, being the law of the land

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3. In addition to the two articles cited *supra* in notes 1 and 2, see also Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997); Stephen Gardbaum, *Preemption*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1989 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

4. Gardbaum, *supra* note 1, at 770.

5. *See id.* at 807-15.

6. U.S. CONST. art. VI, cl. 2, which states that:

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.*

directly upon enactment without need for state implementation—is not something that Congress can either bestow or change.<sup>7</sup> Supremacy means that in the case of a conflict between federal and state law, federal law trumps or displaces the conflicting state law.

Preemption, by contrast, is a power of Congress rather than an automatic characteristic of federal law. Like all powers of Congress, it is discretionary and so may or may not be exercised.<sup>8</sup> Moreover, Congress's power of preemption, when exercised to the full, has a far more radical impact on state law than the automatic characteristic of federal supremacy.<sup>9</sup> This is so for two reasons. First, by exercising its power of preemption, Congress can displace state law even where the latter is *not* in conflict with federal law.<sup>10</sup> For example, Congress may choose to preempt state cigarette labeling requirements that are identical to federal ones. *Ex hypothesi*, such state laws are not displaced by the mere supremacy of federal law.

Second, by exercising its preemption power, Congress may not only displace particular non-conflicting state laws but redistribute general legislative competence between itself and the states.<sup>11</sup> It may convert concurrent federal and state power over a given regulatory area into exclusive federal power; that is, to deprive the states of their preexisting concurrent legislative authority, in whole or in part. Thus, for example, Congress may choose to preempt all (existing and future) state law in the area of cigarette liability, leaving federal law as the only enforceable law in the field. Once again, the mere supremacy of federal law by itself does no such thing.

Accordingly, whereas supremacy means the displacement of conflicting state law, preemption means the displacement of non-conflicting state law and/or concurrent state authority in a given field. Preemption is not needed to—and does not—displace state laws the contents of which conflict with valid federal laws; they are automatically displaced by the operation of the Supremacy Clause. Thus, although *both* supremacy and preemption displace (or supercede) state law, they operate to displace *different types* of state law and do so by the *different mechanisms* of automatic consequence and discretionary power respectively. The general failure to recognize that there are two different ways in which state law may be displaced, as evidenced by

7. Gardbaum, *supra* note 1, at 773 (indicating that “[u]nlike preemption, which is a matter of legislative will, supremacy is inherently a judicial matter.”).

8. *Id.*

9. *Id.* at 771.

10. As Justice Oliver Wendell Holmes succinctly put it in response to the state's argument that its law was not in conflict with the federal law: “When Congress has taken the particular subject-matter in hand, coincidence of a state statute is as ineffective as opposition . . .” *Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597 (1915).

11. Gardbaum, *supra* note 1, at 771 (stating that “[w]hen states lose their concurrent lawmaking powers through preemption by Congress . . . [they] no longer [have] power to legislate at all in the given area.”).

generic use of the term “preemption,”<sup>12</sup> is a major cause of conceptual and doctrinal confusion. This is most obviously (but not exclusively) the case with the doctrinal category of “conflict preemption.”<sup>13</sup>

It might be helpful here to give another concrete example of the difference between supremacy and preemption, one based on last term’s controversial medical marijuana case.<sup>14</sup> Once the Court had upheld Congress’s regulation of marijuana for personal use as a valid exercise of its commerce clause power,<sup>15</sup> the case was then governed by the principle of federal supremacy automatically attaching to the federal Controlled Substances Act (hereinafter “CSA”).<sup>16</sup> To the extent, and only to the extent, that the rules of law contained in California’s Compassionate Use Act of 1996 conflict with the rules of law contained in the CSA, the former are displaced by the latter. Specifically, the state rules permitting doctors to prescribe marijuana in circumstances forbidden by the CSA are displaced and unenforceable because of federal supremacy. This automatic characteristic of federal law has no application at all to parts of the state law not in conflict with the CSA, and California retains full concurrent legislative authority to amend its rules and requirements in any way it chooses that avoids the conflict. In the course of enacting the CSA, Congress did not choose to exercise its power of preemption, which it would have needed (or still needs) to do to alter these two latter propositions: that is, to displace either particular non-conflicting state rules or general state authority on the subject altogether. In other words, notwithstanding the displacement of state law that has taken place, *Gonzales v. Raich* is a case involving supremacy and not preemption.

Finally, the difference between preemption and supremacy as mechanisms for displacing state law is reflected in how courts assess their application. When the issue of supremacy comes into play, a court must answer two questions: first, what do the federal and state laws each say; and second, how do they fit together? To answer this second question, the court must look at and compare the contents of *both* the federal law and the state law to see if their terms conflict with each other. This task obviously cannot be done by considering only the federal law. This point is, of course, true of all supremacy/conflict issues, of which federal-state conflicts are one instance. A second instance is the supremacy of the Constitution over a conflicting federal statute, established in *Marbury v. Madison*,<sup>17</sup> which

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12. For a recent, but entirely unexceptional, example of this conflation in the academic literature, see Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225 n.3 (2000) (stating that “[i]n this Article, I use the term ‘preemption’ to refer to the displacement of state law by federal statutes (or by courts seeking to fill gaps in federal statutes).”; see also *id.* at 251 (stating that “[t]he doctrine of preemption. . . [is] the displacement of state law by federal law. . .”).

13. See Gardbaum, *supra* note 1, at 808-10.

14. *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

15. *Id.* at 2219.

16. *Id.* at 2212. This may change if and when the relevant provisions of the CSA are challenged as violating a constitutional right to palliative care under the Fifth Amendment’s Due Process Clause. See generally *Raich*, 125 S. Ct. at 2200 (noting that the respondent raised a Due Process claim which, because it was not reached by the lower court, the Court did not address).

17. *Marbury v. Madison*, 5 U.S. 137 (1803).

requires (as famously and rhetorically described by Marshall) putting both texts alongside each other and comparing their contents.<sup>18</sup> This is not true of preemption, however. To take the clearest and most paradigmatic case, the only law relevant to an adjudicating court when Congress enacts an express preemption provision is the federal law, and the only question it has to answer is the interpretive one of what Congress has said on the extent to which it has exercised its power. There is no second, comparative question involving the content of state law.<sup>19</sup> This fact is itself further illustration of the point that preemption, unlike supremacy, is not centrally about conflicts between federal and state laws.

### III. THE OVERSTATED ROLE OF THE SUPREMACY CLAUSE IN PREEMPTION ANALYSIS

In my previous work on this subject, I have tried to hack a path out of the preemption thickets by showing that the role of the Supremacy Clause—which embodies the principle of supremacy—is far less central to the issue of preemption than courts and commentators universally assume or claim.<sup>20</sup> This is so for two connected reasons. First, as I have just explained, the concept of preemption (unlike the concept of supremacy) is not essentially about conflicts between federal and state laws, but about displacing non-conflicting state laws and/or concurrent state authority. Second, contrary to

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18. A third supremacy/conflict issue is whether a later federal statute conflicts with, and thereby impliedly repeals, an earlier one. On the history of this issue and the original understanding of the legislative use of “notwithstanding” or “*non obstante*” provisions in this context see Nelson, *supra* note 12, at 235-44.

19. Of course, once a court has completed its preemption analysis, state law may be relevant to the outcome of the case to the extent it is not preempted. But, unlike in the case of supremacy, state law is not relevant to the issue of preemption itself. Two representative cases illustrating this difference in application are *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824), one of the Supreme Court’s earliest supremacy cases, and *Medtronic Inc. v. Lohr*, 518 U.S. 470 (1996), a modern express preemption case. In *Gibbons*, having first found Congress’s 1793 statute a valid exercise of its Commerce Clause power, Chief Justice Marshall then turned to the second, comparative question:

the Court will enter upon the inquiry, whether the laws of New-York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist . . . the acts of New-York must yield to the laws of Congress . . . .

*Gibbons*, 22 U.S. (9 Wheat.) at 210.

In *Medtronic*, by contrast, the Court gave no consideration whatsoever to the content of any state law. The preemption issue posed in the case—whether and to what extent state common law claims were preempted by the express preemption provision of Congress’s Medical Device Amendments of 1976—was answered exclusively by interpreting that provision. *Medtronic*, 518 U.S. at 502-03.

20. Gardbaum, *supra* note 1, at 769-773.

the entrenched orthodoxy,<sup>21</sup> Congress's power of preemption does not derive from the Supremacy Clause.<sup>22</sup>

I believe I have made some headway with this second reason, but little with the first.<sup>23</sup> Even here, however, those accepting my argument about the constitutional source of preemption have not proceeded to engage the issue or its significance, but have moved on quickly, back into the doctrine, by either simply assuming congressional power to preempt or stipulating an alternative source.<sup>24</sup> As a result, the conventional view that preemption is all about conflict, and hence about the Supremacy Clause, retains its hegemony.<sup>25</sup> So although in recent years certain academic commentators

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21. For examples of the orthodoxy, see *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (stating that “[b]ut under the Supremacy Clause, from which our pre-emption doctrine is derived . . .”); Kathleen M. Sullivan & Gerald Gunther, *CONSTITUTIONAL LAW* 324 (15th ed. 2004) (noting that “[w]hen Congress exercises a granted power, the federal law may supersede the state law and preempt state authority, because of the operation of the Supremacy Clause of Art. VI.”).

