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PREEMPTION

*Caleb Nelson**

THE powers of the federal government and the powers of the states overlap enormously. Although the Constitution makes a few of the federal government's powers exclusive,¹ the states retain concurrent authority over most of the areas in which the federal government can act. As a result, nearly every federal statute addresses an area in which the states also have authority to legislate (or would have such authority if not for federal statutes).²

This aspect of our constitutional system makes the interplay of state and federal law vitally important. The extent to which a federal statute displaces (or "preempts"³) state law affects both the

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¹ See, e.g., U.S. Const. art. I, § 8, cl. 5, and *id.* art. I, § 10, cl. 1 (giving the federal government exclusive power to coin money); *id.* art. I, § 8, cl. 11, and *id.* art. I, § 10, cl. 1 (giving the federal government exclusive power to grant letters of marque and reprisal); *id.* art. II, § 2, cl. 2, and *id.* art. I, § 10, cl. 1 (giving the federal government exclusive power to enter into treaties).

² In this respect as in others, the Constitution marked a bold departure from the Articles of Confederation, which had given Congress certain "sole and exclusive" powers and had left most other matters exclusively to the individual states. See Articles of Confederation art. IX, paras. 1, 4; *id.* art. II. The Articles' treatment of certain issues—such as military matters and the payment of common expenses—did require substantial cooperation between Congress and the states. See *id.* arts. VI–IX. Still, to a far greater extent than the present Constitution, the Articles treated powers as belonging at *either* the national *or* the state level, but not both. See 11 *Documentary History of the First Federal Congress of the United States of America: Debates in the House of Representatives 1359* (Charlene Bangs Bickford et al. eds., 1992) (report of Rep. James Madison's remarks on Sept. 5, 1789) (noting the "novelty" of the "concurrence [under the new Constitution] . . . between the legislative authorities of the federal and State governments").

³ In 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). I do not discuss any separate issues concerning the preemption of state law by federal administrative regulations. In particular, I do not discuss how courts should determine the scope of an agency's delegated authority to preempt state law, nor do I discuss

substantive legal rules under which we live and the distribution of authority between the states and the federal government. According to Stephen Gardbaum, indeed, "preemption . . . is almost certainly the most frequently used doctrine of constitutional law in practice."⁴

A few examples illustrate both the range and the significance of preemption questions. If federal law regulates the safety of nuclear power plants, must states allow facilities that meet the federal requirements to operate, or can states supplement the federal standards with additional safety regulations of their own?⁵ If federal law prescribes warnings that cigarette makers must put on each pack, may smokers invoke state products-liability law to recover damages for dangers that the warnings did not disclose?⁶ If federal law entitles army officers to retirement pay, may states treat the anticipated payments as "community property" to be divided between officers and their spouses in the event of divorce?⁷

Answering any of these questions obviously requires a careful analysis of the particular statutory schemes at issue. But the United States Supreme Court has established a general framework within which the analysis proceeds. The Court's taxonomy recognizes three different types of preemption: "express" preemption, (implied) "field" preemption, and "conflict" preemption.

"Express" preemption occurs when a federal statute includes a preemption clause explicitly withdrawing specified powers from the states. Judges confronted with such a clause face a two-fold

whether regulations should be construed any differently than statutes. Cf. *Hillsborough County v. Automated Med. Lab.*, 471 U.S. 707, 717-18 (1985) (suggesting that courts will demand more clarity from agencies than from Congress).

⁴ Stephen A. Gardbaum, *The Nature of Preemption*, 79 *Cornell L. Rev.* 767, 768 (1994).

⁵ See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 212 (1983) (concluding that "the Federal Government maintains complete control of the safety and 'nuclear' aspects of energy generation," although states can still make economic decisions about the need for new power plants); cf. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (holding that despite the federal government's occupation of the field of nuclear safety regulation, people injured by safety lapses may still seek punitive damages under state tort law).

⁶ Cf. *Cipollone v. Liggett Group*, 505 U.S. 504 (1992) (holding that the preemption clause in the Public Health Cigarette Smoking Act of 1969 bars some but not all state-law claims).

⁷ See *McCarty v. McCarty*, 453 U.S. 210 (1981) (holding that the federal system for retirement pay displaces state community-property laws).

task: They must decide what the clause means, and they must decide whether the Constitution permits Congress to bar the states from exercising the powers in question. The Court has indicated that in discharging the first part of this task, judges should apply some version of a presumption against preemption; the Court favors “a narrow reading” of express preemption clauses, at least when the states’ traditional powers to legislate for the general health, safety, and welfare are at stake.⁸ Still, “[i]t is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms.”⁹

Even in the absence of an express preemption clause, the Court sometimes is willing to conclude that a federal statute wholly occupies a particular field and withdraws state lawmaking power over that field. The Court has indicated that a federal regulatory scheme may be “so pervasive” as to imply “that Congress left no room for the States to supplement it.”¹⁰ Likewise, the “federal interest” in the field that a federal statute addresses may be “so dominant” that federal law “will be assumed to preclude enforcement of state laws on the same subject.”¹¹ In essence, judges who infer such “field” preemption are reading an implicit preemption clause into the federal statute; as with express preemption clauses, they must determine the scope of the clause and whether Congress has power to enact it.

The Court has grown increasingly hesitant to read implicit field-preemption clauses into federal statutes.¹² So-called “conflict” pre-

⁸ See, e.g., *Cipollone*, 505 U.S. at 516, 518 (discussing and applying “the presumption against the pre-emption of state police power regulations”); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (reaffirming this presumption and suggesting that it applies more broadly).

⁹ *Pacific Gas*, 461 U.S. at 203.

¹⁰ E.g., *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

¹¹ *Rice*, 331 U.S. at 230; see also *Hines v. Davidowitz*, 312 U.S. 52 (1941) (holding that the federal Alien Registration Act, which touched on the areas of immigration, naturalization, and foreign affairs, preempted a state alien registration act).

¹² See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting) (remarking that “our recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it”); see also *Hillsborough County v. Automated Med. Lab.*, 471 U.S. 707, 717 (1985) (suggesting a reluctance to infer preemption from the comprehensiveness of statutes); *De Canas v. Bica*, 424 U.S. 351, 359–60 (1976) (similar); *New York Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 415 (1973) (explaining that federal legislation in complex fields

emption, on the other hand, is ubiquitous. Everyone agrees that even if a federal statute contains no express preemption clause, and even if it does not impliedly occupy a particular field, it preempts state law with which it “actually conflicts.”¹³ According to the Court, such a conflict exists if either (1) compliance with both the state and federal law is “a physical impossibility” or (2) state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁴ While the first part of this test is vanishingly narrow,¹⁵ the second part can be broad: So-called “obstacle preemption” potentially covers not only cases in which state and federal law contradict each other, but also all other

is likely to be detailed whether or not Congress wants to preempt supplementary state legislation). But cf. *United States v. Locke*, 2000 WL 238223 (U.S. Mar. 6, 2000) (endorsing the decision to find field preemption in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978)).

¹³ See, e.g., *English*, 496 U.S. at 79.

¹⁴ E.g., *Boggs v. Boggs*, 520 U.S. 833, 844 (1997); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991); *English*, 496 U.S. at 79; *California v. ARC Am. Corp.*, 490 U.S. 93, 100–01 (1989); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 79 (1987); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987); *Hillsborough County*, 471 U.S. at 713; *Brown v. Hotel & Restaurant Employees Int'l Union Local 54*, 468 U.S. 491, 501 (1984); *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 469 (1984); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 182 (1983); *Pacific Gas*, 461 U.S. at 204; *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Edgar v. MITE Corp.*, 457 U.S. 624, 631 (1982); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). In articulating the “physical impossibility” prong of its test, the Court generally cites *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963). In articulating the “obstacle” prong of its test, the Court generally cites *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹⁵ The Supreme Court has made clear that even if one sovereign’s law purports to give people a right to engage in conduct that the other sovereign’s law purports to prohibit, the “physical impossibility” test is not satisfied; a person could comply with both state and federal law simply by refraining from the conduct. Thus, even when state and federal law contradict each other, it is physically possible to comply with both unless federal law *requires* what state law *prohibits* (or vice versa). See, e.g., *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (deeming the “physical impossibility” test inapplicable where a federal statute authorized national banks to do something that state law forbade them to do); *Michigan Canners*, 467 U.S. at 478 n.21 (deeming the “physical impossibility” test inapplicable where state law authorized agricultural associations to do something that federal law forbade them to do). The “physical impossibility” test applies so rarely that even *Florida Lime*—the case consistently cited as authority for it—mentioned the test only in dicta. See 373 U.S. at 143 (“No such impossibility of dual compliance is presented on this record . . .”).

cases in which courts think that the effects of state law will hinder accomplishment of the purposes behind federal law.

In recent years, conservative advocates of federalism and liberal advocates of government regulation have joined in arguing that the current tests for preemption risk displacing too much state law.¹⁶ This alliance is not as odd as it might seem, because the politics of preemption are complicated.¹⁷ Advocates of "states' rights" have obvious reasons to oppose preemption: They dislike many federal statutes to begin with, and they want those statutes to leave states with as much policymaking authority as possible. But even people who favor federal regulatory statutes often want those very statutes to have narrow preemptive effects, so that states remain free to supplement the federal statutes with regulations of their own.¹⁸

¹⁶ See, e.g., Kenneth Starr et al., *The Law of Preemption* 47, 56 (1991) (arguing that "preemption diminishes the state sphere that federalism teaches us to protect"); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. Rev. 559, 561 (1997) (noting that "corporations have attempted to turn [federal] statutes from regulatory swords into private shields," and arguing that current tests risk the preemption of too much state tort law); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 685, 687-88 (1991) (pointing out that federal preemption risks displacing state and local laws on such matters as "environmental damage, nuclear power safety, divestment from South Africa, rent control, drug testing, education and testing standards, banking and thrift regulation, employment discrimination, and hostile takeover regulation") (footnotes omitted); Donald P. Rothschild, *A Proposed "Tonic" with Florida Lime to Celebrate Our New Federalism: How to Deal with the "Headache" of Preemption*, 38 U. Miami L. Rev. 829, 830 n.3 (1984) (noting that "present preemption doctrines interfere with a state's right to supplement federal regulation in order to afford greater protection for citizens residing within its borders") (emphasis omitted); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 *Hastings Const. L.Q.* 69, 114 (1988) (arguing that current preemption jurisprudence "fails to protect the political and judicial safeguards of federalism").

¹⁷ See Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 *Tex. L. Rev.* 1743, 1751 (1992) (noting the "confusing" politics of "federal-state conflicts").

¹⁸ Conversely, libertarians and others who want to shrink government at all levels may well oppose many federal statutes on policy grounds, but want those same statutes to have broad preemptive effects if enacted. Preemption is attractive to some people precisely because it prevents states from supplementing the existing federal statutes with additional measures.

Similarly, certain business interests might favor maximizing the preemptive effect of existing federal regulatory statutes, to keep states from imposing burdensome regulations on top of the existing federal scheme. See Hoke, *supra* note 16, at 691-93 (discussing efforts by business and industry groups to secure preemption); Cindy Skrzycki, *The Chamber Reached a Sticking Point*, *Wash. Post*, Sept. 17, 1999, at E1

For those who think that the Court's current jurisprudence risks preempting too much state law, the most common prescription for reform is to strengthen the presumption against preemption that the Court already purports to apply.¹⁹ In the area of "express" preemption, commentators have proposed adopting either a general clear-statement rule²⁰ or more targeted clear-statement rules designed to preserve the types of state law they favor.²¹ The same ideas govern "field" preemption: If even express preemption clauses should be read narrowly, then courts surely should hesitate before reading federal statutes to occupy an entire field by implication.²² As for "conflict" preemption, some of the same

(reporting efforts by "the nation's largest business lobbying group" to defeat a bill that might have curtailed the preemptive effect of federal statutes and regulations); cf. Jerry L. Mashaw & Susan Rose-Ackerman, *Federalism and Regulation*, in *The Reagan Regulatory Strategy: An Assessment* 111, 127-36 (George C. Eads & Michael Fix eds., 1984) (discussing factors that might lead particular businesses to support federal regulatory preemption). These same business interests, however, may favor *minimizing* the preemptive effect of federal statutes granting benefits to businesses, so that states remain free to grant extra benefits of their own.

¹⁹ See, e.g., Starr et al., *supra* note 16, at 40-55; Grey, *supra* note 16, at 565, 569, 611-12 (complaining that despite "lip service" from the Court, judges have not actually enforced a strong enough presumption against the preemption of state tort law); Hoke, *supra* note 16, at 760-61 (arguing that while a clear-statement rule is not a panacea, "[t]he Court's presumptions disfavoring preemption should be more consistently applied"); Wolfson, *supra* note 16, at 111-14. For some rare criticism of a general presumption against preemption, see Viet D. Dinh, *Reassessing the Law of Preemption*, 88 *Geo. L.J.* (forthcoming 2000).

²⁰ See, e.g., Starr et al., *supra* note 16, at 56 (suggesting that "state authority to legislate should be upheld 'unless Congress has clearly swept the boards of all State authority, or the State's claim is in unmistakable conflict with what Congress has ordered'" (quoting *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 241 (1947) (Frankfurter, J., dissenting))); Rothschild, *supra* note 16, at 847-48 (advocating a general clear-statement rule to "limit[] the preemptive effects of express preemption clauses"); Wolfson, *supra* note 16, at 112 (urging courts to "requir[e] that Congress speak clearly and explicitly whenever it preempts state legislation outside those areas that the Constitution reserves for Congress alone").

²¹ See Grey, *supra* note 16, at 607 (concluding that preemption clauses should be construed to cover state tort remedies "only when Congress has explicitly referred to state tort actions in 'clear and unmistakable' language"); Susan Raeker-Jordan, *The Pre-Emption Presumption That Never Was: Pre-Emption Doctrine Swallows the Rule*, 40 *Ariz. L. Rev.* 1379, 1428-39 (1998) (similar).

²² See Starr et al., *supra* note 16, at 34-56 (criticizing implied field preemption, though not advocating its complete abandonment); Grey, *supra* note 16, at 622 (arguing that implied field preemption should never extend to state tort remedies); Rothschild, *supra* note 16, at 873 (arguing against ever inferring field preemption); see also Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 *Tex. L. Rev.* 795,

commentators have proposed finding a conflict between state and federal law *only* if it is physically impossible to comply with both—a proposal that would dramatically reduce the preemptive scope of federal statutes.²³ Others propose more modest shifts in the same direction.²⁴

This Article takes issue with both the Court's current jurisprudence and the commentators' proposed reforms. Part I analyzes the source of preemption doctrine, the Supremacy Clause of the federal Constitution. Drawing on long-overlooked historical materials, I argue that the Supremacy Clause puts questions about whether a federal statute displaces state law within the same framework as questions about whether one statute repeals another. Even if a federal statute does not contain an express preemption clause, it impliedly repeals whatever state law it contradicts: When a court must choose between applying a valid rule of federal law and applying some aspect of state law, the Supremacy Clause requires it to apply the federal law. But if state and federal law can stand together, the Supremacy Clause does not require courts to ignore state law. Courts remain free to apply state law *except* to the extent that doing so would keep them from obeying the Supremacy Clause's direction to follow all valid rules of federal law.

