

AN INTRODUCTION TO FEDERAL PREEMPTION

FEDERAL PREEMPTION AND THE SUPREMACY CLAUSE

Federal preemption is the concept that “federal law preempts contrary state law.” *Hughes v. Talen Energy Mktg., LLC*, 136 S.Ct. 1288, 1297 (2016). The source for federal preemption is found in the Supremacy Clause in Article VI of the United States Constitution. The Supremacy Clause states:

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.

The Federal laws that preempt state law include not only legislation from Congress, but also administrative rules and regulations made pursuant to authority delegated by Congress. *Fidelity Fed. Savings and Loan Ass'n v. de la Cuesta*, 458 US 141, 153 (1982). (“Federal regulations have no less pre-emptive effect than Federal Statutes”). Non-legislative rules, including interpretations, policy statements, and guidance issued by agencies without notice-and-comment process, are not considered federal laws and therefore do not preempt state law. Executive Orders (EO), if otherwise valid as discussed below, are also considered federal law for purposes of preemptive effect. *See Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 273 n.5 (1974)(concluding in that case that the “Executive Order is valid and may create rights protected against inconsistent state law through the Supremacy Clause.”)

STATE AND LOCAL LAWS MAY BE PREEMPTED ONLY BY VALID FEDERAL LAWS

The Supremacy Clause does not independently grant any power to the federal government. Instead, the Supremacy Clause, and the doctrine of federal preemption that arises from it, is essentially a choice-of-law provision, stating that where valid federal and state and local laws are in conflict, the federal laws prevail. The clause itself makes clear that federal law is supreme only when those laws are made “in pursuance” of the Constitution and “under the authority of the United States.” U.S. CONST., Art. VI, cl. 2., *see also Printz v. U.S.*, 521 U.S. 898, 924-25 (1997) (noting that the validity of a federal law is a prerequisite for application of the Supremacy Clause).

The Supremacy Clause does not change the fact that the federal government remains constrained to its enumerated powers. *U.S. v. Lopez*, 514 U.S. 547, 552 (1995), (“The Constitution creates a Federal Government of enumerated powers”). The language of the Constitution makes clear that it is granting particular powers to the federal government, *see, e.g.*, U.S. CONST., Art. I, § 8, as does its history and structure, *see generally Printz*, 521 U.S. at 918-925. The Tenth Amendment makes explicit that states preserve some realm of exclusive sovereignty, stating, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

The enumerated powers of Congress, particularly the Commerce Clause, historically have been interpreted expansively. *See, e.g. Wickard v. Filburn*, 317 U.S. 111 (1942)(interpreting the Commerce Clause as providing Congress with broad powers to regulate). More recently, however, various exercises of federal power have been held to be beyond the scope of the power granted to the federal government by the Constitution. *See U.S. v. Morrison*, 529 U.S. 598 (2000)(striking down parts of the Violence Against Women Act of 1994 as exceeding Congress’ authority under the Commerce Clause); *National Federation of Independent Businesses v. Sebelius*, 132 S.Ct. 2566 (2012)(striking down a portion of the Affordable Care Act that would have significantly expanded Medicaid as being an impermissibly coercive and therefore invalid exercise of Congress’ spending power); *U.S. v. Lopez*, 514 U.S. 549 (1995)(striking down the Gun Free School Zones Act of 1990 as exceeding Congress’ authority under the Commerce Clause).

The Tenth Amendment has also been used to strike down federal legislation as exceeding Congress’ power under the Constitution. *See Printz v. U.S.*, 521 U.S. 898 (1997)(holding that provisions of the Brady Handgun Violence Prevention Act requiring state law enforcement officers to participate in a background check process for gun transfers were invalid because they unconstitutionally commandeered state officials in violation of the Tenth Amendment); *N.Y. v. U.S.*, 505 U.S. 144 (1992) (holding that a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 requiring states to either conform to the federal law or be forced to take title of waste within its borders was unconstitutional commandeering under the Tenth Amendment).

Similarly, in order for federal administrative rules or regulations to have preemptive effect over state laws, those agency rules and regulations must be made pursuant to a valid Congressional delegation of authority. *N.Y. v. Fed. Energy Reg. Comm’n*, 535 U.S. 1 (2002)(a federal agency “literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.”)(quoting *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 374 (1986)). Executive Orders also must be “valid” in order to preempt state law. EOs are sometimes described as being Article I EOs, meaning that they are rooted in express statutory authorizations, or Article II EOs, meaning that they are rooted in the powers of the executive, such as the President’s Article II responsibility for the efficient operation

of the Executive Branch. Courts often allow presidents to “aggregate” authority for an EO from both executive and statutory sources. *See generally Executive Orders in Court*, 124 YALE L.J. 2026 (2015). Questions related to the validity of an EO include whether it is statutorily authorized, whether Congress’ delegation of power to the President was constitutional, whether an EO is precluded or overturned by Congress, and whether the President was constitutionally empowered to issue an EO in the absence of statutory designation, and of course whether the EO violates constitutional rights. *Id.*

TYPES OF PREEMPTION

There are two primary types of preemption: express preemption and implied preemption. Express preemption is when “Congress’ command [to preempt] is explicitly stated in the statute’s language,” and implied preemption is when it is “implicitly contained in its structure or purpose.” *Jones v. Rath Packing Co.*, 430 US 519, 525 (1977).