22. See Gardbaum, *supra* note 1, at 773-77.

23. See, e.g., Nelson, *supra* note 12, at 234 n.32. Professor Nelson explains that:

Stephen Gardbaum has criticized the Court and commentators for tracing preemption to the Supremacy Clause. As Professor Gardbaum properly observes, the Clause does not expand the areas that Congress may legitimately regulate; in order to have any preemptive effect, federal statutes must be authorized . . . by something else in the Constitution.

*Id.* (internal citations omitted); see also Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2088 (2000) (explaining that “it is critically important to note the Supremacy Clause itself does not authorize Congress to preempt state laws.”).

24. Immediately following the sentence quoted in the previous footnote, Professor Nelson continues as follows: “Still assuming that a particular preemption clause is within Congress’s power to enact, the Supremacy Clause is the reason that the clause has its intended effect; it is the Supremacy Clause that requires courts to ignore whatever state laws a valid preemption clause covers.” See Nelson, *supra* note 12, at 234 n.32 (emphasis added). (As I will explain in *infra* note 31 and accompanying text, although the Supremacy Clause operates as a reason that state law is displaced, in the case of preemption it is not the *primary* or most important reason—unlike in the case of supremacy). Throughout his article, Professor Nelson avoids the issue of the source of Congress’s power of preemption by repeating this (or a similar conditional) construction. So, for example, he states that “[i]f Congress has the constitutional power to occupy a particular field, a federal statute may do so either expressly or by implication.” *Id.* at 263. And elsewhere, he writes that “[t]he simple fact is that if a federal statute establishes a rule, and if the Constitution grants Congress the power to establish that rule, then the rule preempts whatever state law it contradicts.” *Id.* at 264 (emphasis added).

The only affirmative discussion of source in Professor Dinh’s article contains no explanation or justification of the power, but only what “must” be the case if the power exists:

The power to preempt state law, if one exists, must be found elsewhere in the Constitution [than the Supremacy Clause], most logically in the affirmative grants of power to Congress under Article I, Section 8. Therefore, should Congress legislate pursuant to its power, say, to regulate interstate commerce and further include a provision expressly preempting certain state laws, the authority for the preemption provision must come from either the Commerce Clause alone or perhaps the Commerce Clause with a helping hand from the Necessary and Proper Clause . . . . The power to preempt, therefore, is necessarily pendant on some enumerated power to regulate under Article I, Section 8.

See Dinh, *supra* note 23, at 2090-91.

25. Professor Nelson’s entire article is expressly premised on the proposition that proper historical and textual understanding of the Supremacy Clause is the key to preemption analysis. More specifically, he states that “[r]ecognizing that *preemption is all about contradiction* [as we should] would tend to rein in the potential breadth of ‘implied’ preemption.” Nelson, *supra* note 12, at 304 (emphasis added). In the same vein, he states that “once we recognize that *all preemption cases are about contradiction between state and federal law*, we should begin to question the

have proposed lopping a head or two off the hydra-like monster of preemption doctrine,<sup>26</sup> it is this continuing hegemony that protects its heart. Surgery at a more foundational level is required if the monster is ever to be truly tamed. Accordingly, let me here attempt to reformulate my alternative paradigm in a way that will perhaps be more persuasive.

It is undoubtedly true that if Congress exercises its power of preemption, then state laws in conflict with this exercise are trumped under the Supremacy Clause. So, for example, if Congress chooses to enact a law that deprives the states of all regulatory authority in the field of automobile safety standards, then any particular state automobile standard relied on by a plaintiff in a lawsuit will be in conflict with the federal law and trumped by the automatic operation of the Supremacy Clause.<sup>27</sup> *It is true but relatively trivial* from the perspective of understanding and analyzing Congress's power of preemption. For this very same fact is true of *any* congressional power and not only preemption: a state law in conflict with a valid exercise of an enumerated power is trumped because of the supremacy automatically attaching to the federal law. Thus, as we have seen, in exercising its power to regulate interstate commerce in the medical marijuana case—even without also exercising its preemption power—the Supremacy Clause operates to trump the conflicting state law.<sup>28</sup> But no one thinks, nor would think based on this example, that the Supremacy Clause plays an essential and critical role in understanding the nature, scope, and limits of Congress's Commerce Clause power. Rather, supremacy is simply a background principle that automatically operates and attaches to the enactment of any federal law. In their various and ingenious attempts to establish the scope of Congress's commerce power over the years, courts and commentators have spent no time on the background principle of supremacy, and rightly so.

usefulness of dividing them into the separate analytical categories of 'express' preemption, 'field' preemption, and 'conflict' preemption". *Id.* at 262 (emphasis added); *see also* Dinh, *supra* note 23, at 2091 n.36:

Such a [preemption] provision has preemptive effect only to the extent that the Supremacy Clause gives it precedence over conflicting state laws – in other words, state laws that seek to be valid within the scope prescribed by the preemption provision. *Express preemption, therefore, is only a special case of true conflict preemption – that is, a special case of supremacy.*

(emphasis added).

26. *See, e.g.,* Nelson, *supra* note 12, at 265-76, 290-98 (rejecting (1) the doctrine of obstacle preemption as contrary to the historical understanding of the analogous issue of when one statute impliedly repeals another, and (2) the presumption against preemption as inconsistent with the historical understanding of the *non obstante* provision in the Supremacy Clause); Dinh, *supra* note 23, at 2088 (challenging the modern presumption against preemption as inconsistent with the constitutional structure of federalism).

27. This is an example of a second-order or "jurisdictional conflict"—a conflict between Congress's enactment that states may not regulate a given area and the state law regulating that same area—as distinct from a first-order or "substantive conflict" between federal and state laws. *See* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1177 (3d ed. 2000); *see also* Gardbaum, *supra* note 1, at 773-77.

28. *See* *Gonzales v. Raich*, 125 S. Ct. 2195, 2201 (2005).



Precisely the same should be true of Congress's power of preemption. To focus on the relatively trivial and commonplace *effect* of the exercise of this power (that all state laws in conflict with its exercise will be trumped under the Supremacy Clause) and to ignore or bypass the power itself, as the orthodox position continues to do, is as myopic in the case of preemption as it would clearly be seen to be with any of Congress's other powers.

Indeed, it is *more* myopic because what distinguishes the power of preemption from Congress's other enumerated powers is precisely that preemption is the power to displace (non-conflicting) state laws and concurrent state authority. In the above automobile example, it is the exercise of the preemption power itself that is primarily and importantly responsible for displacing state law, and not the resulting conflict between that exercise and state law. Whatever technical "bit part" the Supremacy Clause plays, it is preemption that is the star, doing the real work of displacing.<sup>29</sup> Accordingly, just as with Congress's other powers, it is the source, scope, and limits of Congress's power of preemption that should engage us as a threshold matter. In short, the foundational issues about preemption (as distinct from supremacy) have as little to do with the Supremacy Clause and its operation as does Congress's commerce power or taxing powers.

To summarize: supremacy is all about conflict.<sup>30</sup> Conflict between federal and state laws is the only reason that state laws are displaced under the principle of supremacy. By contrast, preemption is *not* all about conflict between federal and state laws, but is primarily about a congressional power and its exercise. It is the exercise of this power that is the *major* reason state law is displaced—because Congress has said so—and not the existence of the resulting conflict.<sup>31</sup> Accordingly, what is central to preemption analysis and doctrine is not conflict, not the Supremacy Clause, but the nature, source, and limits of Congress's power of preemption.

#### IV. THE OPTIONAL NATURE OF CONGRESS'S PREEMPTION POWER

Before embarking on the necessary but missing analysis of Congress's power of preemption, it is important to frame it properly by understanding that there is nothing inevitable, either in theory or in practice, about granting a power of preemption to the central government in a federal system. There are at least three other possibilities. The first is to allocate legislative powers

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29. Imagine for a moment that there were no Supremacy Clause in the Constitution. With respect to Congress's other enumerated powers, a court would have no textual direction whatsoever on how to resolve a conflict between federal and state laws; there would simply be a substantive federal rule and a substantive state rule, as in *Raich* (the medical marijuana case). But given Congress's power of preemption, and assuming a valid exercise thereof, a court would have clear direction from the very nature of this enumerated power that displacement of state law was expected and intended.