Part II explains that constitutional law has no place for the Court's fuzzier notions of "obstacle" preemption, under which state law is preempted whenever its practical effects would stand in the way of accomplishing the full purposes behind a valid federal statute. Under the Supremacy Clause, preemption occurs if and only if state law contradicts a valid rule established by federal law, and the mere fact that federal law serves certain purposes does not automatically mean that it contradicts everything that might get in

828–30 (1996) (suggesting that the Constitution does not permit Congress to occupy a field implicitly, but instead requires any field preemption to be express).

²³ See Grey, *supra* note 16, at 622–27 (suggesting that in the absence of an express preemption clause, state tort law should be preempted only in "the rare case" when compliance with both state and federal law would be physically impossible); Raeker-Jordan, *supra* note 21, at 1439–45 (taking the same position, and acknowledging that under this theory states could make people liable to pay damages for engaging in conduct that federal law requires); Rothschild, *supra* note 16, at 857–62 (contending that "preemption should not be found" where it is possible to comply with both state and federal law).

²⁴ See, e.g., Starr et al., *supra* note 16, at 56 (proposing "a deemphasis of obstacle . . . preemption").

the way of those purposes. As a matter of statutory interpretation, of course, some federal statutes may themselves imply "obstacle preemption" clauses, which contradict (and therefore preempt) all state law that would hinder accomplishing particular purposes. But the propriety of this inference depends upon the particular words and contexts of the federal statutes in question; a general doctrine of obstacle preemption is misplaced.

To the extent that my analysis of the Supremacy Clause undermines the "obstacle" branch of so-called "conflict preemption," it supports those who think that the Court's current framework risks preempting too much state law. As I explain in Part III, however, it simultaneously undermines the artificial "presumption against preemption" that the same commentators cherish. The final phrase in the Supremacy Clause—"any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"²⁵—is something called a "*non obstante* clause." Although such clauses are no longer familiar to us, legal draftsmen in late eighteenth-century America used them to acknowledge that a statute might contradict some other laws and to instruct courts not to apply the traditional presumption against implied repeals. When a statute contained a *non obstante* clause, courts did not have to struggle to harmonize the statute with prior laws; they could give the statute its natural meaning and let it displace whatever law it contradicted.

The presence of a *non obstante* provision in the Supremacy Clause confirms the connection between preemption and repeals. But it also establishes an important rule of construction. The *non obstante* provision tells courts that even if a particular interpretation of a federal statute would contradict (and therefore preempt) some state laws, this fact is not automatically reason to prefer a different interpretation. It follows that courts should not automatically seek "narrowing" constructions of federal statutes solely to avoid preemption.

I. THE SUPREMACY CLAUSE AND PREEMPTION

Most commentators who write about preemption agree on at least one thing: Modern preemption jurisprudence is a muddle. In-

²⁵ U.S. Const. art. VI, cl. 2.

deed, academic commentaries risk understating the extent of the muddle, because they often focus on preemption decisions in one particular area of law.²⁶ Scholars bemoan the “chaos” caused by preemption decisions in the realm of real-estate finance,²⁷ or the “awful mess” of preemption doctrine in certain parts of labor law,²⁸ or the “wildly confused lower court case law on copyright preemption of state unfair competition/misappropriation law.”²⁹ But when the application of a doctrine produces such poor results in area after area, it is time to take a fresh look at the doctrine itself. As commentators who have discussed preemption more broadly agree, preemption doctrine is muddled *in general*, not just as applied to discrete areas.³⁰

²⁶ See Gardbaum, *supra* note 4, at 768 & n.4 (distinguishing “the paucity of ‘second-order’ scholarly work on preemption” from the many articles on “the preemption of particular areas of state law by specific federal statutes”); Susan J. Stabile, Preemption of State Law by Federal Law: A Task for Congress or the Courts?, 40 Vill. L. Rev. 1, 3 n.1 (1995) (“For the most part, commentators have addressed preemption with respect to particular statutes or particular types of claims.”).

²⁷ Frank S. Alexander, Federal Intervention in Real Estate Finance: Preemption and Federal Common Law, 71 N.C. L. Rev. 293, 340 (1993).

²⁸ Richard A. Bales, The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution, 77 B.U. L. Rev. 687, 702 (1997).

²⁹ William Patry, The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision, 67 Geo. Wash. L. Rev. 359, 368 n.51 (1999).

³⁰ See, e.g., Hoke, *supra* note 16, at 687 (“[T]he United States Supreme Court has failed to articulate a coherent standard for deciding preemption cases, and its haphazard approach fails to provide meaningful guidance to lower courts, legislators, and citizens.”); Rothschild, *supra* note 16, at 854, 857 (noting the “amazing inconsistency” with which the Court has applied its test for obstacle preemption, and suggesting that current preemption doctrine is too malleable); Weinberg, *supra* note 17, at 1751 (asserting that “[t]he Court’s own preemption cases are saved from crude politicization only because the politics of federal-state conflicts are too confusing to permit it”).

Because the application of preemption doctrine always involves questions of statutory interpretation, and because those questions can be difficult, some uncertainties are inevitable; no matter what analytical framework one uses, courts will continue to disagree with each other about exactly how that framework applies to certain statutes. Still, the confusions of the existing doctrine only multiply those disagreements. For a sign of the present muddle, one need only consider the Supreme Court’s docket for the current Term. While this Article was in press, the Court agreed to hear three separate preemption cases involving splits among the federal circuits or between federal circuits and state supreme courts. See *Shanklin v. Norfolk Southern Ry. Co.*, 173 F.3d 386 (6th Cir.), cert. granted, 120 S. Ct. 370 (1999); *Geier v. American Honda Motor Co.*, 166 F.3d 1236 (D.C. Cir.), cert. granted, 120 S. Ct. 33 (1999); *International Ass’n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053 (9th Cir. 1998), cert. granted, 120 S. Ct. 33 (1999), rev’d, 2000 WL 238223 (U.S. Mar. 6, 2000).

This Part returns to the doctrine's constitutional roots. As the Supreme Court³¹ and virtually all commentators³² have acknowledged, the Supremacy Clause is the reason that valid federal statutes trump state law. For too long, though, courts have treated the Supremacy Clause chiefly as a symbol—a rhetorical expression of federal dominance, but a provision with little practical content of its own.

This Part argues that the Supremacy Clause is more important than that. It is a practical provision of law that addresses and resolves some of the critical questions in the modern debate over preemption. In particular, the Supremacy Clause supplies a concrete test for preemption: It requires courts to ignore state law if (but only if) state law contradicts a valid rule established by federal law, so that applying the state law would entail disregarding the valid federal rule. In this respect, questions about whether a federal statute preempts state law are no different from questions about whether one statute repeals another. As we shall see, indeed,

³¹ See, e.g., *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982) (noting that preemption doctrine "has its roots in the Supremacy Clause"); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (attributing "[t]he underlying rationale of the preemption doctrine" to the Supremacy Clause); *Philadelphia v. New Jersey*, 430 U.S. 141, 142 (1977) (observing that "federal preemption of state statutes is, of course, ultimately a question under the Supremacy Clause").

³² See, e.g., Gerald Gunther & Kathleen M. Sullivan, *Constitutional Law* 337 (13th ed. 1997) ("When Congress exercises a granted power, the federal law may supersede state laws and preempt state authority, because of the operation of the supremacy clause of Art. VI. In these cases, it is ultimately Art. VI, not the commerce clause or some other grant of delegated power, that overrides the state law.").

Stephen Gardbaum has criticized the Court and commentators for tracing preemption to the Supremacy Clause. See Gardbaum, *supra* note 4, at 773-77 & n.22. 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 (whether implicitly or explicitly) by something else in the Constitution. This principle is obviously true in the realm of "conflict" preemption: In order for a substantive provision of federal law to displace conflicting state law, something in the Constitution must authorize Congress to enact the substantive provision. Gardbaum correctly notes that the principle is no less true for express (or implied) preemption clauses than for other statutory provisions: In order to withdraw particular powers from the states, Congress must be able to point to something in the Constitution that authorizes it to do so. 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.

the Supremacy Clause explicitly draws upon the traditional framework for repeals. Although changes in the techniques of drafting laws have obscured this point, early courts, legislators, and commentators understood the connection between preemption and repeals: They routinely discussed preemption in terms of whether federal law “repealed” state law, and they used the established framework for repeals to analyze this question.

*A. Some Background: How Legal Draftsmen
Superseded Prior Laws*

1. The Traditional Rule of Priority

To understand the Supremacy Clause, we first need to understand how legal draftsmen of the late eighteenth century superseded existing laws. If a state legislature was aware of a particular statute that it wanted to replace with a new law, it could include a clause in the new law expressly repealing the old one.³³ But official records were often poor, and legislators might not be aware of all the existing laws on a particular subject.

To get around this problem, or to avoid the burden of having to list all repealed statutory provisions separately, legislatures sometimes enacted general clauses repealing all prior legislation within the purview of the new statute.³⁴ Such clauses made clear that the

³³ See, e.g., An Act in alteration of the Act, entitled, An Act to promote the making of Raw Silk within this State, 1784 Conn. Pub. Acts 282 (“Be it enacted . . . [t]hat the Act, entitled, An Act to promote the making of Raw Silk, be, and the same is hereby repealed and made void.”); An Act to repeal the act of assembly to regulate auctions, ch. VIII, 1781 Md. Laws (May 10 Sess., unpaginated) (“Be it enacted . . . [t]hat the act of assembly, entitled, An act to regulate auctions, passed at a session of assembly, begun and held at the city of Annapolis, on the seventeenth day of October last past, shall be and is hereby repealed.”).

³⁴ See, e.g., An Act for the Punishment of Burglary and Robbery, 1783 Conn. Pub. Acts 633 (repealing “all Laws heretofore made for the Punishment of the Crimes aforesaid”); An Act for the Punishment of Fornication, and for the Maintenance of Bastard Children, ch. XXVII, 1786 Mass. Acts 416, 418 (repealing “all laws heretofore in force respecting the subject matter of this act”); An Act for the orderly Solemnization of Marriages, ch. III, 1786 Mass. Acts 437, 440 (repealing “all former laws relating to the solemnization of marriages”); An Act for the admeasurement of Boards, and for regulating the tale of Shingles, Clap-boards, Hoops and Staves; and for other purposes therein mentioned, 1785 N.H. Laws 348, 353 (repealing “all Acts, heretofore made, for the admeasurement of boards, and for regulating the tale and dimensions of shingles, clap-boards, hoops, shooks, staves, and heading”); An Act for

new statute occupied the field. But they had their own drawbacks; the legislature might inadvertently be repealing a useful law that was perfectly consistent with the new statute.

Rather than enact such repealing clauses, legal draftsmen could simply take advantage of the hoary maxim *leges posteriores priores contrarias abrogant*—later laws abrogate contrary prior ones. As William Blackstone summarized the principle, “where words are clearly *repugnant* in two laws, the later law takes place of the elder: *leges posteriores priores contrarias abrogant* is a maxim of universal law, as well as of our own constitutions.”³⁵

This rule of priority grew out of necessity. When two statutes were “repugnant” within the meaning of the rule, it would have been logically impossible for courts to follow both; courts that gave effect to one would not be giving effect to the other. In the language of the day, “repugnant” and “contrary” (the English equivalent of *contrarias*) meant the same thing as “contradictory.” Thus, Samuel Johnson defined “repugnant” to mean “contrary” and “repugnantly” to mean “contradictorily”; his definition of “contrary” included both “contradictory” and “repugnant,” while

the better regulating the Militia, ch. XX, 1776–1777 N.J. Laws 26, 36 (repealing “all Laws made by any former Legislature of this State, and Ordinances of any Congress or Convention, for regulating the Militia, or in anywise respecting the same”); An Act to prevent private lotteries to remit certain penalties and to repeal the acts therein mentioned, ch. 12, 1783 N.Y. Laws 523, 525 (repealing “all former laws of this State respecting lotteries”); An act for facilitating the navigation, and regulating the pilotage of the several ports of this state, ch. XX, 1783 N.C. Sess. Laws 23, 29 (repealing “all and every act and acts of assembly, or any clause or clauses of acts coming within the purview of this act, and not herein particularly confirmed”); An act to empower the county surveyors to make surveys and returns in the manner therein mentioned, ch. XIX, 1784 N.C. Sess. Laws 30 (Apr. 19 Sess.) (repealing “so much of any act or acts now in force in this state as comes within the purview and meaning of this act”); An Act for the better securing the City of Philadelphia, and its Liberties, from danger of Gunpowder, ch. CIV, 1783 Pa. Laws 256, 259 (repealing “all Acts heretofore made respecting the storing of Gunpowder in the said City”); An Act for regulating the Inspection and Exportation of Tobacco, 1785 S.C. Acts 30, 36 (Mar. Sess.) (repealing “all other acts within the purview of this act”); An Act to give further time for the probation of Deeds and other instruments of Writing, and for other purposes, ch. CLXXXV, 1783 Va. Acts 44, 45 (May 5 Sess.) (repealing “so much of all other Act or Acts of Assembly, as comes within the purview of this Act”); An Act to regulate the solemnization of Marriages, ch. LXXXVI, 1784 Va. Acts 21, 22 (Oct. 18 Sess.) (repealing “so much of every Act or Acts, as comes within the purview and meaning of this Act”).

³⁵ 1 William Blackstone, Commentaries 59 (1765); see also *id.* at 89 (noting that the same principle applies when a statute contradicts a common-law rule).

his definition of “to contradict” included “to be contrary to” and “to repugn.”³⁶ As Johnson confirmed elsewhere, to say that two things were “contrary” or “repugnant” was to say that one implied “the negation or destruction of the other.”³⁷ Blackstone agreed that two legal rules were not *contrariae* or “repugnant” if “both may stand together.”³⁸

When two statutes were *contrariae* or “repugnant,” then, *some* rule of priority was essential. Consider Blackstone’s example: Statute #1 says that no one is qualified to be a juror unless he has an income of £20 per year, while Statute #2 (as construed by the courts) says that everyone with some smaller income is qualified to be a juror.³⁹ Because these rules contradict each other, the statutes could not have what Blackstone called “a concurrent efficacy.”⁴⁰ After all, when presented with a prospective juror whose income was below what Statute #1 required but above what Statute #2 specified, a court that followed Statute #1 would be disregarding Statute #2 (and vice versa). Courts would have to choose between the two rules, and Blackstone’s *in* maxim told them how to do so: In the case of contradiction, the later statute prevailed. All of the leading authorities agreed.⁴¹

2. “Non Obstante” *Clauses and the Traditional Rule of Construction*

The widespread acceptance of this principle creates a puzzle. Statutes enacted by the early state legislatures often specified that they applied notwithstanding any provisions to the contrary in prior laws. The precise wording of these clauses varied from state

³⁶ Samuel Johnson, *A Dictionary of the English Language* (London, W. Strahan 1755) (unpaginated).

³⁷ 1 *id.* (defining “inconsistent” to mean “[c]ontrary, so as that one infers the negation or destruction of the other”).

³⁸ See 1 Blackstone, *supra* note 35, at 89–90.

³⁹ See *id.* at 89.

⁴⁰ *Id.* at 90.

