Summary of Preemption and the Current State of the Law

Preemption is usually analyzed with two levels of bifurcation by first identifying express or implied Preemption before splitting "implied" Preemption into either field or conflict Preemption. For clarity, this two-level bifurcation will be simplified into five separate and distinct methods: Express Preemption, Implied Preemption, Field Preemption, Actual Direct Conflict Preemption, and Actual Indirect Conflict Preemption. While some case law demonstrates that these five categories are distinct, the U.S. Supreme Court has not formulated explicit boundaries between some categories and does not use some category terms. These categories are conceptual in nature.

I. Origin of the Doctrine

Preemption is rooted in Article VI, Clause 2 of the U.S. Constitution which states: "This Constitution, and the laws of the United States ...made in pursuance thereof...shall be the supreme law of the land[...]."[1]

Chief Justice John Marshall identified the impact of the Supremacy Clause in Preemption's foundational case, *McCulloch v. Maryland* - a case arising from Maryland's attempt, under state law, to tax a federal bank, chartered under federal law.[2] Before the Chief Justice wrote his oft-quoted line on taxation, he explored the nature of the Supremacy Clause. As the Chief Justice stated: "If any one proposition could command the universal assent of mankind, we expect it might be this - that the Government of the Union, though limited in its powers, is supreme within its sphere of action." In setting the stage for the several methods of Preemption, The Chief Justice identified three corollaries: 1) a power to create implies a power to preserve, 2) a power to destroy, "if wielded by a different hand, is hostile to, and incompatible with" powers to create and preserve, and 3) where

[1] The full text is: "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, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

[2] *McCulloch v. Maryland*, 17 U.S. 316 (1819).

these powers overlap, the supreme power must control. These corollaries continue to inform courts' analysis of Preemption issues today.

Chief Justice Marshall addressed the issue once more in *Gibbons v. Ogden.*[3] This case is widely cited for its "commerce clause" implications. However, the Chief Justice pulls in the Court's nascent Preemption jurisprudence as a lodestar. In *Gibbons*, New York granted exclusive steamboat navigation rights of its waters to two individuals, which overlapped with federal law governing navigable waters. The Chief Justice recognized this overlap, finding it "immaterial whether those laws were passed in virtue of a concurrent power … [that] the acts of New York must yield to the law of Congress[.]" The Chief Justice continued to recognize that state laws "enacted in the execution of acknowledged State powers, interfere with, or are contrary to, the laws of Congress [or treaties]...the act of Congress or the treaty is supreme and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."

II. The Legal Footing of the Modern Preemption Doctrine and a Court's Analysis

Current Preemption analysis uses several "termes d'artes" which can be confusing when the same words are used for their plain meaning.[4] It is helpful to keep in mind one simple fact when working through a Preemption issue: in every Preemption case, federal and state law appear to overlap on a legal issue. The laws do not necessarily *express* a conflict. The laws do not necessarily *imply* a conflict. The laws do not necessarily conflict *at all*. The laws just need to appear to overlap.

A. The Court's Underlying Assumptions

[3] *Gibbons v. Ogden*, 22 U.S. 1 (1824).

[4] "This Court...has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment, and interference." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (the Court finding it necessary to define its use of "implies" with "*i.e.*, supports a reasonable inference" in order to further confuse the law of the case).

A court's Preemption analysis begins with three assumptions. First, that Congress does not casually preempt state law.[5] This assumption is strongest when the legal issue is one of the general health and welfare of a state's citizens and consumers.[6] Second, that Congress' purpose in enacting the law is a primary concern of the Preemption analysis. Congress' purpose is evident in two ways: the language of the statute and its framework, and the complete statutory and regulatory scheme.[7] Third, the relative importance to the State of its own law is immaterial to the analysis. State law must yield to federal law.[8] As a practical matter, if a State places a high level of importance on an issue, it could create a solution through Congressional legislation.

B. The Court's Analytical Framework

Once a state and federal law overlap, the courts analyze the relationship between the laws and their contexts for Preemption. There are five primary methods of Preemption, which are categorized for our purposes as: 1) Express;[9] 2) Implied;[10] 3) Field;[11] 4) Actual Direct Conflicts (also called "impossibility");[12] 5) Actual Indirect Conflicts (also called "purposes-and-objectives" or "obstacle").[13] The word "actual" is used to distinguish between when Preemption occurs where the overlap of the law creates a recognized conflict and where the overlap of the law occurs due to its existence in an "area" occupied by federal law.

1. Express Preemption

---

[5] "Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure all federal authority, completely displacing the States." *Bethlehem Steel Co. v New York State Labor Relations Bd.*, 330 U.S. 747, 780 (1947) (majority opinion of Frankfurter, J.).

[6] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985).

[7] *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 486 (1996).

[8] *Free v. Bland*, 369 U.S. 663, 666 (1962).

[9] *Jones v. Rath*, 430 U.S. 519, 525 (1977).