30. See discussion *supra* Part II.

31. Here, I am explaining my disagreement with Professor Nelson's position that "preemption is all about contradiction," and the sense in which I disagree with him that in preemption cases, "the Supremacy Clause is the reason" why state law is displaced. See *supra* note 24.

between federal and state governments on an exclusive basis. That is, those powers granted to the state governments are granted to them exclusively, as are those granted to the federal government. This avoids a power of preemption because preemption regulates and redistributes concurrent federal and state powers only, and *ex hypothesi*, there are none.<sup>32</sup> The U.S. Supreme Court flirted with this structure during the period of so-called “dual federalism” in the nineteenth century but definitively abandoned it during the New Deal.<sup>33</sup> Within modern federal systems, Canada comes closest to this model in that its constitution lists fifteen “Classes of Subjects” in which the provincial legislatures have exclusive power to enact legislation and thirty areas in which the federal Parliament has exclusive legislative power.<sup>34</sup> There are, however, in addition, three express areas of concurrent federal and provincial power.<sup>35</sup>

The second alternative to a central power of preemption within a federal system is to leave concurrent federal and state powers to be regulated only by the principle of supremacy. That is, state law within an area of concurrent power is displaced if and only if it conflicts with substantive provisions of federal law. In this scenario, particular non-conflicting state laws are immune from federal displacement and states always retain general concurrent legislative authority. As a result, they can choose to amend their laws to avoid any conflicts. As I have argued elsewhere, this structure of federalism was generally in place in the United States (apart, that is, from the periods of flirtation with “dual federalism”) from 1789 until approximately 1912.<sup>36</sup>

The third and final alternative to a federal legislative power of preemption is a system in which concurrent state powers automatically terminate within a given area if and when the federal legislature exercises its concurrent power in that same area. This alternative, in other words, converts preemption from a discretionary power of the federal entity into an automatic characteristic of federal law, much as I have explained that

32. It similarly avoids the principle of supremacy because, absent concurrent powers, there cannot be a conflict between otherwise valid federal and state laws.

33. The “flirtation” with dual federalism revolved primarily around the positive and negative aspects of the Commerce Clause. Thus, under its dormant Commerce Clause jurisprudence, the Supreme Court sometimes suggested that Congress’s power over *interstate* commerce was exclusive, while under its Commerce Clause jurisprudence the Court suggested that state power over *intrastate* commerce was exclusive. This ended during the New Deal, when federal and state power over both interstate and intrastate commerce was in effect recognized as concurrent. See Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, *supra* note 3, at 506-532; see also Sally Fairfax, *Old Recipes for New Federalism*, 12 ENVTL. L. 945, 952 (1982) (stating that “[d]ual federalism ‘passed’ during the period of the Depression and World War II” mainly because of the New Deal policies).

34. CONSTITUTION ACT, 1867, 30 & 31 Vict. Ch. 3, (U.K.) §§ 91-92.

35. These areas are pensions, agriculture, and immigration. See *id.* §§ 94A, 95.

36. See Gardbaum, *supra* note 1, at 787-800.

supremacy is in the U.S. system.<sup>37</sup> Rather than granting the states fully concurrent powers subject to the principle of supremacy and the power of preemption, therefore, this alternative grants them “first mover” authority subject to the automatic latent exclusivity of federal law. Here, preemption is an automatic characteristic and consequence of federal action, and not a discretionary one at the instance of the federal legislature. Again, I have argued elsewhere that this alternative system was in place in the United States between approximately 1912 and 1933, when it was replaced by the current structure of concurrency, supremacy, and the discretionary congressional power of preemption.<sup>38</sup> Comparatively, Article 72(1) of the Basic Law enshrines this mechanism as the method for regulating concurrent powers in the Federal Republic of Germany.<sup>39</sup>

## V. THE SOURCE OF CONGRESS’S PREEMPTION POWER

Within the reigning paradigm that I am challenging, the only issue to be determined is whether, and to what extent, Congress has exercised its preemption power—and the content of preemption law is the set of interpretive rules that are used to determine this issue. I have argued above that this is to overlook the important conceptual and constitutional dimension of preemption, which concerns the nature, source and limits of this power. Moreover, a proper understanding of these issues is the necessary foundation for a coherent preemption doctrine to be constructed. In Parts II to IV above, I have provided my explanation of the nature of Congress’s power of preemption, so let me now turn in this section to the source of this power and in the next, to its limits.

Like all powers of Congress, the power of preemption must be an enumerated one. As I have explained in full elsewhere and mentioned briefly above, the power of preemption does not and cannot derive from the Supremacy Clause.<sup>40</sup> In a nutshell, in terms of the two types of displacement of state law, the Supremacy Clause is the source only of the (lesser) principle of supremacy and not the (greater) power of preemption. Indeed, the Supremacy Clause does not purport to grant *any* powers but rather supplies the rule for resolving conflicts resulting from exercise of concurrent federal powers granted elsewhere in the Constitution. Put another way, the Supremacy Clause resolves conflicts between valid federal and state laws but it does not determine whether a federal law is valid – a federal law preempting the states or any other. The answer to this issue,

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37. This alternative does not, of course, change the *meaning* of preemption, which is that non-conflicting state laws and/or general concurrent state authority are displaced by federal law. It simply changes the mechanism for bringing this displacement into effect, from a discretionary power of the legislature to an automatic attribute of federal law.

38. See Gardbaum, *supra* note 1, at 801-08.

39. Article 72(1) states: “[o]n matters within the concurrent legislative power [of the Federation], the Länder [(States)] shall have power to legislate so long as and to the extent that the Federation has not exercised its . . . [right to legislate].” Grundgesetz für die Bundesrepublik Deutschland [GG] [German Basic Law] May 23, 1949.

40. See Gardbaum, *supra* note 1, at 773-77.

with preemption as with any of Congress's powers, depends on the source, scope and limits of the relevant power. In short, if Congress has the power of preemption, its source is not the Supremacy Clause.

Once we turn to Congress's enumerated powers listed in Article I or elsewhere in the Constitution, there is obviously no express power of preemption. Moreover, all of Congress's other powers are entirely workable and plausible without a power of preemption: if the valid exercise of any results in a conflict with state laws, the latter are displaced because of the supremacy that inherently attaches to the former.<sup>41</sup> As we have seen in the medical marijuana example, this is as true of Congress's Commerce Clause power as of any other: by enacting the CSA to regulate interstate commerce in dangerous drugs, any and all state laws—such as California's Compassionate Use Act—in conflict with its terms are displaced because of the CSA's inherent supremacy. Why then might preemption be needed at all? Why, when it is regulating interstate commerce, for example, might Congress want in addition to displace non-conflicting state laws and/or continuing concurrent state authority (which are, of course, not covered by the principle of supremacy)?

The answer to this question suggests the constitutional justification and source of the power. Sometimes, for the effective regulation of interstate commerce in a particular good or class of goods (or for the effective exercise of any of its enumerated powers), Congress will judge it necessary to have a single, uniform set of rules rather than multiple sets of actually or potentially non-conflicting state rules. The fact that in some situations preemption (and not merely supremacy) may be necessary as a means for the effective exercise of one of Congress's enumerated ends exactly states the canonic understanding and purpose of the Necessary and Proper Clause.<sup>42</sup> For this enumerated power of Congress is indeed the proper and best source of Congress's power of preemption.

Why isn't the Commerce Clause itself the source of Congress's power of preemption? Why isn't preemption just an instance of regulating interstate commerce, simply a form that such regulation may take? I have answered this at length elsewhere,<sup>43</sup> but for the present, let me add a few things to what I have previously said. It is not that it is incoherent or impossible to think of the preemption power in this way, just as it is not incoherent or implausible to think that, say, banning the possession of guns

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41. See discussion *supra* Part IV (explaining the second alternative to a federal power of preemption).

42. The Necessary and Proper Clause states: "[The Congress shall have Power] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

43. See Gardbaum, *supra* note 1, at 777-81; Gardbaum, *supra* note 2, at 803-07.

near schools is an instance of regulating interstate commerce.<sup>44</sup> In the realm of constitutional justification, the task is to determine the best or most plausible argument in light of the factors that typically determine the correctness of propositions of constitutional law. In the context of *McCulloch v. Maryland*,<sup>45</sup> it could no doubt have been similarly argued that establishing a Bank of the United States was a regulation of interstate commerce rather than a means deemed necessary for such regulation. And yet that argument was not accepted, nor even obviously made, in *McCulloch* itself and the case remains as the paradigmatic instance of the use by Congress of its Necessary and Proper power.

Lest it be thought that this point about *McCulloch* rests on an anachronistically limited view of the commerce power, or of interpreting Congress's enumerated powers more generally, it is important to note that the very same paradigm was used by the Court to expand this precise power during the New Deal. As the Court itself made crystal clear at the time (and as Justices O'Connor and Scalia together with a few academic commentators have more recently observed),<sup>46</sup> the expansion of Congress's commerce power was premised not on the Commerce Clause itself but on the *McCulloch* interpretation of the Necessary and Proper Clause.<sup>47</sup> The New Deal Court explicitly held that regulating local, intrastate conduct is not itself a regulation of interstate commerce but is sometimes judged by Congress to be a necessary means for the effective regulation of what is interstate commerce.<sup>48</sup> Thus, in *Wickard v. Filburn*,<sup>49</sup> growing wheat for home consumption was not interstate commerce, nor even commerce of any sort. Rather, its aggregate effect of reducing demand was such that regulation became, in Congress's judgment, necessary for the effective

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44. I am here, of course, referring to *United States v. Lopez*, 514 U.S. 549 (1995), in which the Court held that this ban did not amount to a regulation of interstate commerce.

45. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

46. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584-85 (1985) (O'Connor, J., dissenting) (explaining that it is through the Necessary and Proper Clause that "an intrastate activity 'affecting' interstate commerce can be reached through the commerce power"); see also *Gonzales v. Raich*, 125 S. Ct. 2195, 2216 (2005) (Scalia, J., concurring) (noting that "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."). Among academic commentators, see DAVID E. ENGDahl, CONSTITUTIONAL FEDERALISM IN A NUTSHELL 31 (2d ed. 1987); MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 52-53 (1995); see also Gardbaum, *supra* note 2, at 807-11.

47. See *United States v. Darby*, 312 U.S. 100, 118-19 (1941). The Court explains in *Darby* that The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

*Id.* (citing *McCulloch*, 17 U.S. at 421); see also *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (quoting the same passage from *McCulloch* and citing *Darby*); *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (quoting Chief Justice Stone's opinion in *Wrightwood Dairy Co.*, 315 U.S. at 119).

48. See *Wickard*, 317 U.S. at 124-25.

49. *Id.* at 127-28.

regulation of the interstate market for wheat.<sup>50</sup> If *direct* congressional regulation of intrastate commerce is properly understood not as an exercise of the Commerce Clause power but of the Necessary and Proper Clause, then so too should the more *indirect* route of ending state power to regulate intrastate commerce; that is, preemption.

Finally, let me briefly inject a comparative dimension into the argument. Recall two other possibilities for the allocation of legislative powers in a federal system from the previous section: (1) concurrency plus supremacy alone, with no power of preemption, and (2) concurrency and automatic preemption upon the exercise of federal power. Federal constitutions everywhere typically grant the central government express power to regulate interstate commerce,<sup>51</sup> but it is an open and separate question whether and how they also grant a power of preemption—an analytically and practically distinct power. In Germany, for example, an express commerce power is combined with (a) the absence of a necessary and proper clause or other implied powers provision<sup>52</sup> and (b) express provision for automatic preemption.<sup>53</sup> These textual similarities and differences at least suggest the plausibility of the Necessary and Proper Clause as the source of the discretionary preemption power in the United States.

## VI. THE LIMITS OF CONGRESS'S PREEMPTION POWER

Preemption is one of Congress's enumerated powers albeit, as I have argued, a part of its enumerated implied powers under the Necessary and Proper Clause. As an inherent and automatic feature of federal law, supremacy operates whether Congress says so or not. By contrast, as a discretionary power of Congress, preemption operates only if Congress says so.<sup>54</sup> Is there anything specific to this power that conditions how Congress says so? Is it sufficient, for example, for Congress to exercise this power impliedly or must it do so expressly? What other limits, if any, do either the

50. *Id.*

51. For example, the Canadian Constitution grants exclusive legislative power to the federal parliament over the "Regulation of Trade and Commerce." CONSTITUTION ACT, 1867, 30 & 31 Vict. Ch. 3, (U.K.) § 91(2). The Australian Constitution includes among the enumerated powers granted to the federal government, "Trade and commerce with other countries, and among the States." AUSTL. CONST. § 51(i). The German Basic Law grants concurrent power to the federal government over "the law relating to economic affairs (mining, industry, energy, crafts, trades, commerce, banking, stock exchanges, and private insurance)" and to "labor law." Grundgesetz für die Bundesrepublik Deutschland [GG] [German Basic Law] May 23, 1949, art. 74, cl. 11-12.

52. As I will discuss in *infra* Part VI, the nearest thing in Germany is Article 72(2) of the German Basic Law. However, unlike the Necessary and Proper Clause in the United States Constitution, this is not a grant of implied powers but rather a general limit on expressly granted concurrent powers. See discussion *supra* note 39 and accompanying text.

53. Grundgesetz für die Bundesrepublik Deutschland [GG] [German Basic Law] May 23, 1949, art. 72, cl. 2.

54. See discussion *supra* Part II.

Necessary and Proper Clause source, or any other relevant constitutional principles, suggest on the exercise of this power?

In what follows, I will address this issue from four perspectives. First, how do any general limits on the Necessary and Proper Clause power apply specifically to the case of preemption? Second, regardless of the particular source of the preemption power (that is, even if the Necessary and Proper Clause is not accepted as the source), are there any other similar congressional powers that are understood to have relevant conditions on their valid exercise? Third, are any limits on the preemption power suggested by looking at the issue through the lens of the “political safeguards of federalism?”<sup>55</sup> Fourth, do comparative constitutional materials provide any potential guidance on this issue?

My conclusion will be that all four perspectives point to precisely the same constitutional limitation: Congress can only exercise its preemption power expressly. As a matter of constitutional law, there should be no such thing as implied preemption. If Congress wishes to exercise its preemption power, it must say so by speaking directly to the issue. It is up to the courts to determine what Congress has said, using ordinary principles of statutory interpretation in the case of ambiguity, but not to premise an exercise of this power on “sheer implication”<sup>56</sup> from congressional silence, as is now the case. Accordingly, there should be only two ways in which state law can be displaced: (1) non-conflicting state law and/or concurrent state authority may be displaced by express exercise of Congress’s preemption power, and (2) conflicting state law is automatically displaced by operation of federal supremacy.

First, how do any general constitutional limits on the scope of Congress’s Necessary and Proper Clause power apply in the specific case of preemption—which, I have argued, is an instance of this power? In *McCulloch*, John Marshall famously summarized both the scope and the limits of the power as follows: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”<sup>57</sup> And just a few sentences before, in justifying his more flexible definition of “necessary,” he wrote of “the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government.”<sup>58</sup>

As applied specifically to the power of preemption, I suggest that Marshall’s general test of the scope and limits of the Necessary and Proper Clause has the following content. Congress has not only the “right” but also

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55. See *infra* note 81.

56. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 546 (1992) (Scalia, J., concurring in part and dissenting in part) (using this phrase in description, not criticism, of the Court’s implied preemption doctrine: “. . . [preemption] can be achieved by sheer implication, with no express statement of intent at all.”).

57. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

58. *Id.* at 420.

the *duty* “to exercise its best judgment”<sup>59</sup> on whether preemption of the states is necessary given its regulatory goals. In concrete terms, this means that although the substance of Congress’s judgment of the necessity of preemption is not subject to judicial review, it must affirmatively address the issue and render a good faith judgment on it. *This simply cannot be done impliedly.* Moreover, this congressional judgment that there is a need to displace non-conflicting state law and/or concurrent state authority must be expressed in the text of the statute. Statements in legislative history may function as aids in interpreting *what* Congress has said about the issue of preemption in the text, but not as substitutes for the text in ensuring *that* Congress has spoken directly to the issue.

To go back to *McCulloch* and the establishment of the Bank of the United States under the Necessary and Proper Clause, clearly explicit congressional discussion of its need had occupied many sessions.<sup>60</sup> Would the law have satisfied Marshall’s test if there had been no congressional discussion of the Bank as a necessary measure? Would it have satisfied Marshall’s test if the relevant statute had not expressly created the Bank but did so only by judicial implication of congressional intent? More generally, and Marshall’s test aside, can Congress ever exercise its Necessary and Proper Clause power impliedly? What is an implied exercise of an implied power?

This requirement of congressional exercise of judgment, as expressed in the statutory text, is supplemented by the last part of Marshall’s test, which is that exercises of implied powers must comport with “the spirit of the Constitution.”<sup>61</sup> Since federalism and the constitutional role of the states are undoubtedly central components of this “spirit,” it would, I suggest, be violated if the states, with their continuing concurrent authority as the Constitution’s default position, were not given at least this much consideration in the federal legislative process and product. Their concurrent powers should not be abrogated by mere judicial implication from congressional silence.

Accordingly, as a consequence of the preemption power’s derivation from the Necessary and Proper Clause, there should be a constitutional requirement that Congress can only exercise this power expressly. There must be some statutory text in which Congress specifies that it is altering the default constitutional position of concurrency plus supremacy. In the context of preemption, a purely implied exercise of an implied power—in which the courts fill in the nuances of congressional silence—violates the “spirit” of the Constitution, of which the guaranteed role of the states is a

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59. *Id.*

60. *Id.* at 323.

61. *Id.* at 421.



central part. It also violates the duty that Congress has to exercise its best judgment on the necessity of preemption.

Second, independent of the Necessary and Proper Clause derivation of preemption, there is a powerful additional constitutional reason for the proposition that this power may only be exercised expressly. That is, this reason would still operate whatever the source of the power. The reason is the similarity of the preemption power with two other powers of Congress to redefine federal-state relations that, as a matter of constitutional law, can only be exercised expressly. These two other powers are: (1) Congress's power to abrogate state sovereign immunity under the Eleventh Amendment, and (2) Congress's power to authorize discriminatory state laws that would otherwise violate the dormant Commerce Clause. Both powers have long been understood to require express congressional exercise.

What specifically renders these other two powers so similar to preemption is that in all three cases Congress is empowered to alter the default constitutional position of federal-state relations: concurrent state authority regulated only by the Supremacy Clause (preemption); state immunity from federal jurisdiction (the Eleventh Amendment); and state regulatory limits (the dormant Commerce Clause). If the default position can only be altered expressly by Congress in the second two cases, the same should also apply in the case of preemption – and for the same reasons.