⁴¹ See, e.g., 4 Matthew Bacon, *A New Abridgment of the Law* 638 (London, W. Strahan 4th ed. 1778); 4 Edward Coke, *Institutes of the Laws of England* 43 (London, M. Flesher 1644); 2 T. Cunningham, *A New and Complete Law Dictionary* (London, 2d ed. 1771), *tit.* Statute; see also *The Federalist* No. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting the traditional rule that “in determining between two contradictory laws,” courts should prefer “the last in order of time”).

to state and from statute to statute. Many statutes provided that they applied "any law to the contrary notwithstanding"⁴² or "any law, usage or custom to the contrary notwithstanding."⁴³ Others

⁴²E.g., An Act for altering the Place of holding the general Election for the present Year, in the County of Sussex, 1788 Del. Laws 18, 19 (May 27 Sess.); An Act for the more effectual paving the streets of Baltimore-town in Baltimore county, and for other purposes, ch. XVII, 1782 Md. Laws (Nov. 4 Sess., unpaginated), at para. XII; An Act for altering the Line between the Towns of Stow and Marlborough, ch. XIV, 1783 Mass. Acts 33 (May 28 Sess.); An Act granting Liberty for taking the Fish called Menhaden, in Neponset-River, with Seines, ch. IV, 1788 Mass. Acts 665, 666; An Act for establishing Magazines of Arms, Ammunition and Warlike Stores in the several Counties of this State, and to postpone the sinking of so much of the Quotas of the Sinking Fund Tax for the Years One Thousand Seven Hundred and Seventy-six, and One Thousand Seven Hundred and Seventy-seven, as may be necessary for defraying the Expence thereof, ch. XXI, 1776-1777 N.J. Laws 37, 40; An Act to raise troops for the immediate defence of the State, ch. 23, 1781 N.Y. Laws 336, 337; An Act more effectually to punish adherence to the king of Great Britain within this State, ch. 48, 1781 N.Y. Laws 370, 371; An Act to appropriate certain buildings to public uses, ch. 12, 1784 N.Y. Laws 609; An Act to facilitate the settlement of the accounts of the United States within this State, ch. 44, 1784 N.Y. Laws 670, 677; An Act for making public securities payable to the bearer, ch. 19, 1786 N.Y. Laws 199; An act for the relief of persons who have suffered, or may suffer, by their deeds and mesne conveyances not being proved and registered, within the time heretofore appointed by law, ch. V, 1782 N.C. Sess. Laws 11, 12; An act to prolong the time of saving lots in the several towns in this state, ch. XX, 1782 N.C. Sess. Laws 37; An Act for levying a Tax for the Support of Government, and for the Redemption of Old Paper Currency, Specie, and other Certificates, ch. VI, 1784 N.C. Sess. Laws 15 (Apr. 19 Sess.); An Act for the relief of insolvent Debtors, now confined in the several Gaols of this Commonwealth, ch. CLXVII, 1784 Pa. Laws 408, 409; Resolution [Regarding Adjournment of the Court of Common Pleas in Providence County], 1782 R.I. Acts & Resolves 16, 17 (Nov. Sess.); An Act Concerning Estrays, 1787 S.C. Acts 35; An Act for establishing and reviving Inspections of Tobacco at sundry Places, ch. LVI, 1784 Va. Acts 9 (Oct. 18 Sess.).

⁴³E.g., An Act for laying a Tax on Shipping, for repairing and maintaining the Light-house, near the Port of New-London, 1783 Conn. Pub. Acts 634; An Act in Addition to an Act, entitled, "An Act for erecting and continuing a Sign-Post in each Town in this State," 1785 Conn. Pub. Acts 336; An Act in Addition to a Law of this State, entitled, "An Act against Gaming," 1786 Conn. Pub. Acts 348; An Act for the Auditing and Arranging the Accounts of this State, and for the more effectual Settlement of the Same, 1783 Del. Laws 22, 26 (May 26 Sess.); An Act for regnlating the Judiciary Departments of this State, 1789 Ga. Laws 1, 15 (Nov. Sess.); An Act to suspend the Privilege of the Writ of Habeas Corpus for Six Months, ch. III, 1782 Mass. Acts 135; An Act prescribing the Mauner of devising Lands, Teneiments, and Hereditaments, ch. I, 1784 Mass. Acts 49, 54; An Act describing the Power of Justices of the Peace in civil Actions, ch. XIX, 1784 Mass. Acts 89, 92; An Act to prevent Coparceners, joint Tenants, and Tenants in common, from committing Waste, and for making Partition of their Interest, and for abolishing the Principle of Survivorship in joint Tenancy, ch. XXVIII, 1784 Mass. Acts 106, 107; An Act for the restraining the

used some variation of the formulation “any thing in any law to the contrary notwithstanding.”⁴⁴ But in one form or another, such “*non*

taking of excessive Usury, ch. XXXI, 1784 Mass. Acts 111, 112; An Act for the due Regulation of licensed Houses, ch. XVI, 1787 Mass. Acts 579, 585; An Act to prevent the Bodies of Debtors from being taken on execution, when real or personal estate can be found, or is tendered, to satisfy the demand, 1785 N.H. Laws 367, 369; An Act to prevent unnecessary Costs to Debtors by Creditors bringing Actions of Debt on Judgments, where such Creditors might have availed themselves of Executions on the same Judgments, 1786 N.H. Laws 397; An Act to prevent idle and disorderly Persons mispending their Time at Publick-Houses, and for the Suppression of other Immoralities, ch. XXII, 1778–1779 N.J. Laws 53, 55; An Act more effectually to prevent the Inhabitants of this State from trading with the Enemy, or going within their Lines, and for other Purposes therein mentioned, ch. V, 1780–1781 N.J. Laws 11, 18; An Act for raising the Value of One Hundred and Fifty Thousand Pounds in Money and other Supplies, in the State of New-Jersey, and for other Purposes therein Mentioned, ch. XXXIV, 1780–1781 N.J. Laws 84, 98; An Act for better securing the Attendance of Witnesses in the several County Courts, and before Justices of the Peace, ch. XXXIV, 1783–1784 N.J. Laws 85, 87; An Act to pass Estates in Fee by certain Devises in Wills and Testaments, and to limit Estates in Tail, ch. XLVI, 1783–1784 N.J. Laws 97; An Act granting a bounty on hemp to be raised within this State, and imposing an additional duty on sundry articles of merchandise, and for other purposes therein mentioned, ch. 68, 1785 N.Y. Laws 120, 121; An Act making it felony without benefit of clergy to counterfeit or forge or to pass knowing the same to be counterfeit any of the public certificates of the United States or of this State, or any species of gold or silver money now or hereafter to be current in this State, ch. 88, 1785 N.Y. Laws 168; An Act to compel collectors and constables to give security, ch. 33, 1786 N.Y. Laws 240, 242; An Act for levying a Tax by General Assessment, and other Purposes, ch. II, 1777 N.C. Sess. Laws 7, 9 (Apr. 8 Sess.); An act to regulate and establish a militia in this State, ch. I, 1781 N.C. Sess. Laws 1, 5 (Jan. 18 Sess.); An act to prevent persons holding offices of profit from enjoying seats in the general assembly, ch. XXIII, 1784 N.C. Sess. Laws 40 (Oct. 22 Sess.); An Act to declare and establish the right of the Executive Council of this Commonwealth, to appoint all Officers, civil and military, except in the cases reserved by the constitution to the General Assembly, and to the people; and to repeal the laws, whereby certain Officers have been appointed contrary thereto, and to secure the independency of the Comptroller-General by a commission for seven years, and a permanent salary, upon condition of his good behavior only, ch. CCV, 1785 Pa. Laws 546, 549; An Act for establishing County Courts, and for regulating the Proceedings therein, 1785 S.C. Acts 1, 8 (Mar. Sess.); An Act to secure the Credit of Bills of Exchange, 1786 S.C. Acts 36, 37; An Act to supply the defect of Evidence of the Royal Assent to certain Acts of Assembly under the former Government, ch. XX, 1787 Va. Acts 19 (Oct. 15 Sess.). Although minor variations on this formula were common, all of the statutes cited in this footnote use the words of the quoted passage. The punctuation of the passage, however, varies from statute to statute. Cf. *infra* note 102 and accompanying text.

⁴⁴ E.g., An Act to render Parts of divers Acts of Assembly and certain Law-Proceedings more conformable to the present Constitution, ch. LXXXIX, 1777 Del. Laws 80, 82; An Act for the regulation of officers fees, ch. X, 1777 Md. Laws (Oct. 31 Sess., unpaginated); An Act for altering the time of holding the courts in Queen-Anne's county, ch. VIII, 1778 Md. Laws (Nov. 7 Sess.); An Act to revive and aid the

obstante clauses” (named after the Latin phrase for “notwithstanding”) were ubiquitous in the session laws of every state.

The puzzle is this: What work did the *non obstante* clauses do? Given the well-established principle that a new statute would abrogate contrary prior statutes anyway, weren't later commentators on legislative drafting correct to dismiss such clauses as superfluous?⁴⁵

proceedings of Caroline county courts, ch. XII, 1780 Md. Laws (Mar. 23 Sess.); An Act for the relief of certain nonjurors, ch. XV, 1782 Md. Laws (Apr. 25 Sess.); An Act for altering the time of holding the courts in the counties therein mentioned, ch. LIV, 1784 Md. Laws (Nov. 1 Sess.); A supplementary act to the act, entitled, An act to incorporate the managers of Back-creek school, ch. LXIV, 1784 Md. Laws (Nov. 1 Sess.); An Act for the adjournment of Baltimore county court, ch. XLVI, 1786 Md. Laws (Nov. 6 Sess.); An Act to alter the names of the counties of Tryon and Charlotte, ch. 17, 1784 N.Y. Laws 613; An Act for the speedy sale of the confiscated and forfeited estates, within this State and for other purposes therein mentioned, ch. 64, 1784 N.Y. Laws 736, 747, 758; An Act to continue the treasurer of this State in office, ch. 4, 1786 N.Y. Laws 180, 181; An Act for the more effectual collection of the arrears of taxes, ch. 21, 1786 N.Y. Laws 200, 201; An Act for settling intestates estates, proving wills, and granting administrations, ch. 38, 1787 N.Y. Laws 419, 423; An Act for the better regulating the public roads in the city and county of New York, ch. 61, 1787 N.Y. Laws 480, 481; An act directing the duty of naval officers, and for prohibiting the exportation of provisions for a limited time, and for other purposes, ch. VIII, 1781 N.C. Sess. Laws 12, 13 (June Sess.); An act to establish a department for adjusting and liquidating the public accounts of this state, and for appointing a comptroller, and other purposes, ch. XII, 1782 N.C. Sess. Laws 30, 31; An Act to increase the fines and penalties on public Officers for refusal or neglect of duty; and also to augment the fees of the several Officers herein after mentioned, ch. XCIII, 1779 Pa. Laws 182, 183; An Act to restore and ascertain the value of divers fines, penalties and forfeitures, herein after mentioned, which may be incurred by the breach of certain Acts of Assembly of this Commonwealth, ch. CLIII, 1780 Pa. Laws 318, 320; An Act to vest the present Trustee of the Loan-Office with certain Powers and Authorities, ch. LVI, 1783 Pa. Laws 143, 144; An Act for providing the Quota of Foederal Supplies for the Year [1783], and for the Relief of the Citizens of this State, who have become Creditors of the United States of America, by Loans of Money, or other Modes of furnishing public Supplies, ch. LXVI, 1783 Pa. Laws 167, 173; An Act against Treason and Misprison of Treason, and for regulating Trials in such Cases, and for directing the Mode of executing Judgments against Persons attainted of Felony, 1777 R.I. Acts & Resolves 30, 34 (May Sess.); An Act directing the mode or adjusting and settling the payment of certain debts and contracts, and for other purposes, ch. XXII, 1781 Va. Acts 15 (Nov. 5 Sess.); An Act for allowing farther time to Sheriffs or Collectors of Taxes due for the year [1781], and for other purposes, ch. XXXIV, 1781 Va. Acts 24, 25 (Nov. 5 Sess.).

⁴⁵ Cf. Duncan L. Keunedy, *Drafting Bills for the Minnesota Legislature* 16 (1946) (“A common practice in the past, now less frequently followed, was to provide at the close of a bill, ‘all acts or parts of acts inconsistent with the provisions of this act are hereby repealed.’ This is both unnecessary and confusing. In legal effect it adds nothing, as without such provision all prior conflicting laws or parts of laws would be repealed by implication. Robert Luce states it thusly: ‘Why waste ink by so much as

The answer lies in the equally well-established principle that a new statute should not be read to contradict an earlier one (or a common-law rule) if the two laws can possibly be harmonized. Then as now, courts and commentators unanimously agreed that "repeals by implication are not favoured in law."⁴⁶ People gave various reasons for their reluctance to read a newer statute to contradict (and therefore impliedly repeal) an earlier one.⁴⁷ But whatever the reason, courts hesitated to read one statute to abrogate another if a harmonizing construction was possible.

The presumption against reading a statute in a way that would contradict prior law (and the related presumption that statutes in derogation of common-law principles should be strictly construed) created an obvious problem for legislatures. Sometimes legislatures *wanted* a new statute to supersede whatever prior law it might contradict. But in the absence of some direction to the contrary, courts might give the new statute a strained construction in order to harmonize it with prior law. The presumption against implied repeals, then, might cause courts to distort the new statute.

The *non obstante* clause addressed this problem. Far from being superfluous, it established an important rule of construction: A *non obstante* clause in the new statute acknowledged that the statute might contradict prior law and instructed courts not to apply the

declaring that "all acts and parts of acts inconsistent herewith are hereby repealed"? Of course they are. It is elementary that the last word goes."), *excerpted in* Horace E. Read & John W. MacDonald, *Cases and Other Materials on Legislation* 395 (1948).

⁴⁶ 2 Cunningham, *supra* note 41, *tit.* Statute; accord, e.g., 4 Bacon, *supra* note 41, at 638; *Warder v. Arell*, 2 Va. (2 Wash.) 359, 377 (1796) (opinion of Roane, J.); *id.* at 381-82 (opinion of the President).

⁴⁷ Sir Edward Coke suggested that statutes were established with "gravity, wisdom and universal consent of the whole realm, for the advancement of the commonwealth," and it should take more to abrogate them than a "constrained construction out of the general and ambiguous words of a subsequent Act." *Dr. Foster's Case*, 77 Eng. Rep. 1222, 1232 (K.B. 1614). Bacon's *Abridgment* stressed that the repeal of a former statute "carries with it a Reflection upon the Wisdom of the former Parliament," and courts ought to resist the conclusion that lawmakers would either change their minds or show disrespect to the judgment of their predecessors. 4 Bacon, *supra* note 41, at 638-39. Others suggested that finding a repeal by implication would dishonor the *later* legislature, because it would indicate that the legislature had been either ignorant of the earlier statute or negligent in failing to include any express words of repeal. Cf. *Warder*, 2 Va. (2 Wash.) at 381-82 (opinion of the President) ("Whatever apparent inconsistencies may appear in the declaration of the legislative will, yet it is not decent to presume that *they* would change their mind upon the subject, without saying so in express terms.").

general presumption against implied repeals. Rather than straining the new statute in order to harmonize it with prior law, courts were supposed to give the new statute its natural meaning and to let the chips fall where they may.