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

[11] *Id., see generally Hines v. Davidowitz,* 312 U.S. 52 (1941).

[12] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963) ("A holding of federal exclusion of state law is inescapable...where compliance with both federal and state regulations is a physical impossibility….").

[13] *Hines*, 312 U.S. at 67 ("stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); s*ee generally Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-699 (1984).

Express Preemption is the simplest form of Preemption. As stated by the Court in *Jones v. Rath*, " Congressional enactments...override state laws with which they conflict."[14] *Jones* presents the classic example of Express Preemption. In *Jones*, Congress passed a law requiring certain information to be included in food labels, and a particular method for calculating that information. Congress included language which made it clear that any state law that overlapped with the federal statute was preempted. California had an overlapping food label law which required similar information, but used a different method to find that information. Several food packagers challenged California's law as preempted. The Supreme Court agreed, and struck down the California law.

2. Implied Preemption

Implied Preemption is similar to Field Preemption and they are frequently lumped together in a collapsed analysis. But they are separate Preemption methods which can be distinguished by the manner and breadth of Congress' enacted law overlapping with state law. In *Rice v. Santa Fe Elevator Corp.*, two Illinois grain warehousemen sued a grain elevator company for charging them higher rates than the federal government, contrary to Illinois law. In this case, a 1916 federal statute overlapped with Illinois law. The 1916 statute included a "savings clause" and a bond obligation conditioned on state law compliance which left the 1916 statute subservient to state law. However, in 1931, the statute was amended to remove the "savings clause" and the conditional bond requirement. The Court identified the "special and peculiar" history of 1931 amendments and its Congressional records to find that Congress acted "so unequivocally as to make clear that it intends no regulation except its own."[15] Congress eliminated dual regulation through Implied Preemption and substituted single-agency regulation.

3. Field Preemption

[14] *Jones v. Rath*, 430 U.S. 519, 525-526 (1977).
[15] *Rice v. Santa Fe Grain Elevator Corp.*, 331 U.S. 218, 331 (1947).

Field Preemption is most readily identified by three characteristics: the federal power's nature, the federal government's goal, and the statutory and regulatory framework's types of imposed obligations.[16] In *Hines v. Davidowitz*, a Pennsylvania foreign citizens registration act overlapped with a federal foreign citizens registration statutory and regulatory scheme. The Court identified the federal government's foreign affairs power, its goal of balancing foreign and domestic policies for every state's benefit, and the comprehensiveness of the federal scheme as dispositive. The Court recognized that "it has provided...a single integrated and all-embracing system in order to obtain the information deemed to be desirable in connection with aliens [and] plainly manifested a purpose to do so...[.]"[17] Field Preemption indicates "pervasiveness" and "dominance" of federal law.

4. Actual Direct Conflict Preemption

Actual Direct Conflict Preemption, often referred to as "impossibility," is readily-identifiable - the federal and state laws overlap on an identical legal issue and say two different things. You simply can't do both. It's *impossible*. If compliance with both federal and state regulation is a physical impossibility, "a holding of federal exclusion of state law is inescapable, and requires no inquiry into congressional design."[18] It is important to note that it is not enough that federal and state laws overlap on the same legal issue. They must be impossible to comply with simultaneously. If compliance is possible, it must be possible unilaterally in order to avoid "impossibility."[19]

5. Actual Indirect Conflict Preemption

Actual Indirect Conflict Preemption "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[20] Consequently, it is often referred to as "purposes and objectives" preemption. Both the federal and state law can be complied with, but

---

[16] *Hines v. Davidowitz*, 312 U.S. 52, 70 (1941).
[17] *Id.* at 74.
[18] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).
[19] *See Pliva, Inc. v. Mensing*, 564 U.S. 604 (2011) (finding, 5-4, that the mere possibility of possibility, subject to the actions of others, is not enough to defeat the "impossibility" requirement).
[20] *Hines*, 312 U.S. at 67; s*ee generally Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-699 (1984).

doing so frustrates Congress' purpose in enacting its law.[21] Actual Indirect Conflict Preemption is caught under the umbrella of Implied and Field Preemption in many cases. But actual indirect conflicts have their own qualities - an actual, not implied, conflict between two separate sovereigns' purposes, not simply competing statutory requirements.[22]

III. Preemption and Regulation

Preemption applies equally to regulations as it does to statutes.[23] This application is of increasing importance as agency rulemaking becomes the dominant force of federal governing actions. According to a recent report titled, "Regulator's Budget from Eisenhower to Obama," regulatory agency spending has increased by more than 2,000% since 1960.[24] Regulations, collectively referred to as "administrative law," have been the subject of attention and scrutiny by courts, practitioners, and legal academics, alike.[25]

Congress may use Preemption Clauses in statutes to expressly preempt overlapping state law, and Congress may use Saving Clauses to save overlapping state law from preemption. These clauses extend to regulations propounded by an agency in accordance with a statute.