In *Atascadero State Hospital v. Scanlon*,<sup>62</sup> decided in 1985, the Court held that “Congress must express its intention to abrogate [the State’s constitutionally secured immunity from suit in federal court under] the Eleventh Amendment in unmistakable language in the statute itself.”<sup>63</sup> The Court explained why it did not permit implied exercise of Congress’s abrogation power as follows:

[B]ecause the Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States, this Court consistently has held that these exceptions [to state immunity] apply only when certain specific conditions are met . . . ; [in the case of abrogation] ‘an unequivocal expression of congressional intent . . . ’<sup>64</sup>

Elsewhere, the opinion for the Court explained that express exercise of the abrogation power was required because “Congress’ power to abrogate a State’s immunity means that in certain circumstances the usual constitutional balance between the States and the Federal Government does not obtain.”<sup>65</sup> Although since *Atascadero* the Court has changed its position at least once (and possibly twice depending on point of view) on the issue of

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62. 473 U.S. 234 (1985), *superseded by statute*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1845 (codified at 42 U.S.C. § 2000d-7 (2000)).

63. *Id.* at 243.

64. *Id.* at 238-40 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)) (footnote omitted).

65. *Id.* at 242.

whether Congress has the enumerated power to abrogate state immunity under the Commerce Clause as well as under the Fourteenth Amendment's enforcement power,<sup>66</sup> its rule of express textual abrogation has been continuously affirmed under both powers.<sup>67</sup>

The Court has also long held that Congress's power to authorize otherwise unconstitutional state discrimination against interstate commerce can only be exercised by "an unmistakably clear" and "unequivocal" expression of approval by Congress and not by "implicit approval."<sup>68</sup> This is so even though the source of this power is the Commerce Clause. Thus, even if the Commerce Clause is taken to be the source of Congress's power of preemption, the authorization power is powerful precedent for rejecting implied exercises in circumstances analogous to preemption.

In *South-Central Timber Development, Inc., v. Wunnicke*,<sup>69</sup> decided in 1984, the Court held that Congress's power to remove a state regulation from the reach of the dormant Commerce Clause is subject to "[a] rule requiring a clear expression of approval by Congress . . ."<sup>70</sup> It also described the congressional requirement in the same terms as in *Atascadero*: "congressional intent must be unmistakably clear."<sup>71</sup> Moreover, in rejecting the lower court's "implicit approval" theory, the Court stated as follows: "[t]he requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine."<sup>72</sup> It went on to explain that such "affirmative contemplation" by Congress ensures that a decision to permit one state such an advantage represents a "collective decision"<sup>73</sup> of the nation rather than exploitative cost-exporting by a single state. Although, unlike in the Eleventh Amendment context, the Court suggested that the required "clear expression of approval" might appear in the legislative history and not necessarily in the statute itself,<sup>74</sup> the constitutional duty placed on Congress

66. Controversy over this power was first triggered by *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (holding for the first time that Congress has power under the Commerce Clause to abrogate the states' Eleventh Amendment immunity) and heightened by *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (overruling *Union Gas* on this point).

67. This is not to say, of course, that the rule has not been challenged. In *Atascadero* itself, Justice Brennan seemingly dissented on this point—arguing instead for ordinary principles of statutory interpretation to determine congressional intent. *Atascadero*, 473 U.S. at 248-52. In *Union Gas* and *Seminole Tribe*, the issue dividing the Court was the congressional power and not the existence or appropriateness of express abrogation. See *Union Gas*, 491 U.S. at 1; *Seminole Tribe*, 517 U.S. at 44-45. In several other cases finding no express abrogation, the minority argued that the *Atascadero* standard had in fact been met, although certain justices also supported Justice Brennan's position that this standard should be lowered. *Atascadero*, 473 U.S. 303-04.

68. *South-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).

69. *Id.*

70. *Id.* at 92.

71. *Id.* at 91.

72. *Id.* at 91-92.

73. *Id.* at 92.

74. *South-Cent. Timber*, 467 U.S. at 92. The Court explains that

to exercise its judgment on the merits of upholding state authority clearly rules out a purely implied authorization.

By contrast with this requirement of “unmistakably clear” and “unequivocal” expression of congressional intent in the Eleventh Amendment and dormant Commerce Clause contexts, the Court officially requires the lesser test of “clear and manifest intent” before Congress will be deemed to have exercised its preemption power.<sup>75</sup> Although arguably even this lesser test should rule out any form of implied preemption, in practice the Court has of course long held that “clear and manifest” congressional intent may be implied under its field preemption and conflict preemption rubrics.<sup>76</sup> That is, congressional silence on the issue does not prevent judicial implication of preemption (a) where the scope of regulation is sufficiently comprehensive to make such inference reasonable (field preemption) or (b) where there is an actual conflict between federal and state regulation (conflict preemption).<sup>77</sup>

My thesis here is that there is simply no justification for this lesser requirement in the case of preemption. “[W]hen Congress has been silent with respect to preemption,” there should be no judicial “resort” to preemption principles of any sort.<sup>78</sup> The states should not be preempted as a result of merely “reasonable” judicial inference from congressional silence.<sup>79</sup> Proper understanding of the nature of preemption as a *power to abrogate concurrent state authority* renders it sufficiently similar to Eleventh Amendment abrogation to require a similar standard, and the stated rationale behind the condition on both Eleventh Amendment and dormant Commerce Clause powers is exactly the same in the preemption context: namely, congressional altering of the Constitution’s default position on

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It is true that most of our cases have looked for an express statement of congressional approval prior to finding that state regulation is permissible . . . [but] [t]here is no talismanic significance to the phrase ‘expressly stated,’ however; it merely states one way of meeting the requirement that for state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear. The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine.

*Id.*

75. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947), the locus classicus of modern preemption doctrine: “Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act [United States Warehouse Act] unless that was the clear and manifest purpose of Congress.”

76. The passage from *Rice* quoted in *supra* note 75 continues as follows: “Such a [clear and manifest] purpose may be evidenced in various 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 state policy may produce a result inconsistent with the objective of the federal statute.” *Rice*, 331 U.S. at 231 (citations omitted).

77. See *id.* at 532 (Blackmun, J., concurring in part and dissenting in part) (“We resort to principles of implied preemption—that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law—only when Congress has been silent with respect to pre-emption.”) (citation omitted).

78. *Id.* (quoting from Justice Blackmun’s statement of preemption principles).

79. Quoting from the Court’s statement of implied preemption principles in *Rice*, 331 U.S. at 231; see *supra* note 76.

federal-state relations.<sup>80</sup> Indeed, it is the failure to see that preemption is simply an enumerated power like these two others, having no more connection to the automatic operation of the Supremacy Clause than they (or any other enumerated powers) do, that is primarily responsible for its different treatment. Accordingly, one of the benefits of distinguishing preemption from supremacy is to remove this false barrier to similar treatment for similar powers.

Third, the limits I have proposed may be seen as a representation-reinforcement mechanism for the states that renders the “political safeguards of federalism” a more attractive and workable theory than at present.<sup>81</sup> By insisting that before being preempted the states are owed more in the political process than reasonable judicial inference from congressional silence, those who currently deem purely procedural safeguards for federalism inadequate may be persuaded otherwise. As is well known, both the Court and the commentators have been locked in a war of attrition over the constitutional sufficiency of the political process as exclusive protector of the states ever since *Garcia v. San Antonio Metropolitan Transit Authority*<sup>82</sup> made this the law in the specific area of federal application of general regulations to the states in 1985.

As a general approach to federalism, there has been little focus within this debate on the content of the political process, as it were, by contrast with its representative structure and results.<sup>83</sup> The requirement of express preemption suggests a way of breaking the deadlock by bolstering the process that the states are due in Congress. By imposing a constitutional duty on Congress to address the issue of preemption in the statutory text, my proposal enhances political protection of the states, but without placing substantive limits on congressional power. In short, if Congress can only preempt the states expressly, then legislative proposals preempting the states are less likely to pass. This type of new procedural protection, which may

80. See discussion *supra* notes 62-74 and accompanying text.

81. Tracing its roots to Madison's argument in The Federalist No. 46 that because the federal political institutions are elected by or accountable to state constituencies, they will be sensitive to state interests, this theory stands for the proposition that judicial enforcement of federalism is less necessary than judicial enforcement of other constitutional norms, especially individual rights provisions. THE FEDERALIST NO. 46 (James Madison). For its modern locus classicus, see 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 (1954). For an influential recent updating of the theory, see Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

82. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), superseded by statute, Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787.

83. For example, as the Court noted in *Garcia*:

[T]he principal means chosen by the Framers to insure the role of the States in the federal system lies in the structure of the Federal Government itself. . . . State sovereign interests, then, are more properly protected by the procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

*Id.* at 550, 552.

perhaps be termed “constitutional hard look doctrine,” is potentially of quite general significance as an alternative to the existing polar claims of judicial versus political safeguards of federalism.<sup>84</sup>

Finally, comparative constitutional materials also provide precedent and support for the limit I have proposed for Congress’s power of preemption. This is because at least two of the world’s most important federal systems have imposed approximately similar conditions on the power. To explain these limits and how they might be relevant in the U.S. constitutional context, a little translation is in order.