To understand the significance of *non obstante* clauses, one need only consider discussions of their absence. As early as the sixteenth century, Chief Justice Dyer had explained that "when there are two statutes, the one in appearance crossing the other, and no clause of *non obstante* is contained in the second statute, so that one may stand with the other, the exposition ought to be that both should stand in force."⁴⁸ This concept was standard fare for English commentators in the eighteenth century. In the words of Matthew Bacon's *New Abridgment of the Law*, "[a]lthough two Acts of Parliament are *seemingly* repugnant, yet if there be no Clause of *non Obstante* in the latter, they shall if possible have such Construction, that the latter may not be a Repeal of the former by Implication."⁴⁹ Giles Jacob's law dictionary agreed that "when there is a seeming variance between two *statutes*, and no clause of *non obstante* in the latter, such construction shall be made that both may stand."⁵⁰

All these works were well known in America.⁵¹ Indeed, for an illustration of the significance of *non obstante* clauses, one need look

⁴⁸ *Weston's Case*, 73 Eng. Rep. 780, 781 (K.B. 1576).

⁴⁹ 4 Bacon, *supra* note 41, at 639; accord 2 Cunningham, *supra* note 41, *tit.* Statute; see also, e.g., 19 Charles Viner, *A General Abridgment of Law and Equity* (London, 1744), *tit.* Statutes (paraphrasing and endorsing Dyer's statement).

⁵⁰ Giles Jacob, *A New Law Dictionary* (London, W. Strahan 9th ed. 1772), *tit.* Statute. The use of *non obstante* clauses as rules of construction in statutes should not be confused with the use of such clauses in royal charters and letters patent. From the early days of Parliament on, English monarchs had issued licenses authorizing the recipients to do specified things *non obstante aliquo statuto in contrarium* (notwithstanding any statute to the contrary). See 7 Oxford English Dictionary 198 (1933). This royal prerogative of granting dispensations from statutory obligations figured into the power struggles between Parliament and the Crown, and the English Bill of Rights curtailed it in 1688. See 6 W.S. Holdsworth, *A History of English Law* 217-25, 240-41 (1924).

⁵¹ See, e.g., William Hamilton Bryson, *Census of Law Books in Colonial Virginia* xvi-xvii (1978) (reporting relatively widespread ownership of Jacob's *Dictionary* in colonial Virginia); Herbert A. Johnson, *Imported Eighteenth-Century Law Treatises in American Libraries 1700-1799*, at 59, 61 (1978) (noting the popularity of Bacon's *Abridgment* and Jacob's *Dictionary* in American libraries); Leonard W. Levy, *Origins of the Fifth Amendment and its Critics*, 19 Cardozo L. Rev. 821, 854 (1997) (discussing the availability of English sources to American colonists and calling Jacob's work "the most widely used English law dictionary"); Robert J. Pushaw, Jr., Article III's

no further than the famous American case of *Rutgers v. Waddington*,⁵² argued by Alexander Hamilton and decided only three years before the Philadelphia Convention. A New York statute of 1783 purported to let inhabitants who had fled the British occupation of New York City seek damages for trespass from anyone who had lived in their houses during the occupation.⁵³ The statute seemed to apply against British soldiers and others who had occupied property in reliance on the orders of the British military commander; it specifically prohibited defendants from pleading “any military order or command . . . of the enemy” to justify their actions.⁵⁴ When Elizabeth Rutgers sued the agent of a British merchant under this statute, Hamilton (representing the defendant) argued that the statute was invalid because it conflicted with the law of nations and with the sixth article of the treaty of peace between the United States and Great Britain.⁵⁵

But Hamilton also advanced an alternative argument, on which Judge James Duane ultimately rested his decision. In order to avoid reading the Trespass Act to conflict with the law of nations,

Case/Controversy Distinction and the Dual Functions of Federal Courts, 69 *Notre Dame L. Rev.* 447, 466 & n.104 (1994) (discussing Americans' reliance on English legal commentary and calling Bacon's work the “most popular” abridgment); see also William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 *Am. J. Legal Hist.* 117, 146 (1993) (noting that Jacob's *Dictionary* “was one of the primary texts” in Oliver Ellsworth's legal education); Craig Evan Klafter, *The Influence of Vocational Law Schools on the Origins of American Legal Thought, 1779–1829*, 37 *Am. J. Legal Hist.* 307, 315 (1993) (noting that Bacon's *Abridgment* was a “key textbook[]” for the law course that George Wythe taught at the College of William and Mary); William F. Swindler, *John Marshall's Preparation for the Bar—Some Observations on His Law Notes*, 11 *Am. J. Legal Hist.* 207, 208 (1967) (observing that the notes that John Marshall compiled in 1780 to summarize the common law in Virginia “are, for the most part, abstracted from the corresponding subjects” in Bacon's *Abridgment*).

⁵² For an extensive discussion of the case and a compendium of relevant documents, see 1 *The Law Practice of Alexander Hamilton* 282–419 (Julius Goebel, Jr. ed., 1964).

⁵³ See *An Act for granting a more effectual relief in cases of certain trespasses*, ch. 31, 1783 N.Y. Laws 552.

⁵⁴ *Id.*

⁵⁵ See *Provisional Articles*, Nov. 30, 1782, U.S.–G.B., art. VI, 8 Stat. 54, 56 (“there shall be no . . . prosecutions commenced against any person or persons for, or by reason of the part which he or they may have taken in the present war; and . . . no person shall on that account suffer any future loss or damage, either in his person, liberty or property”); *Definitive Treaty of Peace*, Sept. 3, 1783, U.S.–G.B., art. VI, 8 Stat. 80, 83 (same). But cf. 1 *Op. Att’y Gen.* 50, 51 (1794) (suggesting that the term “prosecution” is limited to “a suit against another in a *criminal* cause”).

Judge Duane adopted a strained construction of the statute; he held that it did not authorize damages for the period during which Mrs. Rutgers's property was occupied under authority of the British military commander. Duane specifically justified this construction by noting (among other things) that the Trespass Act "doth not contain even the common *non obstante* clause, tho' it is so frequent in our statute book." Duane then quoted the "established maxim" that "where two laws are seemingly repugnant, and there be no clause of non obstante in the latter, they shall, if possible, have such construction, that the latter may not repeal the former by implication."⁵⁶

This maxim continued to be commonplace for decades. In the 1830s and 1840s, for instance, Sir Fortunatus Dwarrior's celebrated treatise on statutes was still echoing the discussion of *non obstante* clauses in Bacon's *Abridgment*.⁵⁷ American courts likewise continued to refer to *non obstante* clauses as rules of construction through at least the mid-nineteenth century.⁵⁸

⁵⁶ Opinion of the Mayor's Court (Aug. 27, 1784), in 1 *The Law Practice of Alexander Hamilton*, supra note 52, at 417.

⁵⁷ See Sir Fortunatus Dwarrior, *A General Treatise on Statutes: Their Rules of Construction, and the Proper Boundaries of Legislation and of Judicial Interpretation* 533 (London, William Benning & Co. 2d ed. 1848) ("Although . . . two acts of Parliament are seemingly repugnant, yet if there be no clause of *non obstante* in the latter, they shall, if possible, have such construction, that the latter may not be a repeal of the former by implication.").

⁵⁸ See, e.g., *Doolittle's Lessee v. Bryan*, 55 U.S. (14 How.) 563, 566 (1852) (citing Dwarrior and indicating that whether a statute contains a *non obstante* clause will affect whether the statute is construed to repeal a prior act); *Wynan v. Campbell*, 6 Port. 219, 231 (Ala. 1838) (opinion of Collier, C.J.) ("And though two statutes be seemingly repugnant, yet, if there be no clause of non obstante, in the latter, they shall, if possible, have such construction, that the latter may not be a repeal of the former, by implication."); *North Carolina v. Woodside*, 31 N.C. (9 Ired.) 496, 500-01 (1849) (opinion of Nash, J.) (reading a later statute to repeal an earlier one to some extent "but no further, as there is no *non obstante* clause in it"); see also J.G. Sutherland, *Statutes and Statutory Construction* 199 (Chicago, Callaghan & Co. 1891) ("[W]hen there is inserted in a statute a provision declaring a repeal of all inconsistent acts and parts of acts, there is an assumption that the new rule to some extent is repugnant to some law enacted before. . . . It is to be supposed that courts will be less inclined against recognizing repugnancy in applying such statutes, while, in dealing with those of the other class, they will, as principle and authority requires, be astute to find some reasonable mode of reconciling them with prior statutes, so as to avoid a repeal by implication.").

B. Reading the Supremacy Clause as a Legal Provision

With this legal background in place, we are now in a position to understand the Supremacy Clause. The Clause declares that the Constitution, treaties, and valid federal statutes “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.”⁵⁹ For present purposes, we can break the Clause down into three aspects: (1) the declaration that federal law is the “Law of the Land” and that “the Judges in every State shall be bound thereby”;⁶⁰ (2) the further declaration that federal law is the “supreme” law of the land; and (3) the statement that federal law is binding “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

I hope to persuade readers of two basic points, both of which draw on the discussion in Section I.A. First, the Supremacy Clause puts the doctrine of preemption within the same general frame-

⁵⁹U.S. Const. art. VI, cl. 2.

⁶⁰I group these two statements about the applicability of federal law in order to sidestep a debate that is beyond the scope of this Article. Several commentators have suggested that once the Supremacy Clause tells us that the federal Constitution and laws “shall be the supreme Law of the Land,” there is no real need for it to add that “the Judges in every State shall be bound thereby.” See, e.g., S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 Conn. L. Rev. 829, 845 (1992) (speculating that the Framers included the Judges Clause simply “[t]o guard against any misconceptions as to the meaning of ‘supreme Law’”); Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism*, 32 Ind. L. Rev. 71, 85 (1998) (asserting that “the redundancy in the text of the Supremacy Clause could conceivably have been intended to serve a vital political function of providing emphasis and avoiding any conceivable future interpretational ambiguity”); cf. Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1034–42 (1995) (suggesting that the Judges Clause may have been intended “simply to emphasize the Framers’ understanding that state judges would apply federal law to nullify conflicting provisions of state law”). But the Supreme Court—in the course of holding that Congress may not require state executive officials to administer federal law—has indicated that the Judges Clause *does* add something to the “supreme Law of the Land” clause. See *Printz v. United States*, 521 U.S. 898, 928–29 (1997) (asserting that the Judges Clause explains why state courts must apply valid federal law, and implying that the “supreme Law of the Land” clause does not itself give state courts this obligation); cf. *New York v. United States*, 505 U.S. 144, 178–79 (1992) (noting that the Judges Clause mandates one type of “federal ‘direction’ of state judges,” and claiming that “[n]o comparable provision authorizes Congress to command state legislatures to legislate”).

work as the traditional doctrine of repeals. As we shall see in Part II, this point has important implications for "obstacle" preemption. Second, the final portion of the Supremacy Clause is a *non obstante* provision. As we shall see in Part III, this point has important implications for the presumption against preemption.

1. *The Rule of Applicability: Federal Law in State Courts*

The first aspect of the Supremacy Clause may strike modern readers as highfalutin rhetoric. But it serves a straightforward function: It sets out what might be called a "rule of applicability," making clear that federal law applies even in state courts. At least as far as the courts are concerned, then, federal statutes take effect automatically within each state and form part of the same body of jurisprudence as state statutes.⁶¹ In this respect, federal statutes automatically become part of what Evan Caminker calls "in-state law."⁶²

For reasons that some modern commentators may not fully appreciate, this was an important point. Under prevailing conceptions of the law of nations, the laws of one country did not apply in another country's courts of their own force, but only as a matter of comity.⁶³ The judges in each state therefore had discretion to refuse

⁶¹ See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340-41 (1816) (noting that "the very nature of their judicial duties" requires state judges "to pronounce the law applicable to the case in judgment," and the Supremacy Clause obliges them to decide "not . . . merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States—the supreme law of the land"); *Claffin v. Houseman*, 93 U.S. 130, 137 (1876) ("[A state court] . . . is just as much bound to recognize [federal laws] as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State . . .").

⁶² See Caminker, *supra* note 60, at 1023.

⁶³ See, e.g., Ulrik Huber, *De Conflictu Legum Diversarum in Diversis Imperiis* (1689), reprinted and translated in Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 Ill. L. Rev. 375, 401-18 (1918-1919) (asserting that "the laws of one nation can have no force directly with another," but that "[s]overeigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of [the forum] government or of its subjects"); see also *Emory v. Grenough*, 3 U.S. (3 Dall.) 369, 370 n.* (1797) (appending relevant passages from Huber); Jay Comison, *What Does Due Process Have to Do with Jurisdiction?*, 46 Rutgers L. Rev. 1071, 1104-07 (1994) (discussing Huber's influence in America). Foreign laws have a similar status today. See, e.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The*

to apply foreign laws. In the words of the Supreme Judicial Court of Massachusetts,

as the laws of foreign countries are not admitted *ex proprio vigore*, but only *ex comitate*, the judicial power will exercise a discretion with respect to the laws that they may be called upon to sanction; for, if they should be manifestly unjust, or calculated to injure their own citizens, they ought to be rejected.⁶⁴

In the absence of something like the Supremacy Clause, state courts might have sought to analogize federal statutes to the laws of a foreign sovereign, which they could ignore under principles of international law.⁶⁵

The Articles of Confederation had gone only part of the way toward solving this problem. Article XIII had specified that “[e]very State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them.”⁶⁶ But this language did not necessarily mean that Congress’s acts automatically became part of the law applied in state courts; it could be read to mean only that each state legislature was supposed to pass laws implementing Con-

Constitutional Foundations of Choice of Law, 92 Colum. L. Rev. 249, 259 (1992) (“How U.S. courts treat foreign law is a matter of comity and diplomacy, the voluntary choice of a sovereign power.”).

⁶⁴ *Blanchard v. Russell*, 13 Mass. (12 Tyng) 1, 6 (1816).

⁶⁵ Cf., e.g., *Banks v. Greenleaf*, 2 F. Cas. 756, 757 (C.C.D. Va. 1799) (No. 959) (invoking Huber’s “universally acknowledged” principles to resolve a contradiction between the laws of two American states); *Ingraham v. Geyer*, 13 Mass. (12 Tyng) 146, 147 (1816) (similar). For a modern invocation of this analogy, consider *Testa v. Katt*, 47 A.2d 312 (R.I. 1946), rev’d, 330 U.S. 386 (1947). There, a federal statute created a cause of action for treble damages. The Rhode Island courts refused to enforce the statute on the ground that it was “penal . . . in the international sense” and that under principles of international law, the courts of one sovereign are not bound to enforce the penal laws of a foreign sovereign. *Id.* at 313–14. The federal Supreme Court reversed, concluding that the Supremacy Clause prevents state courts from refusing to enforce a federal statute for this reason. See 330 U.S. at 392.

⁶⁶ Articles of Confederation art. XIII. In reading this phrase, one should equate Congress’s “determinations . . . on all questions . . . submitted to them” with Congress’s exercise of any of its delegated powers. Throughout the Articles, the word “question” referred to any matter that came to a vote in Congress. See, e.g., *id.* art. V, para. 4 (“In determining questions in the United States, in Congress assembled, each State shall have one vote.”); *id.* art. IX, para. 6 (establishing a supermajority requirement for various important determinations, and requiring a majority vote to determine “a question on any other point, except for adjourning from day to day”).

gress's directives.⁶⁷ If a state legislature failed to do so, and if Congress's acts had the status of another sovereign's law, then Congress's acts might have no effect in the courts of that state.