For express preemption, when a federal law makes explicit the intent to preempt, the focus of any preemption-related dispute will be on the scope of intended preemption. *Dan’s City Used Cars, Inc. v. Pelkey*, 133 S.Ct. 1769, 1778 (2013)(“Where, as in this case, Congress has superseded state legislation by statute, our task is to ‘identify the domain expressly pre-empted.’”) (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001)).

Under the heading of implied preemption, there are two general approaches to determining whether state laws are preempted when there is no explicit declaration of Congressional intent: (1) field preemption and (2) conflict preemption. Field preemption occurs when Congress has legislated in an area of law in so comprehensive a manner that we can infer that Congress intended that its regulations be the only ones in that area, creating nationally uniform regulation. *Northwest Central Pipeline Corp. v. State Corp. Comm’n of Kan.*, 489 U.S. 493, 509 (1989)(A state law is preempted where “Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law.”). In *U.S. v. Locke*, 529 U.S. 89 (2000), the state of Washington had passed a law, in response to the devastating Exxon Valdez oil spill, permitting a state agency to regulate oil tanker operations when in Washington state ports. The United States challenged the law under the Supremacy Clause, arguing that the United States Coast Guard’s regulations occupied the field through its “comprehensive federal regulatory scheme governing oil tankers.” *Id.* at 94. The Court held that Washington’s state law was preempted. *Id.* Where legislation in a particular area is extensive, and where the legislative and regulatory scheme evidences an intent to promote uniformity, courts are likely to find that the area is preempted through field preemption.

Conflict preemption occurs in one of two ways, either when “the state law at issue conflicts with federal law, either because it is impossible to comply with both, *Florida*

Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).” *Northwest Central Pipeline Corp.*, 489 U.S. at 509. For implied conflict preemption under the theory of impossibility, the standard is whether there is a “physical impossibility” of complying with both a federal and state law. *Florida Lime & Avocado Growers*, 373 U.S. at 142-43. Two cases involving failure-to-warn claims highlight how the Court has addressed an impossibility theory of preemption, at times relying on seemingly minor and technical factual distinctions in determining whether compliance with federal and state laws is truly impossible. In 2009, in *Wyeth v. Levine*, 555 U.S. 555 (2009), the Supreme Court considered whether a drug manufacturer could be held liable under state tort laws for failing to warn consumers even if the drug manufacturer complied with all federal labeling requirements. The Court held that the drug manufacturer could be held liable, despite the FDA’s stamp of approval, because it could have complied with federal regulations but then gone above and beyond by adding additional warning language. Only two years later, in *PLIVA, Inc. v. Mensing*, 131 S.Ct. 2567 (2011), a very similar case was again before the Court, with the only difference being that the drug at issue was a generic drug. In *PLIVA*, the Court came out the other way and found that the state tort law was preempted, because generic drugs are not permitted under federal law to make any changes in labeling from the labels approved for the name-brand drug. The Court itself acknowledged that this result, in which state tort claims are preempted for generic drugs but not the identical branded drugs, “makes little sense,” *id.* at 2581, but the majority believed itself bound to reach this conclusion given the differences in the laws and regulations covering generic drugs.

For implied conflict preemption under the theory of obstacle preemption, the Supreme Court describes implied conflict obstacle preemption as federal laws’ “preempting state law that under the circumstances of the particular case . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress—whether that “obstacle” goes by the name of conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency; violation; curtailment; . . . interference,” or the like.” *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000)(internal quotation marks and modifications omitted). In *Geier, id.*, the Court held that the National Traffic and Motor Vehicle Safety Act of 1966 preempted a state tort action based on negligence where an auto manufacturer was in compliance with the safety standard under the Act but did not install airbags. The Court held that bringing a state tort action for lack of airbags conflicted with the objectives of the Act, which was to promote the widespread adoption of safety provisions through a scheme that allowed a varied mix of safety devices and a phase-in of safety requirements. This case highlights the difference between actual impossibility of compliance with state and federal laws versus a broader inquiry into whether the state law is an obstacle to the accomplishment of the full purposes of a federal law. Notably, in this case the dissent faulted the majority for its “unprecedented use of inferences from regulatory history and commentary” in finding that state tort claims interfere with the federal law. *Id.* at 912-13. Because claims

of implied preemption based on a theory of obstacle preemption depend on interpretation of the overall goals of a statutory scheme, questions about the existence type of preemption are particularly open to divergent conclusions.