In Germany, Article 72(2) of the Basic Law contains a general constitutional limit on the federal exercise of all concurrent powers that is broadly similar to how I have argued the Necessary and Proper Clause should be understood to limit the preemption power. This general limit is necessary in Germany because, it will be recalled, the effect of a federal exercise of concurrent power is the automatic preemption of all state law in the same area.<sup>85</sup> In particular, Article 72(2) states that:

The [federal government] shall have the right to legislate in these matters [within concurrent federal and state power] to the extent that a need for regulation by federal legislation exists because:

(1) a matter cannot be effectively regulated by the legislation of individual [states,] or . . .

(3) the maintenance of legal or economic unity . . . necessitates such regulation.<sup>86</sup>

Article 72(2) was also the inspiration and source for the principle of “subsidiarity,” which was adopted by the European Union in 1992. According to Article 5 of the Treaty Establishing the European Community, subsidiarity places similar limits on the exercise of the EU’s concurrent legislative powers.<sup>87</sup> Although neither the German Constitutional Court nor the European Court of Justice has shown much interest in reviewing federal legislation for substantive violations of these textual limits, the latter at least

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84. I have elsewhere suggested this type of enhanced procedural protection in the context of Congress’s power to regulate intrastate commerce as well as preemption. See Gardbaum, *supra* note 2, at 819-31. See also Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2231-45 (1998).

85. See discussion *supra* Part IV and note 53.

86. Grundgesetz für die Bundesrepublik Deutschland [GG] [German Basic Law] May 23, 1949, art. 72, cl. 2(1)-(3).

87. See Treaty Establishing the European Community, art. 5 (ex art. 3b), which states that:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

has suggested the limits are to be enforced procedurally.<sup>88</sup> That is, the EU's legislative organs are affirmatively required to consider, and "exercise judgment," on the necessity of federal legislative intervention.

Rather than a general limit on the exercise of all concurrent federal powers, my proposal, translated into the specific context of the power of preemption in the United States, is that if Congress wishes to exercise its preemption power, then the same basic criteria found in Germany and the EU should apply as a result of the Necessary and Proper Clause. Congress may only preempt the states where it has exercised its judgment on the necessity of so doing and the statutory text testifies to this.

In sum, both the Necessary and Proper Clause derivation of the power and its similarity to other federal-state altering congressional powers suggest that Congress must exercise its preemption power expressly. Preemption should not be premised on "sheer implication"<sup>89</sup> from congressional silence. Such a condition on the preemption power is further supported both by comparative federal experience and by a friendly amendment to the theory of the political safeguards of federalism. I should stress that the proposed limit is constitutional in nature and is not "merely" a rule of statutory interpretation (whatever the latter means in this context): Congress has no power to impliedly preempt the states.<sup>90</sup>

## VII. THE RESULTING PREEMPTION DOCTRINE

The result of my analysis is a radical simplification of preemption law. Congress has the power to preempt the states but can only do so expressly:

88. Although the European Court of Justice has generally manifested a reluctance to address the issue of the justiciability of subsidiarity, in three cases it has engaged in procedural review, requiring that the legislative organs explain in the legislative text why they considered exercise of concurrent federal power necessary (while requiring no explicit reference to subsidiarity). See Case C-233/94, *F.R.G. v. Eur. Parl. and Council of the EU*, 1997 E.C.R. I-2405 (holding that statements in the legislation's preamble adequately explained why the Parliament and Council considered their action complied with subsidiarity, even though there was no explicit reference to that principle); Case C-377/98, *Neth. v. Eur. Parl. & Council of the E.U.*, 2001 E.C.R. I-07079 (same); Case C-491/01, *The Queen v. Sec'y of State for Health*, 2002 E.C.R. I-11453 (same).

89. See *supra* note 56.

90. To the extent that my proposal can be thought of as instituting a constitutional "plain statement rule," it would be a general rule for the power of preemption as a whole—as with Congress's abrogation and approval powers. As a matter of existing doctrine, the Court has imposed a "plain statement rule" only in the specific context of whether congressional statutes apply to state judges. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the only case employing the "plain statement rule," the issue was whether the federal Age Discrimination in Employment Act (ADEA) should be interpreted to cover state judges. If so, then this would clearly trump the conflicting state law permitting age-related compulsory retirement of judges. The Court applied the plain statement rule to interpret the ADEA as not applying to state judges. *Id.* at 467. In my terms, the Court applied this rule to the issue of supremacy and not preemption (i.e., whether there was a conflict between state and federal law). More generally, my proposal is that Congress must speak to the issue of preemption in the statutory text. What it says may sometimes, however, not be "clear" or "plain," in which case courts have the duty of interpreting the ambiguity.

there is no such thing as implied preemption. In this context, congressional silence does not speak louder than words. If Congress wishes to exercise its preemption power, it must say so in the statutory text. Where Congress has not spoken directly to the issue of preemption, there is no second set of principles—implied preemption—permitting courts to infer preemption from the nuances of congressional silence, as at present.<sup>91</sup> Accordingly, absent express preemption, state law can be displaced only by the ordinary operation of the supremacy principle: a particular federal law trumps a particular state law when their contents conflict. Such trumping under the Supremacy Clause operates automatically and without reference to congressional power or intent.

Let me run through the existing categories of preemption doctrine to underscore how they would fare under my framework. First, express preemption survives as the only type of preemption. As a condition of a valid exercise of its power, Congress is required to address the issue of preemption by express statement in the text of the statute. While this does not mandate an explicitly labeled “preemption provision” per se,<sup>92</sup> or any other particular form of words, it does require statutory language speaking directly to the issue of the effect of Congress’s regulation on non-conflicting state laws and/or concurrent state authority. If there is no such statement, there is no such effect. This constitutional rule states a condition on the exercise of the power similar to those applying to Congress’s abrogation of state immunity and approval powers.<sup>93</sup> By contrast, once the condition is satisfied, the precise scope and extent of Congress’s exercise of the power will be a matter of the ordinary statutory interpretation of the express provision or provisions—as with the exercise of any other enumerated power.<sup>94</sup> That is, what Congress says directly about the issue may be

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91. An oft-quoted Supreme Court statement of the current standard is the following: “Preemption may be either express or implied, and ‘is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.’” *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). It is, of course, this second alternative that I am challenging.

92. On this point I agree with Justice Kennedy in his *Gade* concurrence, and disagree with Justice Souter’s dissent. Compare *Gade*, 505 U.S. at 112 (Kennedy, J., concurring) (“Though most statutes creating express pre-emption contain an explicit statement to that effect . . . we have never required any particular magic words in our express preemption cases.”), with *id.* at 115 (Souter, J., dissenting) (“express pre-emption requires ‘explicit pre-emptive language.’”). For examples of this difference in practice, see discussion *infra* Part VIII.

93. See discussion *supra* Part VI.

94. Here, I agree with Justice Scalia that in interpreting the statutory text to determine what Congress has said about preemption, there should be no role for a presumption of preemption. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part). Whether or not these ordinary rules of statutory interpretation include the use of legislative history will presumably depend on one’s general theory of statutory interpretation. In keeping with his general theory, Justice Scalia has suggested that he rules out the use of legislative history in express preemption cases. See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 389-91 (2000). Whether he also rules it out in implied preemption cases is less clear.

ambiguous, particularly given that exercise of the preemption power is not only a yes-no issue but also an issue of to what extent.<sup>95</sup>

Second, field preemption—as the first type of implied preemption under existing doctrine—would simply be abolished. Defined as the reasonable inference by the courts, absent an express preemption statement, of congressional intent to preempt all concurrent state authority within a given field from the scope of congressional regulation<sup>96</sup> field preemption simply fails the threshold condition on the exercise of Congress's power—just as such inferences would currently fail the conditions on Congress's abrogation and authorization powers. “Sheer implication” from congressional silence is inadequate. This does not, of course, mean that Congress cannot preempt an entire regulatory field; it means only that Congress must do so expressly.<sup>97</sup>

Third, conflict preemption, the oxymoron that currently functions as the second type of implied preemption, would similarly be abolished. The mere existence of a conflict between state and federal law does not constitute express exercise of congressional power to displace non-conflicting law and/or concurrent state authority; i.e., its power to preempt. Indeed, as I have argued previously,<sup>98</sup> even under the existing preemption framework with its lesser test and resulting acceptance of purely implied preemption, conflict preemption makes little sense as a matter of statutory interpretation. If the nature of preemption is properly understood, it is highly unlikely that by itself a substantive conflict between federal and state laws would ever constitute evidence from which congressional intent to preempt can even reasonably be inferred. If the federal law predates that of the states, there is no conflict from which to infer a congressional intent to preempt at the time

95. Although they are thus “similar,” the limits I am proposing on Congress's preemption power are not quite the same as the current limits on either Congress's abrogation (unambiguous statement of abrogation in the statutory text) or approval power (unambiguous expression of congressional intent, but not necessarily in the statutory text). See discussion *supra* Part VI. It is beyond the scope of this article to discuss whether or not the standard I am proposing for preemption should also apply to both of these other powers. However, some divergence in standards may be justified by an important difference between the powers. Whereas both the abrogation and approval powers are essentially “yes or no” issues and not questions of degree, preemption is also a question of degree: to what extent is Congress exercising its power, and what types of non-conflicting state laws and/or concurrent state authority is it displacing. In these circumstances, there is arguably greater room for congressional ambiguity and need for statutory interpretation, and the constitutional test may plausibly reflect this.

96. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947).

97. As I have argued elsewhere, even within the existing framework of preemption doctrine and independently of my constitutional argument against it, field preemption survives as an awkward holdover from the initial establishment of preemption in the early twentieth century. See Gardbaum, *supra* note 1, at 811-12. It will be recalled that at this point, preemption was deemed not a discretionary congressional power, but an automatic consequence of congressional entry into a field. *Id.* Under this mechanism of preemption, congressional intent was as irrelevant as it is under the automatic principle of supremacy. Once the Court shifted to the modern understanding of preemption as a discretionary power, however, the very notion of field preemption always existed uneasily alongside the stated modern focus on congressional intent. *Id.* It should now be rejected.

98. See Gardbaum, *supra* note 1, at 808-10.



it was enacted. If the federal law that neither occupies the field nor contains an express preemption provision is enacted after the conflicting state law, surely the only reasonable inference about congressional intent (even if it were relevant) is to displace the particular state law, and not to preempt. What remains after the abolition of conflict preemption is simply supremacy as an alternative mechanism for displacing state law, as in the medical marijuana case.

Fourth, as a sub-species of conflict preemption, obstacle preemption will of course suffer the same fate. Concurrent state law and/or authority is not preempted merely because it stands as an obstacle to the full implementation of congressional policy, although of course this may be the reason that Congress chooses to exercise its preemption power. There is a genuine issue concerning obstacle preemption that survives my analysis, however, but it concerns supremacy and not preemption: what degree of conflict between state and federal laws is necessary to trigger the automatic supremacy principle? Although this issue is largely tangential to the thesis of this Article, once disconnected from preemption and inferences about congressional intent, it seems reasonably clear from first principles that supremacy requires irreconcilability between state and federal laws and not mere interference or inconvenience.<sup>99</sup> Short of either adopting automatic preemption, as in the U.S. between 1912 and 1933<sup>100</sup> and currently in Germany,<sup>101</sup> or an exercise by Congress of its preemption power, the existence of concurrent powers necessarily presumes a certain amount of unavoidable inconvenience and friction when they are both exercised. Supremacy is designed to do away with the most extreme form of such friction—namely, irreconcilability—but not all forms.

Fifth, as a distinct variety of obstacle preemption, Justice Souter—drawing on the work of Professor Laurence Tribe—has identified what he refers to as “purpose-conflict pre-emption,”<sup>102</sup> although this term has not yet been given official imprimatur. In several recent cases, the Court has found implied preemption because state law is held to obstruct or frustrate not the substance of federal policy, but the underlying congressional intent to preempt. For example, in *Gade v. National Solid Wastes Management Ass’n*,<sup>103</sup> a plurality held that state safety laws for hazardous waste workers conflicted with the full purposes and objectives of Congress’s Occupational Safety and Health Act (OSHA), which were to have a single set of

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99. Historical support for this position is impressively marshaled by Professor Nelson, see Nelson, *supra* note 12, at 251. He refers to the requirement as the “logical-contradiction test” as distinguished from the “physical impossibility” test. See *id.* at 260.

100. See Gardbaum, *supra* note 1, at 801-08.

101. See discussion *supra* Part VI.

102. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 115-16 (1992) (Souter, J., dissenting) (“As one commentator has observed, this kind of purpose-conflict pre-emption, which occurs when state law is held to ‘undermin[e] a congressional decision in favor of national uniformity of standards,’ presents a ‘situation similar in practical effect to that of federal occupation of a field.’”) (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 486 (2d ed. 1988)).

103. *Gade*, 505 U.S. at 88.

regulations on the subject.<sup>104</sup> As Justice Blackmun also correctly noted, this type of obstacle preemption is really just the flip side of a finding of field preemption.<sup>105</sup> If congressional intent to preempt a given field is inferred (and, of course, is deemed a valid exercise of the preemption power), then the commonplace operation of the Supremacy Clause<sup>106</sup> means that every particular state law within that field will conflict with the exercise of preemption and be displaced. Within the existing framework, this is just two ways of saying the same thing, although it is the finding of field preemption that is doing all the work. Under my framework, both sides of this coin will disappear. If Congress intends to preempt an entire field of regulation, it must do so expressly. If it does, then of course the technical operation of the Supremacy Clause will also mean that any state law in that field is in conflict with this exercise of power. If it does not preempt expressly, then regardless of its "intent," there is no exercise of the preemption power for the Supremacy Clause to operate on.

Finally, what about the general presumption against preemption with which the Court routinely begins its ritualistic statement of preemption principles, and which has come in for some recent academic criticism?<sup>107</sup> Under the framework developed in this Article, a presumption against preemption is reflected in the threshold constitutional issue of ruling out implied exercises of the preemption power, but not in interpreting the necessary express statement. That is, a proper understanding of preemption as distinct from, and a more radical inroad on state power than, the principle of supremacy alone supports a "presumption" against preemption that takes the form of the conditions on the congressional power that I have suggested. Given the constitutional limits attaching to the preemption power, there should be no additional presumption against preemption as a matter of statutory interpretation. In interpreting the extent and scope of Congress's express preemption provisions, ordinary, unmediated principles of statutory interpretation should be used without any presumption one way or the other.<sup>108</sup> As far as supremacy is concerned, ordinary principles of statutory interpretation should also apply to the federal text in comparing it to the state with no starting presumptions.<sup>109</sup> As discussed above, however, the

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104. *Id.* at 98. For details and discussion, as well as other recent cases falling under this rubric, see the discussion *infra* Part VIII.

105. See *English v. Gen. Elec. Co.*, 496 U.S. 72, 79-80, n.5 (1990) (majority opinion of Blackmun, J.) ("[F]ield preemption may be understood as a species of conflict preemption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation.").

106. See *supra* notes 21-25 and accompanying text.

107. See Nelson, *supra* note 12; Dinh, *supra* note 23.

108. Here, as already noted, I agree with Justice Scalia, see *supra* note 94, and also with Professor Nelson, see *supra* note 12, and Professor Dinh, see *supra* note 23.

109. For an instructive historical/textual argument based on the original understanding of the *non obstante* clause in the Supremacy Clause, see Nelson, *supra* note 12.

general concept of a “conflict of laws” suggests that irreconcilability or contradiction and not mere interference is necessary before a state law is displaced.

#### VIII. APPLICATION TO THE LEADING PREEMPTION CASES OF RECENT YEARS

In this final section, I will illustrate the practical workings of my recast preemption doctrine by applying it to the leading cases of recent years.

In *English v. General Electric Co.*,<sup>110</sup> decided in 1990, the Court unanimously held that state tort law of intentional infliction of emotional distress was not within the field impliedly preempted by federal nuclear safety regulation, as previously defined in *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*.<sup>111</sup> In addition, it found no “actual conflict”<sup>112</sup> between congressional intent and state law, because of the previous finding that there was no such intent.<sup>113</sup> Although reaching the same result, my framework would simply find that there is no express preemption here and, under supremacy principles, no substantive conflict between the texts of the federal laws and the state laws. Contrary to the Court’s fairly typical treatment of the actual conflict issue, the only question under ordinary supremacy principles should be the reconcilability of the two sets of rules; congressional intent is irrelevant.

In the 1992 case of *Gade v. National Solid Waste*,<sup>114</sup> a plurality of four held that Illinois’ occupational health and safety laws dealing with hazardous waste were impliedly preempted by Congress’s OSHA under the doctrine of obstacle preemption.<sup>115</sup> The state rules were found to be in conflict with the full purposes and objectives of the federal statute, which were to have a single set of regulations (federal or state) on the subject.<sup>116</sup> Justice Kennedy’s concurrence found express preemption from the relevant text of OSHA, and criticized the plurality for an “undue expansion of our implied pre-emption jurisprudence which, in my view, is neither wise nor necessary.”<sup>117</sup> The dissent rejected both arguments: first, express preemption requires explicit preemptive language, which Justice Kennedy acknowledged was lacking; second, contrary to the plurality, OSHA did not disclose the clear expression of congressional intent required by the

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110. 496 U.S. 72 (1990).

111. 461 U.S. 190 (1983).

112. *English*, 496 U.S. at 89.

113. This is a second example of the “two sides of the same coin” connection between field preemption and “purpose-conflict” preemption discussed previously. See *supra* note 105.

114. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88 (1992).

115. *Id.* at 97.

116. *Id.* at 98. As discussed earlier, the plurality might just as easily have said that this congressional intent amounted to implied preemption of the field. See *supra* note 105. Once again, under the Court’s current doctrine, the two are effectively mirror images of each other and interchangeable. Of course, under my proposal, both field preemption and “purpose-conflict preemption” would disappear.