This ambiguity had particular salience in foreign affairs. The Articles of Confederation gave Congress "the sole and exclusive right and power of determining on peace and war" and of "entering into treaties,"⁶⁸ and Congress had exercised this power by entering into the Treaty of Peace that ended the Revolutionary War. The fourth article of the treaty pledged that "creditors on either side[] shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted."⁶⁹ A number of states, however, had laws imposing just such "lawful impediments." In the absence of state legislation implementing the treaty, there was considerable uncertainty about whether state courts would continue to apply those laws. Some of this uncertainty stemmed from questions about whether treaties could be "self-executing"—whether they could have domestic legal effect in the absence of implementing legislation.⁷⁰ But even people who thought that treaties could be self-executing expressed doubts about whether treaties adopted by Congress would automatically go into effect within the states.⁷¹ The first aspect of the Supremacy Clause addressed such doubts; it told state courts to treat valid fed-

⁶⁷ Cf. James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 *Papers of James Madison* 345, 352 (Robert A. Rutland & William M.E. Rachal eds., 1975) (noting that in practice even if not in theory, "the acts of Cong[re]s[s] [under the Articles] . . . depen[d] for their execution on the will of the state legislatures").

⁶⁸ Articles of Confederation art. IX, para. 1.

⁶⁹ Provisional Articles, Nov. 30, 1782, U.S.—G.B., art. IV, 8 Stat. 54, 56; Definitive Treaty of Peace, Sept. 3, 1783, U.S.—G.B., art. IV, 8 Stat. 80, 82.

⁷⁰ See, e.g., Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 *Am. J. Int'l L.* 695, 697–700 (1995).

⁷¹ See Letter from William Grayson to James Madison (May 28, 1786), in 9 *Papers of James Madison*, supra note 67, at 62–63 (suggesting that the treaty "became the law of the land in every State" as soon as it was ratified by Congress and Great Britain, but adding that "I am not certain I am right in my positions on the ground of the law of nations as applying to foederal governments of separate sovereignties"); see also Notes on Debates in Congress (Mar. 21, 1787), in 9 *Papers of James Madison*, supra note 67, at 327 (reporting Madison's observation that it "was expedient & even necessary" for state legislatures to enact legislation repealing all state laws repugnant to the treaty, in order "to free the Courts from the bias of their oaths which bound the Judges more strongly to the State than the federal authority").

eral statutes and treaties as “in-state law” rather than as the law of another sovereign.

This analysis clears up a mystery that has sparked debate among commentators. One might wonder why the Supremacy Clause’s discussion of the binding nature of federal law addresses only “the Judges in every State”—a phrase that arguably does not cover the federal judiciary.⁷² Doesn’t valid federal law bind federal judges too? Of course it does, but there was little need for the Judges Clause to say so: Unlike the state courts, federal courts could not possibly have deemed federal law to be the law of a foreign sovereign.⁷³

⁷² See, e.g., Caminker, *supra* note 60, at 1034 n.129 (agreeing with “the conventional view that the Clause references state judges only”). Even if one could read the phrase to cover *some* federal judges, it does not seem to cover *all* federal judges. Ever since their relocation to the District of Columbia, for instance, the members of the Supreme Court have not been judges “in [a] State.”

⁷³ Thus, I side with Henry Hart and against William Crosskey about the implications of the Supremacy Clause. Because state courts are bound by the federal Constitution notwithstanding anything to the contrary in state statutes, while federal courts “are *not* declared to be similarly ‘bound’ by the Constitution” notwithstanding anything to the contrary in federal statutes, Professor Crosskey inferred that the Philadelphia Convention “mean[t] . . . to provide generally for judicial review of the national constitutionality of all *state* legislation, but to exclude it in the case of acts of Congress.” See 2 William Winslow Crosskey, *Politics and the Constitution in the History of the United States* 985 (1953). Professor Hart responded that the Supremacy Clause singled out state judges simply in order to address “the special problem, peculiar to the state judges, of conflict between the commands of their own government and those of a different government.” Henry M. Hart, Jr., *Professor Crosskey and Judicial Review*, 67 *Harv. L. Rev.* 1456, 1470 (1954). The law-of-nations rule explained above clearly supports Hart’s view.

More recent commentators have again lost sight of why the Supremacy Clause specifies that valid federal law binds “the Judges in every State.” According to David Engdahl, for instance, “[t]he reason that *state* judges are singled out . . . is simply that the supremacy clause was adopted by the Convention from Paterson’s ‘New Jersey’ plan, which had provided for no federal courts . . .” David E. Engdahl, *Constitutional Federalism in a Nutshell* 74 (2d ed. 1987). As Professor Engdahl’s later work recognizes, this claim is overstated: Although the New Jersey plan provided for no *lower* federal courts, it did call for the creation of a *supreme* federal court. See 1 *Documentary History of the Ratification of the Constitution* 252 (Merrill Jensen ed., 1976) [hereinafter *DHRC*]; David E. Engdahl, *Intrinsic Limits of Congress’ Power Regarding the Judicial Branch*, 1999 *BYU L. Rev.* 75, 112 n.138, 160 n.315. Still, this court’s chief job would have been to review state-court decisions; the federal court would have exercised original jurisdiction only in cases of impeachment. The drafters of the New Jersey plan might therefore have thought it sufficient to specify that state judges had to follow valid federal law; there was no need to specify independently that federal judges also had to follow federal law, because federal judges would sim-

2. *The Rule of Priority*

It was not enough, however, simply to declare that federal laws take effect of their own force within each state. If federal laws were merely on a par with state statutes, then they would supersede whatever preexisting state laws they contradicted, but they might themselves be superseded by subsequent acts of the state legislature. When two statutes contradicted each other and courts had to decide which one to follow, the established rule of priority was that the later statute prevailed.⁷⁴

Not surprisingly, the second aspect of the Supremacy Clause substitutes a *federal* rule of priority for the traditional *temporal* rule of priority. The Supremacy Clause not only makes valid federal law part of the same body of jurisprudence as state law, but also declares that within that body of jurisprudence federal law is “supreme”—a word that both Samuel Johnson and Chief Justice Marshall defined to mean “highest in authority.”⁷⁵ Under this new rule of priority, when courts had to choose between following a valid federal law and following a state law, the federal law would prevail even if the state law had been enacted more recently.

ply be double-checking that state courts had done what they were supposed to do. On this view, the Supremacy Clause’s reference to “the Judges in every State” is an accident of drafting history: Although the Constitution ultimately empowered Congress to create lower federal courts with broad-ranging original jurisdiction, and although the Constitution gave some significant original jurisdiction to the Supreme Court itself, the Framers never bothered to amend the Judges Clause to reflect these changes.

This explanation, though possible, is unsatisfactory for two reasons. First, by the time the Philadelphia Convention adopted a prototype of the Supremacy Clause, it had already rejected the New Jersey plan and was envisioning that Congress would have the power “to appoint” lower federal courts. See 1 Records of the Federal Convention of 1787, at 313, 237 (Max Farrand rev. ed., 1966) [hereinafter Farrand]. But cf. James S. Liebman & William F. Ryan, “Some Effectual Power”: The Quantity and Quality of Decisionmaking that Article III and the Supremacy Clause Demand of the Federal Courts, 98 Colnm. L. Rev. 696, 717 & n.100 (1998) (reading this language to connote “formally eulisting *state* courts for national purposes”). Second, the Committee of Detail and the Committee of Style both changed the language of the Supremacy Clause, see 2 Farrand, *supra*, at 183, 603, and both of those Committees plainly had lower federal courts in mind, see *id.* at 186, 600. The explanation in the text avoids these difficulties.

⁷⁴ See *supra* notes 35–41 and accompanying text.

⁷⁵ 2 Samuel Johnson, *A Dictionary of the English Language* (London, J.F. & C. Rivington 6th ed. 1785) (unpaginated); accord *A Friend of the Constitution V* [John Marshall], *Alexandria Gazette*, July 5, 1819, *reprinted in* John Marshall’s *Defense of McCulloch v. Maryland* 184, 187 (Gerald Gunther ed., 1969) (discussing the Supremacy Clause and noting that “[t]he word ‘supreme’ means ‘highest in authority’”).

Again, experience under the Articles of Confederation helps explain the Philadelphia Convention's attention to this point, as well as the connection between the Supremacy Clause and the Constitution's provision for popular ratification. The Articles had not been ratified by conventions of the people in each state; states had manifested their assent merely by passing ordinary statutes authorizing their delegates to sign the Articles, and many states had not recognized the Confederation in their own constitutions. James Madison fretted that as a result, "[w]henver a law of a State happens to be repugnant to an act of Congress," it "will be at least questionable" which law should take priority, "particularly when the latter is of posterior date to the former."⁷⁶ After all, if the authority of federal law within a state rested entirely on an ordinary state statute, and if courts applied the normal rule that later statutes trump earlier ones in the event of contradiction, then a subsequently enacted state statute could conceivably prevent the application of federal law. The second aspect of the Supremacy Clause, coupled with the ratification provisions of Article VII, foreclosed this possibility.

Note, however, that while the Supremacy Clause changes the old rule of priority, it does not change what *triggers* the rule of priority. To borrow Madison's words, the Supremacy Clause's rule of priority matters only when state law is "repugnant to" valid federal law; the rule of priority comes into play only when courts cannot apply *both* state law *and* federal law, but instead must choose between them.

When we work through the Supremacy Clause with preemption in mind, we notice a striking fact: Even though the Supremacy Clause is the reason why courts sometimes must ignore state law, the Clause actually says very little about state law. The doctrine of preemption—the displacement of state law by federal law—is in-

⁷⁶ Madison, *supra* note 67, at 352. In the manuscript version of this document, someone corrected Madison's apparent transposition of "the latter" and "the former." See *id.* at 358 n.8. The quotation in the text uses Madison's original phrasing, but whoever edited Madison's manuscript probably captured his real meaning. Given the rules of priority for implied repeals, the concern identified by Madison was most applicable where a federal statute conflicted with a subsequently enacted state law. Cf. Notes on Debates in Congress, *supra* note 71, at 327 (reporting Madison's concern, under the Articles of Confederation, that even if state courts recognized the Treaty of Peace and held that it "repeal[ed] all antecedent [state] laws [contravening it]," they might hold that it did not invalidate any "succeeding" laws).

stead derivative. Taken as a whole, the Supremacy Clause says that courts must apply all valid rules of federal law. To the extent that applying state law would keep them from doing so, the Supremacy Clause requires courts to disregard the state rule and follow the federal one. But this is the extent of the preemption it requires. Under the Supremacy Clause, any obligation to disregard state law flows entirely from the obligation to follow federal law.

To put the same point slightly differently, the Supremacy Clause's rules of applicability and priority mean that courts are always bound to apply the federal portion of "in-state law." But if it is possible for courts simultaneously to follow the state portion of "in-state law," then the Supremacy Clause's demand that courts apply federal law does not prevent them from applying state law too. The constitutional test for preemption is thus the same as the traditional test for repeal: Can state and federal law stand together, or do they establish contradictory rules?⁷⁷

It should not be surprising, then, that during the debates over whether to ratify the Constitution, people consistently discussed preemption in terms of repeal. Numerous Antifederalists warned that by virtue of the Supremacy Clause, federal statutes could "repeal" state laws.⁷⁸ Supporters of the Supremacy Clause responded

⁷⁷ Thus, I agree with Candice Hoke that all preemption cases should boil down to whether there is "some notion of proscribed . . . *conflict*" between state and federal law. Hoke, *supra* note 16, at 735; see also *id.* at 745 n.278 (indicating that all of the Court's current categories of preemption should be thought of as "subtypes of conflict preemption"); Hoke, *supra* note 60, at 889 n.288 (similar). But the Supremacy Clause supports a considerably stronger claim. The Supremacy Clause requires courts to ignore state law only to the extent there is a particular *type* of conflict between state and federal law. Preemption does not occur if state and federal law can stand together—that is, if courts can follow all valid rules of federal law (as required by the Supremacy Clause) while simultaneously applying state law.

⁷⁸ See, e.g., An Old Whig VI, Philadelphia Indep. Gazetteer, Nov. 24, 1787, reprinted in 14 DHRC, *supra* note 73, at 216 (John P. Kaminski & Gaspare J. Saladino eds., 1983); Centinel V, Philadelphia Indep. Gazetteer, Dec. 4, 1787, reprinted in 14 DHRC, *supra* note 73, at 345; 4 Debates in the Several State Conventions, on the Adoption of the Federal Constitution 192 (Jonathan Elliot 2d ed., 1836) [hereinafter Elliot] (reporting Mr. M'Dowall's remarks in the North Carolina convention); see also *id.* at 215 (reporting Mr. Lancaster's concern that "if treaties are to be the supreme law of the land, it may repeal the laws of different states"); Brutus II, N.Y. Journal, Nov. 1, 1787, reprinted in 13 DHRC, *supra* note 73, at 529 (warning that by virtue of the Supremacy Clause, "[t]he most important article in any [state] constitution may . . . be repealed"). In Maryland, indeed, William Paca Proposed the following amendment to keep federal statutes and treaties from preempting state con-

that the alternative was to let states “repeal the laws of the union at large.”⁷⁹

After ratification, members of Congress continued to use the framework of repeal to think about preemption. The Judiciary Act of 1789 assumes that the state courts’ obligation to follow federal law will affect the applicability of state law only where state law is “repugnant to” federal law.⁸⁰ Similarly, Fisher Ames told fellow members of the First Congress that valid federal statutory provisions “would supercede state laws contradicting them.”⁸¹ A savings clause in the federal bankruptcy act of 1800 explicitly discussed the circumstances in which the act would “repeal or annul” state insolvency laws.⁸²

Early courts also used the framework of repeal to analyze preemption cases. In the 1796 case of *Ellmore v. Mills*,⁸³ for instance, the Superior Court of North Carolina held that a federal statute requiring courts to recognize state laws that were authenticated in a particular way⁸⁴ did not preempt a state practice permitting an al-

stitutional provisions: “No Law of Congress, or Treaties, shall be effectual to repeal or abrogate the Constitutions, or Bills of Rights, of the States, . . . or any Part of the said Constitutions or Bills of Rights.” Amendments Proposed by William Paca in the Maryland Convention, Md. J., Apr. 29, 1788, reprinted in 17 DHRC, supra note 73, at 241.

⁷⁹ 4 Elliot, supra note 78, at 192 (reporting Governor Johnston’s remarks in the North Carolina convention).

⁸⁰ Judiciary Act of 1789, § 25, 1 Stat. 73, 85–86 (providing “[t]hat a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, . . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error”).

⁸¹ 14 Documentary History of the First Federal Congress of the United States of America: Debates in the House of Representatives 388 (William Charles diGiacomantonio et al. eds., 1995); cf. 11 id. at 1360–61 (remarks of James Jackson) (hypothesizing a case in which federal law gave someone a right to engage in conduct that state law purported to criminalize).