PREEMPTION ANALYSIS: INTENT AND PRESUMPTION AGAINST PREEMPTION

The Supreme Court has emphasized “two cornerstones” of preemption jurisprudence: congressional intent and what is often referred to as a “presumption against preemption.” *Wyeth v. Levine*, 555 U.S. at 565. The Supreme Court has described these two core aspects of the preemption analysis as being:

First, “the purpose of Congress is the ultimate touchstone in every pre-emption case.” *Medtronic, Inc. v. Lohr*, 518 U. S. 470, 485 (1996) (internal quotation marks omitted) . . .
Second, “[i]n all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ . . . we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’ “ *Lohr*, 518 U. S., at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)).

Wyeth v. Levine, 555 U.S. at 565.

The question of intent is the central issue for all forms of preemption. *Gobeille v. Liberty Mut. Ins. Co.*, 136 S.Ct. 936, 946 (2016). Even where an intent to preempt is explicit in a statute, there will almost always be some question about how broad the preemption was intended to be, and whether the state law to be preempted falls within the intended scope of preemption. *Altria Group v. Good*, 555 U.S. 70, 76 (2008)(“If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress’ displacement of state law still remains.”) Congressional intent is determined by the language of the statute itself, and through the structure and purpose of the federal law. *Id.*

For implied preemption under a theory of field preemption, the core question will be whether “Congress’ intent to supercede state law altogether [can] be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it.” *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Com’n*, 461 U.S. 190, 203-04 (1983)(internal quotation marks omitted). The inverse of this is that where an area is heavily regulated, but Congress did not intend to prevent states from supplementing it, the field is not preempted.

For implied preemption through a theory of conflict preemption, if it is truly impossible to comply with both a federal and state law, the intent of Congress to have the federal law control may be clear. However, often there will not be a direct conflict, but rather the state and federal laws will cover the same subject. The question of intent in these obstacle preemption cases will often be whether Congress intended to create a uniform standard, or to legislate a floor and allow states to supplement the federal standard. *See, e.g., Geier*, 529 U.S. 86; *see also Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132.

Courts interpreting the language and purpose of federal laws to determine whether there is federal preemption of a state law often claim to be analyzing Congress' intent through the lens of a "presumption against preemption." It is a well-established and often-cited principle that analysis of federal preemption must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). "That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). The potency ascribed to this presumption, particularly in implied preemption cases varies widely, leading some observers to note that it appears that the Court in fact often applies a presumption in favor of preemption, *see, e.g.,* Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C.L. Rev. 967 (2002)(discussing the history of the presumption against preemption, and arguing that the Supreme Court today often applies a presumption in favor of preemption).

A presumption against preemption has, at times, been applied in cases of express preemption to limit how broadly express directions related to preemption are interpreted, *see Medtronic, Inc.*, 518 U.S. at 485(including a vigorous dissent to the application of this principle in the context of express preemption). However, more recently the Supreme Court has declined to apply it in express preemption cases, at least when the Court can claim to rely on a statute's "plain language," *see Puerto Rico v. Franklin California Tax-Free Trust*, 136 S.Ct. 1938 (2016)("Where a federal statute contains an express preemption clause, courts do not invoke any presumption against preemption but, instead, focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.").

In *New York v. FERC*, 535 U.S. 1, the Supreme Court has addressed the question of how the presumption against preemption applies in the context of administrative preemption, in which an administrative executive agency displaces state law through federal rules or regulations. The Court explained that the presumption against preemption does apply when determining whether a "given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority," *id.* at 17, but not when determining the proper scope of an agency's jurisdiction, *id.* at 18.

The appropriateness and extent of judicial deference to an agency’s own conclusions about its ability to preempt and its intent to preempt is somewhat unclear, with courts typically deferring to agency’s interpretations of its own statutes but not its conclusions about preemption. In *PLIVA*, 131 S.Ct. 2567, 2575 n.3 (2011), the Supreme Court held that courts should not defer to agencies’ ultimate conclusion about whether its own rules preempt state law. However, at other times, the Court has stated that courts should give “some weight” to agency views about whether federal and state laws are actually irreconcilable and how the federal and state laws interact within a regulatory scheme. *See Wyeth*, 555 US at 576-66 (“While agencies have no special authority to pronounce on pre-emption absent delegation by Congress, they do have unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an ‘obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”), *see also Smiley v. Citibank*, 517 U.S. 735, 743-44 (1996) (suggesting that in the face of ambiguous statutory provision for preemption, a court should give deference to the agency’s interpretation creating preemption, if not to the agency’s conclusion about the preemptive nature of its regulation). The line between deferring to the agency’s interpretations and its conclusions about preemption is likely to be muddled, with deference to the former necessarily affecting the conclusions as to the latter.

The role of the presumption against preemption is an evolving one in preemption jurisprudence—at times given great weight, and at others disregarded completely. While it may be a helpful tool in individual preemption cases, it is not a presumption that can reliably be depended on to counter arguments in favor of preemption.