117. *Gade*, 505 U.S. at 109 (Kennedy, J., concurring).

presumption against preemption, as it could with equal plausibility be read consistently with non-preemption.<sup>118</sup>

My framework first asks whether, as a threshold condition of the exercise of its power, Congress has expressly addressed the issue of preemption in the text of the statute—even though there may be no explicit preemption provision per se. On this point, I agree with Justice Kennedy and disagree with both the plurality and dissent. It seems clear from the text of OSHA that Congress addressed the issue of preemption and so has satisfied the threshold constitutional test.<sup>119</sup> The next question is *how* has Congress addressed the issue in the text, and this should be answered using ordinary principles of statutory interpretation without any presumption one way or the other. To my mind this is a close case on the facts. Although what Congress has expressly said is not entirely free from ambiguity as to preemption of supplementary state regulation, overall the preemptive interpretation of OSHA's Section 18(b) is more plausible than the non-preemptive.<sup>120</sup>

If, by contrast, one interprets what Congress has expressly said in section 18 as not preempting the states, then the only possible way that state law can be displaced is by supremacy principles. Do the relevant state and federal laws conflict? On the facts, the answer appears to be no, because OSHA mandates a minimum requirement of three days of actual field experience for certification of all registered hazardous waste workers, whereas the state law sets a minimum of 500 days for the licensing of some (such as crane operators).<sup>121</sup> These are clearly not irreconcilable, as they would be if the federal standard had required no more than three days. The plurality once again (misguidedly to my mind) looks to congressional intent in analyzing the case as one of obstacle preemption, finding a desire for uniformity with which concurrent state authority would interfere.<sup>122</sup> But under ordinary supremacy principles, congressional intent is irrelevant; the

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118. *See id.* at 114-22.

119. *Id.* at 112 (Kennedy, J., concurring). The relevant text of OSHA is section 18 as a whole. *See* 29 U.S.C. § 667 (2000). By contrast, the plurality stated that “[w]e cannot agree that the negative implications of the text, although ultimately dispositive to our own [obstacle preemption] analysis, expressly address the issue of federal pre-emption of state law.” *Gade*, 505 U.S. at 104, n.2. The dissent, as mentioned above, stated that “[e]xpress preemption requires ‘explicit preemptive language,’” presumably meaning an explicitly labeled preemption provision. *See id.* at 115. In my view, both the plurality and the dissent create too high of a threshold for express preemption, which should simply require that Congress address the issue of preemption in the text, i.e., speak directly to the issue of the impact of its regulatory scheme on non-conflicting state law and/or concurrent state authority. The important contrast is with purely implied preemption, i.e., inferring preemption not from what Congress has said in the text but from its silence.

120. Section 18(b) reads as follows: “Any State which . . . desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated shall submit a State plan . . .” 29 U.S.C. §667(b) (2000).

121. *Id.* at 94.

122. *Id.* at 103.

only relevant conflict is between the content of the text it has enacted and that of the existing state rules.<sup>123</sup> If Congress intends uniformity, its intent counts only if expressed in the statute; such intent should not be implied and then used to create a conflict with state law.

In *Cipollone v. Liggett Group, Inc.*,<sup>124</sup> a plurality of the Court interpreted the express preemption provision of the 1969 Public Health Cigarette Smoking Act to preempt one of the plaintiff's state common law claims but not the others.<sup>125</sup> By contrast, Justice Blackmun's partial concurrence and dissent interpreted the express provision not to preempt *any* state common law claims,<sup>126</sup> while Justice Scalia's interpreted it to preempt *all* the state common law claims.<sup>127</sup> In the course of his opinion, Justice Scalia identified and rejected two principles relied on by those finding at least some state common law claims to have survived.<sup>128</sup> These were: first, given the existence of an express preemption provision, the scope of preemption was governed entirely by its language, thus ruling out any type of implied preemption;<sup>129</sup> and second, the presumption against preemption applies to express preemption provisions.<sup>130</sup>

My framework suggests disagreement with Justice Scalia on this first point but agreement on the second. The scope of preemption should always be governed entirely by the language of express preemption provisions (and any other text speaking directly to the issue) because express preemption is the only type there should be. But in interpreting such provisions, ordinary principles of statutory interpretation should be used to determine whether and to what extent Congress has exercised its power. Once Congress has spoken directly to the preemption issue by enacting an explicit preemption provision, the scope and extent of its exercise should be left to ordinary statutory interpretation of what it has said. Whether or not this includes legislative history will depend upon a general account of the proper method of statutory interpretation. For Justice Scalia, I presume the answer is no.<sup>131</sup> Again, the presumption against preemption is reflected only in the requirement of express exercise of the power, not in interpreting its scope. Like *Cipollone*, *Medtronic Inc. v. Lohr*<sup>132</sup> involved interpreting the scope of an express preemption provision.

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123. See discussion *supra* Part II.

124. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

125. The Court held that the 1969 Act preempted the plaintiff's failure to warn claim but not express warranty, intentional fraud and misrepresentation, or conspiracy claims. *Id.* at 524-31.

126. *Id.* at 531.

127. *Id.* at 544.

128. *Id.* at 545-48.

129. *Id.* at 545.

130. *Id.* at 549.

131. As is well-known, Justice Scalia is an outspoken critic of using legislative history in statutory interpretation. See ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997). As noted above, whether he believes this also applies to implied preemption is unclear. See *supra* note 94 and accompanying text.

132. *Medtronic Inc. v. Lohr*, 518 U.S. 470 (1996).

Although curious in its failure to analyze the case through the standard preemption metric, *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*<sup>133</sup> found preemption of state contract and tort claims based on pure implication of congressional intent. Nothing in the text of the relevant federal statute, the Communications Act of 1934, addressed the preemption issue. This is, therefore, a clear example of preemption that would not occur under my model.

A similar case is *United States v. Locke*,<sup>134</sup> in which the Court held that the State of Washington's more stringent regulations of oil tankers in the wake of the *Torrey Canyon* and *Exxon Valdez* disasters were impliedly preempted by Title II of Congress's Port and Waterways Safety Act of 1972, as amended by the Oil Pollution Act of 1990.<sup>135</sup> In affirming the 1978 decision in *Ray v. Atlantic Richfield Co.*,<sup>136</sup> which interpreted the unexpressed congressional intent behind Title II as mandating uniform national rules, the Court in *Locke* held that the comprehensive federal regulatory scheme governing oil tankers left no room for state regulation.<sup>137</sup> In my terms, the only way that Congress can preempt a field is expressly. Had the statutory text of Title II actually contained a provision mandating uniform national rules on the list of specified subjects, this would amount to perhaps the most minimal form of express preemption satisfying the threshold test. Sheer implication of such a mandate from the "structure" and "purpose" of the statute does not.<sup>138</sup>

In *Geier v. Honda*,<sup>139</sup> decided in 2000, the Court interpreted the express preemption provision of the National Traffic and Motor Vehicle Safety Act of 1966 not to preempt the plaintiff's state common law tort claim. However, the Court held that the claim was impliedly preempted because it actually conflicted with the relevant federal standard, FMVSS 208, promulgated under the Act.<sup>140</sup> A state common law duty to install airbags, as urged by the plaintiff, stood as an obstacle to the full purposes and objectives of the standard, which sought a gradual introduction of airbags and a plurality of safety options.<sup>141</sup>

For what it is worth, I agree with the interpretation of the express preemption clause. Under my analysis, what then remains, of course, is an ordinary application not of preemption but supremacy principles. A mere obstacle to federal objectives, as found by the Court, is not sufficient to

133. 524 U.S. 214 (1998).

134. *U.S. v. Locke*, 529 U.S. 89 (2000).

135. *Id.* at 110.

136. 435 U.S. 151 (1978).

137. *Locke*, 529 U.S. at 110.

138. *Id.*

139. *Geier v. Honda*, 529 U.S. 861, 868 (2000).

140. *Id.*

141. *Id.*

displace state law under the Supremacy Clause; rather a textual irreconcilability is necessary. Arguably, there was such in this case, if the text of FMVSS 208 is interpreted as permitting what the state common law prohibited (i.e., the continued use of seatbelts without an airbag).

Finally, the 2000 case of *Crosby v. National Foreign Trade Council*<sup>142</sup> is a third example of purely implied preemption that would be ruled out under my proposal. The Court once again relied on obstacle preemption to hold that Massachusetts's Burma Law was preempted because it frustrated federal statutory objectives, even though Congress had not addressed the issue in that statute.<sup>143</sup> And once again, absent express preemption, this is a case of ordinary supremacy principles. Only a genuine conflict between the contents of state law and federal law – and not a conflict with presumed federal intentions – results in the trumping of the former in a case where both are relied upon. Alternatively, the case could have been decided on the basis that Congress has exclusive power in the area of foreign affairs. Either way, this was not a case about preemption.

Accordingly, in some of these cases application of my framework to the preemption issue results in different outcomes. In others, it reaches the same outcome but does so via a different and, I believe, more principled, coherent, and predictable preemption analysis. As I hope this application suggests, my framework is informed not by any general, result-oriented bias either for or against preemption, but by a proper understanding of the nature of this constitutional concept and of Congress's power to preempt the states.

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142. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000).

143. That federal statute was the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997, Pub. L. No. 104-208, § 570(d), 110 Stat. 3009-166 to 3009-167 (1997).