⁸² An Act to establish an uniform System of Bankruptcy throughout the United States, § 61, 2 Stat. 19, 36 (1800) (providing that “this act shall not repeal or annul, or be construed to repeal or annul the laws of any state . . . for the relief of insolvent debtors, except so far as the same may respect persons who are, or may be clearly within the purview of this act, and whose debts shall amount in the cases specified in the second section thereof to the sums therein mentioned”).

⁸³ 2 N.C. (1 Hayw.) 412.

⁸⁴ See An Act to prescribe the mode in which the public Acts, Records, and judicial Proceedings in each State, shall be authenticated so as to take effect in every other

ternative method of authentication. The court explained that the federal statute was “only affirmative”—a locution borrowed directly from “implied repeal” cases.⁸⁵ Federal cases used the same framework. Riding circuit in 1792, Chief Justice Oliver Ellsworth invoked “the maxim that when two statutes are opposed to each other, the latter abrogates the former” to explain why a federal treaty preempted a state law that was “repugnant” to it.⁸⁶ Even in *McCulloch v. Maryland*,⁸⁷ Chief Justice Marshall began his discussion of preemption by noting that “[a] law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.”⁸⁸

3. *The Rule of Construction*

The Supremacy Clause’s final phrase—which, as we shall see, is a *non obstante* provision—confirms the connection between preemption and repeals. Indeed, to overlook that connection is to make this phrase superfluous. The Supremacy Clause’s final fourteen words explicitly draw on the framework of repeals, and they serve a function only within that framework.

State, 1 Stat. 122 (1790); cf. U.S. Const. art. IV, § 1 (providing that “[f]ull Faith and Credit shall be given in each State to the public Acts . . . of every other State,” and authorizing Congress to enact general laws “prescrib[ing] the Manner in which such Acts . . . shall be proved, and the Effect thereof”).

⁸⁵ *Ellmore*, 2 N.C. (1 Hayw.) at 412; cf. 1 Blackstone, *supra* note 35, at 89–90 (discussing the doctrine of implied repeals and noting that implied repeals were less likely to be found “if both acts be merely affirmative”); see also *Harden v. Gordon*, 11 F. Cas. 480, 484 (C.C.D. Me. 1823) (No. 6047) (Story, J.) (concluding that a federal statute cast “merely in the affirmative” did not displace general maritime law, because “[t]here must be something inconsistent with or repugnant to [prior laws], to draw after a statute an implied repeal”).

⁸⁶ *Hamilton v. Eaton*, 11 F. Cas. 336, 340 (C.C.D.N.C. 1792) (No. 5980) (opinion of Ellsworth, C.J.); see also, e.g., *Gardner v. Ward*, 2 Mass. (1 Tyng) 244, 253 (1805) (opinion of Sedgwick, J.) (noting that “if there be any opposition between the [national] treaty and the [state] law,” the Supremacy Clause means that “the latter, so far as that opposition exists, is repealed”).

⁸⁷ 17 U.S. (4 Wheat.) 316 (1819).

⁸⁸ *Id.* at 425–26; see also *Hampden III* [Spencer Roane], *Richmond Enquirer*, June 1819, reprinted in John Marshall’s *Defense of McCulloch v. Maryland*, *supra* note 75, at 136 (complaining that the federal statute establishing the Second Bank of the United States “enables the corporation of the bank by its *by laws*, to *repeal* the laws of the several states[,] . . . a right only given to the *congress* itself, by the constitution, and that only when acting under its provisions”).

Modern readers, who consider preemption outside of that framework, are left scratching their heads over the Supremacy Clause's alleged redundancy: Once we have been told that valid federal law is supreme and binding, we see no reason to be told that it applies "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Understood in light of the prevailing conventions for repeals, however, these words addressed a specific problem that remained even after the Supremacy Clause established its rules of applicability and priority. The rule of applicability told state courts to treat the federal Constitution, treaties, and valid federal statutes as "in-state law," and the rule of priority told them that the federal portion of "in-state law" trumped (or impliedly repealed) whatever aspects of the state portion it contradicted. But if the relevant provision of federal law did not contain a *non obstante* clause, courts might hesitate to read it in a way that created such a contradiction. Applying the normal presumption against implied repeals, they might strain the federal law's meaning in order to harmonize it with state law.

To be sure, the reasons for reading one law to avoid contradicting another are weaker when the two laws were enacted by different legislative bodies; it makes more sense to presume that statutes enacted by the same legislature will be consistent with each other than that statutes enacted by Congress will always be consistent with statutes enacted by the states. But the Supremacy Clause did not rely upon state courts to reach this conclusion on their own. Instead, the final part of the Supremacy Clause is a global *non obstante* provision. This provision established a rule of construction, telling courts not to apply the traditional presumption against implied repeals in determining whether federal law contradicts state law. Thus, even if a federal statute or treaty did not itself contain a *non obstante* provision, the Supremacy Clause told courts not to strain its meaning in order to harmonize it with state law. As Daniel Webster asserted in his argument in *Gibbons v. Ogden*,⁸⁹ "[t]he presence or absence of a *non obstante* clause[] cannot affect the extent or operation of the act of Congress," because "[t]he laws of Congress need no *non obstante* clause."⁹⁰

⁸⁹ 22 U.S. (9 Wheat.) 1 (1824).

⁹⁰ *Id.* at 30–31 (argument of counsel).

Like the rest of the Supremacy Clause, the *non obstante* provision is carefully formulated. It does not affect the presumption against reading two *federal* statutes to contradict each other; in that situation, the normal presumption against implied repeals continues to apply in full force.⁹¹ But the *non obstante* provision does caution against straining the meaning of a federal law to avoid a contradiction with *state* law. Unless there is some particular reason (over and above the general presumption against implied repeals) to believe that Congress meant to avoid such a contradiction, the Supremacy Clause indicates that the content of state law should not alter the meaning of federal law.

Like the rule of applicability and the rule of priority, this aspect of the Supremacy Clause reflects problems that arose under the Articles of Confederation. In 1786, Congress had directed John Jay to investigate British complaints that states were violating the Treaty of Peace, and Jay duly gave Congress a lengthy report.⁹² Jay condemned various state laws for flatly violating the treaty's promise that British creditors would face "no lawful impediment" to the recovery of "bona fide debts."⁹³ But Jay also condemned state laws that purported to affect the treaty's proper interpretation. The Massachusetts legislature, for instance, had opined that the term "bona fide debt" did not include any interest that accumulated during the war years on pre-existing debts, and had directed Massachusetts courts not to include such interest in any judgments until Congress had a chance to consider this issue.⁹⁴ In Jay's view, "no individual state has a right by legislative acts to decide and point out the sense in which their particular citizens and courts shall understand this or that article of a treaty."⁹⁵ Otherwise, "the

⁹¹ See, e.g., *Morton v. Mancari*, 417 U.S. 535, 549–51 (1974).

⁹² 4 Secret Journals of the Acts and Proceedings of Congress, from the First Meeting Thereof to the Dissolution of the Confederation, by the Adoption of the Constitution of the United States 185–287 (1821) [hereinafter *Secret Journals of Congress*].

⁹³ See, e.g., *id.* at 233–39 (discussing Virginia resolution of June 22, 1784, and South Carolina debtor-relief ordinance of March 1784); see also *supra* text accompanying note 69 (quoting the treaty's fourth article).

⁹⁴ See 4 Secret Journals of Congress, *supra* note 92, at 213–15.

⁹⁵ *Id.* at 205. In fact, Jay argued that even Congress itself could not pass a statute affecting the proper interpretation of a treaty. Only a subsequent treaty between the United States and Great Britain could "correct or explain" the prior agreement. See *id.* at 204.

same article of the same treaty may by law mean one thing in New Hampshire, another in New York, and neither the one nor the other in Georgia.”⁹⁶ According to Jay, then, the Massachusetts legislature “ought not to have restrained [the] courts from rendering such judgments as to them appeared consistent with the treaty and the law.”⁹⁷

Under the regime set up by the Articles of Confederation, Jay’s analysis was potentially controversial.⁹⁸ Even if state courts agreed with Jay that certain laws went beyond the state legislatures’ power, moreover, they still might not feel free to ignore those laws; the principle of judicial review was not yet thoroughly established in all states. Accordingly, Jay advised Congress (and Congress unanimously agreed) to ask each state legislature to enact a law repealing “all . . . acts or parts of acts repugnant to the treaty of peace” and providing that

the courts of law and equity in all causes and questions cognizable by them respectively, and arising from, or touching the said treaty, shall decide and adjudge according to the true intent and meaning of the same, any thing in the said acts or parts of acts to the contrary thereof in any wise notwithstanding.⁹⁹

The *non obstante* clause in this proposed state law dovetailed with the rest of Jay’s report. If adopted by a state legislature, it would tell state courts not to let other potentially conflicting parts of state law affect their interpretation of the Treaty of Peace. The *non obstante* provision in the Supremacy Clause reflects the same impulse.

Modern readers might object that the punctuation of the Supremacy Clause casts doubt on my view of the *non obstante* provision as a rule of construction. On my view, one might expect the *non obstante* provision to address all judges who are charged with interpreting federal law. The “supreme Law of the Land” clause presumably does address all judges, but the Judges Clause

⁹⁶ Id. at 205.

⁹⁷ Id. at 216; cf. Letter from William Grayson to James Madison, *supra* note 71, at 63 (remarking upon “the striking impropriety of the interference of States as to the construction of a treaty in any case whatever”).

⁹⁸ See *supra* notes 66–71 and accompanying text (noting uncertainties under the Articles of Confederation about a treaty’s effect within the states).

⁹⁹ 4 Secret Journals of Congress, *supra* note 92, at 282–83 (Jay’s resolution); *id.* at 295–96 (Congress’s resolution).

addresses only "the Judges in every State" (a phrase that most commentators read to cover only *state judges*¹⁰⁰). Because a semi-colon separates the "supreme Law" clause from the Judges Clause, while only a comma separates the Judges Clause from the *non obstante* provision,¹⁰¹ modern grammarians would conclude that the *non obstante* provision goes only with the Judges Clause.

This objection might rest on a faulty premise. At the time it was written, the *non obstante* provision could have been understood to modify the "supreme Law" clause as well as the Judges Clause, and hence to address federal as well as state judges. To lawyers of the day, little hinged on the difference between a semi-colon and a comma. Not only were punctuation marks thought to lack the legal status of words,¹⁰² but commas and semi-colons were not as distinct

¹⁰⁰ See supra note 72 and accompanying text.

¹⁰¹ See U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

¹⁰² At the time of the Founding, the British Parliament was in the habit of enacting laws without any punctuation marks at all; clerks or printers inserted punctuation *after* the statute was enacted. See, e.g., *Doe dem. Willis v. Martin*, 100 Eng. Rep. 882, 897 (K.B. 1790) (opinion of Kenyon, C.J.) ("[W]e know that no stops are ever inserted in Acts of Parliament . . ."). Indeed, punctuation marks were not deemed part of the law even when they *did* appear in the bill that Parliament enacted. See generally Raymond B. Marcin, *Punctuation and the Interpretation of Statutes*, 9 Conn. L. Rev. 227, 233-35 (1977) (discussing the English canon that "[p]unctuation . . . forms no part of an act").

This canon was not confined to England. Riding circuit in the 1820s, no less an authority than Chief Justice Marshall asserted that "the construction of a sentence in a legislative act does not depend on its [punctuation]." *Black v. Scott*, 3 F. Cas. 507, 510 (C.C.D. Va. 1828) (No. 1464); cf. *In re Irwine*, 13 F. Cas. 125, 130 (C.C.E.D. Pa. 1842) (No. 7086) (Baldwin, J.) (asserting, in a case involving a federal bankruptcy law, that the punctuation of statutes "is generally the act of the clerk or printer" and "is no criterion of the sense of the legislature, unless it is in conformity with their intention as expressed in the words they use"). At any rate, punctuation marks certainly were not considered a *co-equal* part of the text of written laws. See, e.g., *Ewing v. Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837) (noting that "[p]unctuation is a most fallible standard by which to interpret a writing," although "it may be resorted to when all other means fail").

The ratification of the Constitution by the states reflects this relatively casual attitude toward punctuation. In many of the states, the official form of ratification incorporated a copy of the Constitution. See, e.g., 2 *Documentary History of the Constitution of the United States of America, 1786-1870*, at 27-45 (1894) (reprinting Pennsylvania's form of ratification, which set forth a copy of the Constitution and de-

as they are today.¹⁰³ The very first semi-colon in the Supremacy Clause proves the point; in modern writing, it would be a comma. If the second semi-colon is also the equivalent of a comma, then the *non obstante* provision can go with the "supreme Law" clause as well as the Judges Clause. Indeed, before the Committee of Style made minor changes to the Supremacy Clause at the Philadelphia Convention, the *non obstante* provision plainly *did* go with both clauses.¹⁰⁴

clared that Pennsylvania's delegates "assent to, and ratify the foregoing Constitution"). While the wording of these copies of the Constitution is identical, their punctuation is not. In roughly thirty-five different places, for instance, the copy of the Constitution in the Pennsylvania form of ratification uses different punctuation marks than the Constitution engrossed at the Federal Convention. Compare *id.* at 27-43 with 1 DHRC, *supra* note 73, at 306-17.

¹⁰³ Semi-colons might have told readers to pause longer than they would over a comma, see Noah Webster, *A Grammatical Institute of the English Language* app. 118 (Hartford, Hudson & Goodwin 6th ed. 1800), but the two punctuation marks frequently were used almost interchangeably. Consider, for instance, the similar function of the comma and the semi-colon in the following sentence from an eighteenth-century treatise on punctuation: "The foregoing rule is to be observed, where several substantives immediately follow one another in the same case; and are joined in pairs by the copulative conj[un]ction AND." Joseph J. Robertson, *An Essay on Punctuation* 26 (Philadelphia, James 1789).

¹⁰⁴ The version of the Supremacy Clause that the Convention submitted to the Committee of Style read as follows: "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 several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; any thing in the constitutions or laws of the several States to the contrary notwithstanding." 2 Farrand, *supra* note 73, at 572.

It is natural to assume that something important happened when the Committee of Style replaced the final semi-colon with a comma. But the Constitution itself casts doubt on this assumption: In several other places, the Constitution uses commas as the functional equivalent of the final semi-colon in a series. See U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."); *id.* art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."); cf. *Powell v. McCormack*, 395 U.S. 486, 538-39 (1969) (cautioning against ascribing substantive content to changes made by the Committee of Style).

Yet even if the *non obstante* provision addresses only “the Judges in every State,” this objection is insignificant. The people who drafted the Constitution might well have been more worried about what *state* courts would do with federal law than about what *federal* courts would do with federal law; federal courts might have been thought less likely than state courts to distort federal law in order to accommodate state law. Or perhaps people thought that courts would feel a need to harmonize state and federal law only where state law applied of its own force, and people were not sure what role state law would play in federal courts.¹⁰⁵ There are a host of reasons why the *non obstante* provision might have been directed especially at state judges. The punctuation of the Supremacy Clause, then, does not undermine the widespread evidence that *non obstante* provisions were rules of construction.