Whether a court finds that a statute expressly preempts overlapping state law or expressly *does not* preempt overlapping state law, the court is not foreclosed from conducting further Preemption analysis. Preemption Clauses in statutes do not preclude the operation of other

---

[21] *Savage v. Jones*, 225 U.S. 501, 533 (1912) ("...if the purpose of the act cannot otherwise be accomplished - if its operation within its chosen field else must be frustrated, and its provisions be refused their natural effect - the state law must yield to the regulation of Congress within the sphere of its delegated power.") (*Hines*, 312 U.S. at n. 20).

[22] *See generally, Gade v. Nat'l Solid Waste Mgmt. Ass'n,* 505 U.S. 88 (1992).

[23] *Fidelity Federal Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 152 (1982) ("Federal regulations have no less preemptive effect than federal statutes").

[24] *See* Susan Dudley & Melinda Warren, Weidenbaum Center, Washington University and the George Washington University Regulatory Studies Center, *Regulator's Budget from Eisenhower to Obama* (May 2016), https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/2017_Regulators_Budget_05-17-2016.pdf (last accessed on May 23, 2016).

[25] *See* Phillip Hamburger, *Is Administrative Law Unlawful?* (2015); Antonin Scalia, *Support Your Local Professor of Administrative Law*, 34 Administrative L. Rev. xvii (1982); Jeffrey Wall, *Administrative Law: Litigation and Legislation*, AMERICAN TORT REFORM ASSOCIATION (presented March 22, 2016).

preemption principles.[26] Saving Clauses in statutes do not bar the "ordinary working of conflict pre-emption principles."[27]

A. Current Examples of Regulatory Conflicts

Many modern Preemption cases arise from overlapping federal regulations and state common law. Case examples cited herein include *Florida Lime & Avocado Growers* and generally any cited case from the past fifty years. Federal courts continue to deal with Preemption issues arising from these cases.

The U.S. Supreme Court recently denied certiorari in *Exxon Mobil v. New Hampshire*, a case implicating both the "feasibility" requirement under Actual Direct Conflict Preemption - also referred to as "impossibility" Preemption - and the "obstacle" requirement under Actual Indirect Conflict Preemption - also referred to as "objectives and purposes" Preemption.[28] In *Exxon Mobil*, the gasoline manufacturer in New Hampshire had a long-standing practice of using MTBE - one of two federally-approved primary Clean Air Act additives - in its gasoline as the safer and more effective means to comply with federal law enacted in 1990. In 2003, New Hampshire brought a *parens patriae* ("parent of the citizenry") suit against Exxon Mobil for using MTBE in gasoline products distributed in the state instead of an alternative additive and exposing its citizens to potentially contaminated groundwater.[29] Exxon Mobil argued that replacing the infrastructure used to distribute and store its MTBE gasoline in favor of non-MTBE gasoline was not feasible, and New Hampshire's common law suit was preempted as applied.

The New Hampshire Supreme Court ruled that Clean Air Act and New Hampshire common law compliance was not impossible, and Congress' intent was not to provide a complete list of

---

[26] *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (discussing *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504 (1992)).
[27] *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000).
[28] *See State v. Exxon Mobil Corp.,* 168 N.H. 211 (N.H. 2015), *cert denied, Exxon Mobil Corp. v. New Hampshire*, 2016 U.S. LEXIS 3184 (May 16, 2016).
[29] "Low levels of MTBE can make drinking water supplies undrinkable due to its offensive taste and odor." EPA, https://archive.epa.gov/mtbe/web/html/water.html (accessed on May 18, 2016; last updated on February 20, 2016).

additive alternatives but simply to provide expressly-approved examples of complying additives. Therefore, New Hampshire's common law claims were not preempted.

The United States Court of Appeals for the Eleventh Circuit has granted rehearing for an appeal in *Graham v. R.J. Reynolds Tobacco Co.*[30] This case implicates Actual Indirect Conflict Preemption - referred to by the court in the case as "obstacle preemption."[31] The court has previously ruled that, while Florida common law may impose a duty on cigarette companies to protect the health, safety, and welfare of its citizens, it cannot do so using "inherently defective" and "inherently negligent" jury findings through its *Engle* case line. As succinctly stated by the Eleventh Circuit panel: "[] our holding is narrow indeed: it is only these specific, sweeping bases for state tort liability that we conclude frustrate the full purposes and objectives of Congress."[32]

IV. Conclusion

The Preemption Doctrine is well-settled and well-litigated law. This is particularly so as federal regulations continue to dominate the governing landscape and increase the opportunities to overlap with state law. Courts addressing these issues should work to ensure clarity in its application.

---

[30] *Graham v. R.J. Reynolds Tobacco Co.*, 811 F.3d 434 (11th Cir., February 2, 2016).
[31] *Graham v. R.J. Reynolds Tobacco Co.*, 782 F.3d 1261, 1275 (11th Cir. 2015).
[32] *Id.* at 1284.