C. Simplifying the Analytical Framework for Preemption Cases

When we put the various aspects of the Supremacy Clause together, we can clear away the overgrowth created by the Supreme Court’s existing analytical framework for preemption cases. As we have seen, the rule of applicability and the rule of priority combine to mean that courts must follow all valid rules of federal law. But if courts can follow state law too, the Supremacy Clause leaves them free to do so. Under the Supremacy Clause, then, the test for preemption is simple: Courts are required to disregard state law if, but only if, it contradicts a rule validly established by federal law.

This logical-contradiction test should not be confused with the “physical impossibility” prong of the Court’s current test for “conflict” preemption.¹⁰⁶ There are plenty of circumstances in which it is physically possible for *individuals* to comply with both state and federal law even though *courts* would have to choose between them—that is, even though state and federal law contradict each

¹⁰⁵ If everyone had assumed that state law would apply of its own force in federal courts, the First Congress might not have bothered to pass the Rules of Decision Act. See Judiciary Act of 1789, § 34, 1 Stat. 73, 92 (providing, as a matter of federal law, that “the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply”).

¹⁰⁶ See *supra* notes 14–15 and accompanying text.

other. Imagine, for instance, that a valid rule of federal law gives workers the right to join a labor union (subject to certain qualifications), while state law purports to prohibit all union membership. It is physically possible for workers to comply with both laws by refraining from joining a union. But the logical-contradiction test would still mean that the state law is preempted: A court that enforced the state-law prohibition would be ignoring the federal-law right.¹⁰⁷

The logical-contradiction test is not confined to instances of what the Court calls “conflict” preemption. It also comfortably accommodates both “express” preemption and appropriate instances of “field” preemption. As Laurence Tribe has noted, rules established by federal law can be either “substantive” or “jurisdictional”; substantive rules tend to regulate conduct directly, while jurisdictional rules tend to say that states may *not* regulate certain areas of conduct (or at least may not do so in particular ways).¹⁰⁸ It is easy to see how a “substantive” rule of federal law can contradict a state-law rule: If state law purports to authorize something that federal law forbids or to penalize something that federal law gives people an unqualified right to do, then courts would have to choose between applying the federal rule and applying the state rule, and the Supremacy Clause requires them to apply the federal rule. But a “jurisdictional” rule of federal law—of the sort typically associated with “field” preemption, whether express or implied—can also contradict a state-law rule. After all, if a state purports to regulate the forbidden field, a court would have to choose between giving legal effect to the state regulation and giving legal effect to the federal rule depriving such regulations

¹⁰⁷ Depending on the scope of the federal right, the same analysis applies if state law purports to let people unionize but to hold them liable for damages if they do so. Suppose, for instance, that federal law is interpreted to give workers who comply with certain federally recognized conditions an unqualified right to belong to a union, and suppose that the federally recognized conditions do *not* include compliance with state laws requiring all union members to pay damages to their employers. A state law purporting to impose this additional condition on union membership would fail the logical-contradiction test, even though it is physically possible for workers to comply with both laws.

¹⁰⁸ See 1 Laurence H. Tribe, *American Constitutional Law* 1177 (3d ed. 2000); see also *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996) (distinguishing between the “substantive” and the “pre-emptive” meaning of a statute).

of authority. Again, the Supremacy Clause tells the court to resolve this contradiction in favor of the federal rule (if that rule is within Congress's power to promulgate).

Once we recognize that all preemption cases are about contradiction between state and federal law, we should begin to question the usefulness of dividing them into the separate analytical categories of "express" preemption, "field" preemption, and "conflict" preemption. The Supreme Court itself has been unable to keep these categories "rigidly distinct,"¹⁰⁹ and they only get in the way of its analysis. In the recent case of *Gade v. National Solid Wastes Management Association*,¹¹⁰ for instance, a four-Justice plurality described a statute's preemptive effects as an example of "conflict" preemption, but acknowledged that they could equally well be described under the rubric of "field" preemption.¹¹¹ A fifth Justice thought that the same effects should be described instead as "express" preemption.¹¹² This dispute about labels kept the Justices from forming a majority and resulted in splintered opinions, but it made no difference to the Justices' legal analysis; it was simply a distraction.¹¹³

To be sure, the Court's taxonomy does capture some elements of truth. The Court's distinction between "conflict" and "field" preemption reflects the difference between "substantive" and "jurisdictional" rules. Likewise, the Court's distinction between "express" and "implied" preemption reflects the fact that federal statutes may establish rules by implication as well as explicitly. Still, there are at least three problems with the Court's taxonomy.

First, any important distinction between "substantive" and "jurisdictional" rules (or between what the Court calls "conflict"

¹⁰⁹ *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990); see also, e.g., 1 Tribe, *supra* note 108, at 1177 (noting that the Supreme Court's three categories "are anything but analytically air-tight").

¹¹⁰ 505 U.S. 88 (1992).

¹¹¹ See *id.* at 104 n.2.

¹¹² See *id.* at 109 (Kennedy, J., concurring in part and concurring in the judgment).

¹¹³ Cf. *id.* at 109-14 (Kennedy, J., concurring in part and concurring in the judgment) (agreeing with the plurality's statutory analysis, but disagreeing about what to call the resulting preemption, and appearing to assume that this label has some practical consequence). For a more detailed discussion of *Gade*, see Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 *Vand. L. Rev.* 1149, 1172-76 (1998).

preemption and what it calls “field” preemption) is independent of the distinction between “express” and “implied” rules. Even if the Court’s taxonomy were otherwise helpful, then, it is potentially misleading to speak of “express” preemption as a rival of “field” and “conflict” preemption. If Congress has the constitutional power to occupy a particular field, a federal statute may do so either expressly or by implication; the statute may contain an express preemption clause to that effect, or it may simply imply such a clause. In this sense, “field” preemption may be either express or implied. The same goes for what the Court calls “conflict” preemption: If Congress has the constitutional power to establish a particular substantive rule, a federal statute may do so either expressly or by implication.

Second, even with this clarification, the distinctions on which the Court’s taxonomy rests are not very crisp. It seems natural to think that a federal statute granting rights—authorizing individuals or entities to do certain things if they meet certain conditions—establishes a “substantive” rule. But if one accepts this usage, then one can readily recast most “jurisdictional” rules in “substantive” terms. The “jurisdictional” rule that states may not regulate the safety of nuclear power plants, for example, is hard to distinguish from a “substantive” rule giving nuclear power plants permission to operate if they comply with all safety requirements imposed by federal law (provided that they comply with whatever nonsafety requirements states may impose). The Court itself has therefore conceded that “field pre-emption may be understood as a species of conflict pre-emption.”¹¹⁴

Even the distinction between “express” and “implied” rules is surprisingly elusive. It is tempting to claim that “express” rules are formed by the definitions of individual terms in a statute, while “implied” rules stem from broader inferences. But when we say that a particular sequence of words in a statute “implies” a given rule, we are merely saying that the rule is part of what that sequence of (express) words means in the context in which it appears; implied rules, no less than express rules, are part of the

¹¹⁴ *English*, 496 U.S. at 79 n.5; see also, e.g., 1 Tribe, *supra* note 108, at 1204 (“[L]abels like ‘conflict’ and ‘field’ preemption rarely offer much real help in the inherently difficult task that lies at the heart of preemption analysis—the task of determining statutory meaning.”).

meaning of the whole sequence.¹¹⁵ No attempt to draw sharp distinctions between the definitions of the individual components and the "definition" of the whole sequence can be entirely successful, because the statute's component parts cannot really be separated from its overall whole. By the time statutory interpreters have reached equilibrium—by the time they have reached a stable understanding of the whole statute—their understanding of each individual word in the statute will reflect their understanding of the overall sequence and vice versa.¹¹⁶

Third, and most fundamentally, the labels that one uses to describe different types of rules do not capture anything very important about preemption doctrine. Thus, even if everyone could agree about which rules are "express" and which are "implied," which are "substantive" and which are "jurisdictional," these distinctions would do little to advance preemption analysis.¹¹⁷ The 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. This is so whether the rule is substantive or jurisdictional and whether it is express or implied.

¹¹⁵ Cf. Jordan, *supra* note 113, at 1179–82 (noting that whether the Court proceeds under the rubric of "express" or "implied" preemption, it is "engag[ing] in statutory construction," although its approach to express preemption clauses has tended to reflect a different style of statutory interpretation than its analysis of "implied" preemption).

¹¹⁶ See, e.g., E.D. Hirsch, Jr., *The Aims of Interpretation* 5 (1976) ("The hermeneutic circle is based on the paradox that we must know the whole in a general way *before* we know a part, since the nature of the part as such is determined by its function in the larger whole. Of course, since we can know a whole only through its parts, the process of interpretation is a circle."); Richard E. Palmer, *Hermeneutics: Interpretation Theory in Schleiermacher, Dilthey, Heidegger, and Gadamer* 16 (1969) (discussing "the complex dialectical process involved in all understanding as it grasps the meaning of a sentence, and somehow in a reverse direction supplies the attitude and emphasis which alone can make the written word meaningful"); cf. *id.* at 27 (noting that "[t]he act of translation is not a simple mechanical matter of synonym-finding, as the ludicrous products of translation machines make only too clear").

¹¹⁷ Cf., e.g., Wolfson, *supra* note 16, at 70–71 (observing that the Supreme Court's various categories of preemption "are useless in difficult cases").

II. THE FAILURE OF ANY GENERAL DOCTRINE OF "OBSTACLE" PREEMPTION

In addition to helping us simplify the Court's taxonomy, the analysis of the Supremacy Clause in Part I has some important implications for the substance of preemption doctrine. In this Part, I discuss the failure of any general doctrine of "obstacle" preemption. In Part III, I discuss the failure of the courts' artificial "presumption against preemption."

The Supreme Court routinely says that valid federal statutes preempt whatever state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹¹⁸ In *Perez v. Campbell*,¹¹⁹ the Court described this test as an "articulation of the meaning of the Supremacy Clause."¹²⁰ According to *Perez*, the Supremacy Clause invalidates "any state legislation which frustrates the full effectiveness of federal law."¹²¹

This understanding of the Supremacy Clause obviously differs from the analysis that I presented in Part I. In Section II.A, I therefore go on the defensive: I consider the evidence on which the *Perez* Court rested its claim, as well as some additional historical evidence that might be thought to buttress that claim. I conclude that none of this evidence undermines the logical-contradiction test or supports a constitutional doctrine of obstacle preemption.

In tacit recognition of this fact, the Supreme Court usually does not link the doctrine of obstacle preemption directly to the Supremacy Clause, but presents it instead as a rule of statutory interpretation. The Court suggests, in other words, that all federal statutes should be read to imply a clause forbidding states to enact or enforce laws that would get in the way of Congress's full purposes and objectives. Section II.B considers this argument and concludes that it is too broad. Some federal statutes can indeed be read to establish a rule of obstacle preemption; even if they do not

¹¹⁸ See cases cited *supra* note 14.

¹¹⁹ 402 U.S. 637 (1971).

¹²⁰ *Id.* at 649.

¹²¹ *Id.* at 652; see also *id.* at 644 ("Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict."); accord *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981).

say in so many words that state law is preempted to the extent it hinders accomplishment of certain federal objectives, they may imply some such clause. By virtue of the Supremacy Clause, this rule (if within Congress's power to establish) would then displace whatever state law it contradicts. But obstacle preemption cannot be defended as a *general* doctrine of statutory interpretation. While some federal statutes may indeed imply an obstacle-preemption clause, others do not. As I argue in Section II.B, whether a particular federal statute requires obstacle preemption depends on the specific words and context of the federal statute at issue.

A. *Is There Historical Support for a Constitutional Doctrine of Obstacle Preemption?*

The *Perez* Court traced its claims about the Supremacy Clause to Chief Justice Marshall's famous opinion in *Gibbons v. Ogden*.¹²² Some commentators share this understanding of *Gibbons* and suggest that *McCulloch v. Maryland*¹²³ also reflects a constitutional doctrine of obstacle preemption.¹²⁴ Were this true, it would certainly be a strike against my approach; one should not casually embrace a constitutional theory at odds with such seminal precedents. As Section II.A.1 explains, however, both *Gibbons* and *McCulloch* fit comfortably with the logical-contradiction test. Section II.A.2 examines some other possible historical objections to the logical-contradiction test.

1. *Gibbons v. Ogden and McCulloch v. Maryland*

The facts of *Gibbons* are familiar. Thomas Gibbons wanted to use a steamboat to ferry passengers in New York waters. But a New York statute purported to give Robert Livingston and Robert Fulton the "exclusive right to navigate the waters of this state, with boats moved by steam or fire,"¹²⁵ and Gibbons did not have

¹²² 22 U.S. (9 Wheat.) 1 (1824).

¹²³ 17 U.S. (4 Wheat.) 316 (1819).

¹²⁴ See, e.g., Grey, *supra* note 16, at 567 (reading both *Gibbons* and *McCulloch* broadly but suggesting that they go too far); Hoke, *supra* note 16, at 715 (similar). But cf., e.g., Starr et al., *supra* note 16, at 8–9 (interpreting *Gibbons* more narrowly).

¹²⁵ E.g., An Act for the further encouragement of Steam Boats on the waters of this state, and for other purposes, ch. CCXXV, 1808 N.Y. Laws 333, 333.

Livingston and Fulton's permission to operate his steamboat ferry. What Gibbons did have was a federal license to use his steamboat in the "coasting trade." Chief Justice Marshall interpreted the relevant federal statute—which specified that licensed ships "shall be . . . entitled to the privileges of ships or vessels employed in the coasting trade"¹²⁶—to entitle all federally licensed ships to carry on the "coasting trade,"¹²⁷ and he understood that term to include the business of transporting passengers by ferry.¹²⁸ Thus interpreted, the federal statute (which authorized Gibbons to use his steamboat in all aspects of the coasting trade) was "in direct collision" with the New York statute (which purported to prohibit Gibbons from using his steamboat in one aspect of that trade).¹²⁹ Marshall decided the case on this basis; insofar as it applied to Gibbons, the New York law contradicted the federal statute and was therefore preempted.

One sentence in Chief Justice Marshall's opinion did indicate that preemption occurs when state laws "*interfere with*, or are contrary to the laws of Congress, made in pursuance of the constitution."¹³⁰ The *Perez* Court took this sentence to mean that the constitutional test for preemption requires only "interfer[ence]" and not actual contradiction.¹³¹ But Marshall was not using the word "interfere" as we might use it today.¹³² In the language of the day, "to interfere" could mean "to clash."¹³³ Marshall's

¹²⁶ An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same, § 1, 1 Stat. 305 (1793).

¹²⁷ See *Gibbons*, 22 U.S. (9 Wheat.) at 212 ("To the Court it seems very clear, that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to licensed vessels to carry on the coasting trade."); *id.* at 213 ("To construe these words otherwise than as entitling the ships or vessels described, to carry on the coasting trade, would be, we think, to disregard the apparent intent of the act.").

¹²⁸ See *id.* at 215.

¹²⁹ See *id.* at 221.

¹³⁰ *Id.* at 211 (emphasis added).

¹³¹ See *Perez v. Campbell*, 402 U.S. 637, 649 (1971) (emphasizing the word "interfere").

¹³² Cf. Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* xi (1985) (noting that in trying to understand documents from the time of the Founding, "one must pay close attention to meanings of even the most ordinary words, for these have changed in myriad ways").

¹³³ See 1 Johnson, *supra* note 75 (defining "to interfere" as meaning either "to interpose; to intermeddle" or "to clash; to oppose each other").

contemporaneous opinions frequently used the word in this sense; two things were said to “interfere with” each other when they were mutually exclusive or contradictory.¹³⁴ In *Gibbons*, both the Court’s ultimate holding and the context of the relevant passage indicate that Marshall had this meaning in mind. After noting that “the States may sometimes enact laws, the validity of which depends on their *interfering with*, and being contrary to, an act of Congress passed in pursuance of the constitution,” Marshall concluded that the key question was therefore “whether the laws of New-York . . . 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.*”¹³⁵ Thus, far from establishing that the Supremacy Clause mandates preemption whenever the effects of state law might get in the way of the purposes behind federal law, *Gibbons* illustrates the fact that preemption is all about contradiction.

At first glance, Chief Justice Marshall’s opinion in *McCulloch v. Maryland* comes closer to supporting *Perez*’s assertions about the Supremacy Clause. Again, the facts are familiar. A federal statute called for the establishment of the Second Bank of the United States, a corporation whose shares would be subscribed and paid for partly by the federal government and partly by other investors.¹³⁶ The statute gave the corporation appropriate powers, including the power to set up branch “offices of discount and deposit”¹³⁷ and the power “generally to do and execute all and singular the acts, matters, and things, which to [the subscribers] it shall or may appertain to do.”¹³⁸ The Bank duly established a branch office in Baltimore. In 1818, the Maryland legislature passed a statute purporting to prevent the Baltimore branch from

¹³⁴ See, e.g., *Stephens v. M’Cargo*, 22 U.S. (9 Wheat.) 502, 504–05 (1824) (discussing the law that applies when land claims “interfere with” each other—that is, when two people both lay claim to the same land); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 582 (1823) (noting that after Europeans discovered America, England’s claim to vast tracts of land “interfered . . . with the claims of France, founded on the same principle”).

¹³⁵ *Gibbons*, 22 U.S. (9 Wheat.) at 210 (emphasis added).

¹³⁶ See An Act to incorporate the subscribers to the Bank of the United States, 3 Stat. 266 (1816).

¹³⁷ *Id.* § 11, para. 14, 3 Stat. at 273.

¹³⁸ *Id.* § 7, 3 Stat. at 269.

issuing bank notes unless it either paid the state an annual fee of \$15,000 or printed each note on stamped paper available for a fee from the state.¹³⁹ The cashier of the Baltimore branch, who apparently preferred to take the Bank's money for himself,¹⁴⁰ refused to pay.

Chief Justice Marshall's opinion first rejected a constitutional challenge to the federal statute empowering the Bank; the Bank, Marshall indicated, was a necessary and proper means of carrying into execution various fiscal powers that the Constitution gave the federal government. Marshall then considered the validity of the Maryland statute purporting to tax the Bank's operations. In words that seem to bode ill for the logical-contradiction test, Marshall asserted that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government," and he labeled this principle "the unavoidable consequence of that supremacy which the constitution has declared."¹⁴¹

Any tension between *McCulloch* and the logical-contradiction test, however, is more apparent than real. There are two possible ways of understanding *McCulloch*. First, one could read *McCulloch* to hold that structural principles in the Constitution establish a doctrine of intergovernmental immunities: In the absence of congressional consent, states cannot exercise sovereign powers over federal instrumentalities. Thus, Marshall suggested that states could not tax the National Bank's operations any more than they could "tax the mail" or "tax the mint."¹⁴² Marshall was not clear about the precise derivation of this immunity; perhaps the Constitution implicitly deprived states of the power to tax federal instrumentalities, or perhaps the states would have enjoyed this

¹³⁹ See *McCulloch*, 17 U.S. (4 Wheat.) at 320–22 (reprinting Maryland's statute).

¹⁴⁰ See Gunther & Sullivan, *supra* note 32, at 104 ("McCulloch and his accomplices were systematically looting the Bank by instigating unsecured loans and sanctioning unreported overdrafts").

¹⁴¹ *McCulloch*, 17 U.S. (4 Wheat.) at 436; see also, e.g., *id.* at 427 ("It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.").

¹⁴² *Id.* at 432.

power only if the Constitution had affirmatively given it to them.¹⁴³ In either case, however, this understanding of *McCulloch* does not affect ordinary preemption analysis. It is one thing to say that states lack the power to tax or otherwise regulate federal instrumentalities. It is quite another thing to say that states cannot exercise legislative powers that they unquestionably possess if their exercise of those powers would get in the way of federal purposes. The principle of intergovernmental immunity articulated in *McCulloch* hardly compels a general doctrine of obstacle preemption.

The second possible understanding of *McCulloch* does involve ordinary preemption analysis, but it affirmatively supports the logical-contradiction test. In *Osborn v. Bank of the United States*,¹⁴⁴ Marshall cast the relevant part of *McCulloch* as an interpretation of the federal statute creating the national Bank. As Marshall indicated, the federal statute not only incorporated the Bank but also “authorize[d] its Banking operations.”¹⁴⁵ This aspect of the federal statute was constitutional, because the Bank’s powers were “necessary to the legitimate operations” of the federal government.¹⁴⁶ But given Congress’s judgment that “these faculties were necessary, to enable the Bank to perform the services . . . for which it was created,” Marshall interpreted the federal statute to “exempt[] the trade of the Bank . . . from the control of the States.”¹⁴⁷ Marshall conceded that the statute did not “expressly assert[]” this exemp-

¹⁴³ Compare *id.* at 427 (noting that the states’ power of taxation “may be controlled by the constitution of the United States,” and proceeding to inquire “[h]ow far it has been controlled by that instrument”), with *id.* at 430 (suggesting that because the power at issue—“to tax the means employed by the government of the Union, for the execution of its powers [granted by the Constitution]”—could not have existed before the Constitution, “the question whether it has been surrendered, cannot arise”). For a modern reprise of this ambiguity in *McCulloch*, compare *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802 (1995) (invoking *McCulloch* and arguing that states cannot set eligibility requirements for their members of Congress unless the Constitution grants this power to the states), with *id.* at 853–56 (Thomas, J., dissenting) (criticizing the majority’s reading of *McCulloch* and arguing that states have a qualification-setting power unless the Constitution takes it away from them).

¹⁴⁴ 22 U.S. (9 Wheat.) 738 (1824).

¹⁴⁵ *Id.* at 861.

¹⁴⁶ *Id.* at 861–65.

¹⁴⁷ *Id.* at 864–66; see also *McCulloch*, 17 U.S. (4 Wheat.) at 434 (referring to the federal government’s “incidental privilege of exempting its own measures from State taxation”).

tion, but he rejected the notion that it “ought not to be implied by the Court”; in his view, “[i]t is no unusual thing for an act of Congress to imply, without expressing, this very exemption from State control”¹⁴⁸ Given this “sound construction of the act,”¹⁴⁹ state laws purporting to tax the Bank’s operations were “repugnant to a law of the United States, made in pursuance of the constitution, and, therefore, void.”¹⁵⁰

To judge from *Osborn*, then, Marshall read the federal statute creating the Bank to contradict state laws taxing its operations. One can understand the contradiction in either “substantive” or “jurisdictional” terms. As in *Gibbons*, one could read the federal statute to give the Bank an unqualified license to engage in certain banking operations, such as issuing bank notes;¹⁵¹ a state law purporting to prevent the Bank from issuing bank notes (unless it paid a tax on each note or gave the state \$15,000 a year) would contradict this substantive license. Alternatively, one could describe the same contradiction in jurisdictional terms: One could interpret the federal statute chartering the Bank to occupy a particular field and to deprive the states of what Marshall called “controlling power” over the Bank’s operations.¹⁵² On either view, however, Maryland’s law was preempted because it contradicted a rule validly established by the federal statute chartering the Bank.

One might be skeptical that the federal statute chartering the Bank really implied the rule that *Osborn* detected.¹⁵³ But my point

¹⁴⁸ *Osborn*, 22 U.S. (9 Wheat.) at 865.

¹⁴⁹ *Id.* at 866.

¹⁵⁰ *Id.* at 868.

¹⁵¹ *Cf. id.* at 861 (noting that Congress had given the Bank “th[e] faculty of lending and dealing in money”).

¹⁵² *McCulloch*, 17 U.S. (4 Wheat.) at 433.

¹⁵³ In general, Marshall was more willing to infer field preemption than courts interpreting modern statutes would be. Indeed, his famous dicta in *Gibbons*—concerning whether the states retain power to regulate interstate commerce—can be understood to be about implied field preemption rather than the “dormant” Commerce Clause. Law students are taught that “[i]n *Gibbons*, Chief Justice Marshall found ‘great force’ in [the] argument . . . that Congress’s power to regulate interstate commerce was exclusive—that is, that the Constitution necessarily withdrew that power from the states.” Geoffrey R. Stone et al., *Constitutional Law* 290 (3d ed. 1996). But Marshall’s opinion in *Gibbons* did not address this constitutional argument separately. Instead, Marshall lumped it together with the alternative argument that even though the Commerce Clause did not itself grant Congress an exclusive power, the statutes that Congress had enacted should be understood to occupy the field (and hence to pre-

is not that we should revert to Chief Justice Marshall's methods of statutory interpretation. My point is simply that neither *Gibbons* nor *McCulloch* undermines my view of the Supremacy Clause. *Gibbons* plainly involved a contradiction between the challenged state law and a federal statute (as interpreted by the Court). To the extent that *McCulloch* implicates ordinary preemption analysis at all, *Osborn* suggests that the same is true of it.

2. *The Jay Report and the Ratification Debates*

People seeking to read a doctrine of obstacle preemption into the Supremacy Clause might also invoke John Jay's 1786 report about state violations of the Treaty of Peace.¹⁵⁴ One of the three resolutions that Jay urged Congress to adopt declared, in part,

[t]hat the legislatures of the several states cannot of right pass any act or acts . . . *for restraining, limiting or in any manner impeding, retarding or counteracting the operation or execution of [national treaties]*; for that on being constitutionally made, ratified, and published, they become, in virtue of the confederation, part of the law of the land, and are not only independent of the will and power of such legislatures, but also binding and obligatory on them.¹⁵⁵

The words that I have italicized can be read as an early statement of obstacle preemption, linked to the notion that valid federal treaties are part of the "law of the land."

empt additional state regulations of interstate commerce). See *Gibbons*, 22 U.S. (9 Wheat.) at 200. As Marshall pointed out, "the regulations which Congress deemed it proper to make, are now in full operation." *Id.* And the argument in which he found "great force"—that "regulation . . . produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated"—is at least as consistent with the notion of implied field preemption as with the notion that the Commerce Clause itself deprives the states of power. See *id.* at 209.

¹⁵⁴ See *supra* text accompanying notes 92–99.

¹⁵⁵ 4 Secret Journals of Congress, *supra* note 92, at 282 (emphasis added). Jay's proposed resolutions, which Congress unanimously adopted, are sometimes seen as a precursor of the Supremacy Clause. See, e.g., 4 *The Founders' Constitution* 589–91 (Philip B. Kurland & Ralph Lerner eds., 1987); see also Marcus III [James Iredell], *Norfolk & Portsmouth J.*, Mar. 5, 1788, *reprinted in* 16 *DHRC*, *supra* note 73, at 324–25 (citing Jay's report in order to defend the Supremacy Clause's inclusion of treaties).

This evidence, however, is equivocal at best. The actual legal analysis in Jay's report contained no flavor of modern notions of obstacle preemption. Instead of asking whether the challenged state laws hindered accomplishment of the treaty's purposes, Jay was asking whether they contradicted the treaty's provisions. A number of state laws did so.¹⁵⁶ But when a challenged state law did *not* contradict any of the treaty's articles, Jay's analysis went no farther.¹⁵⁷

Indeed, even the italicized words in Jay's proposed resolution are ambiguous. They seem to be limited to state laws enacted *for the purpose of* obstructing national treaties, as opposed to state laws that merely have this effect. In addition, Jay's reference to state laws "for . . . impeding" a treaty's operation may reflect the language of the particular treaty in question, which had promised that states would raise "no lawful impediment" to the collection of British debts.¹⁵⁸ Rather than simply hindering accomplishment of the treaty's purposes, such impediments would contradict one of its central provisions. The other words in Jay's resolution can also be read to be consistent with the logical-contradiction test for preemption.¹⁵⁹

¹⁵⁶ See, e.g., 4 Secret Journals of Congress, *supra* note 92, at 216 (describing the Massachusetts law deferring interest payments as "a violation" of the fourth article); *id.* at 224 (calling Pennsylvania's law deferring execution on judgments "an infraction" of the fourth article); *id.* at 239 (adding that South Carolina's law stretching out payments on British debts was in "direct opposition" to the same article).

¹⁵⁷ For instance, Jay was untroubled by British complaints that many states had done little to restore property that had been confiscated during the war. The fifth article of the treaty merely said that Congress would "recommend" the restitution of such property, and it gave states no obligation to do anything in response to Congress's recommendation. *Id.* at 258. Likewise, Jay rejected arguments against a New York statute that, in his view, simply impeded the collection of debts by Americans who had sympathized with the British; Jay did not think that this statute affected "creditors on [the British] side" within the meaning of the fourth article. *Id.* at 206, 221; *cf.* 1 *The Law Practice of Alexander Hamilton*, *supra* note 52, at 199–200 (discussing the statute).

¹⁵⁸ See *supra* text accompanying note 69 (quoting the treaty's fourth article).

¹⁵⁹ The notion that state laws cannot "retard[]" (or delay) compliance with a national treaty is unexceptionable; as the body of Jay's report made clear, state laws purporting to postpone or phase in a treaty's obligations contradict the treaty. See 4 Secret Journals of Congress, *supra* note 92, at 233–39. Likewise, Jay's reference to state laws for "restraining," "limiting," or "counteracting" a treaty's operation or execution may simply have meant (in the words of the circular that Jay prepared to accompany the

In describing how to give effect to his resolution, moreover, Jay did not propose asking states to repeal all laws that might have the effect of hindering accomplishment of the treaty's purposes. Instead, he simply recommended asking states to repeal acts "repugnant to" the treaty.¹⁶⁰ This is the language of contradiction, not the language of modern obstacle preemption.

In keeping with this understanding of Jay's report, the major participants in the debate over whether to ratify the Constitution apparently did not envision the modern doctrine of obstacle preemption. This is not because they neglected the Supremacy Clause; Antifederalists vehemently objected to that Clause,¹⁶¹ and they

resolutions) that treaties are "not . . . subject to such alterations as this or that state legislature may think expedient to make." *Id.* at 333.

Jay's circular did insist "that the treaty ought to have free course in its operation and execution, and that all obstacles interposed by state acts be removed." *Id.* at 335. Again, though, other passages in the circular indicate that Jay did not have modern notions of obstacle preemption in mind. As relevant here, the circular focused on "the impropriety of state acts to control, delay or modify the operation and execution of these national compacts." *Id.* at 332-33. The words "delay" and "modify" are self-explanatory, and the verb "to control" was of the same piece: it meant "to govern; to restrain; to subject." 1 Johnson, *supra* note 75 (illustrating this definition with the question "[w]ho shall *control* me for my works?"). This language suggests that the "obstacles" Jay had in mind were real constraints on the treaty itself, such as the states' efforts to postpone implementation of the treaty or to impose additional conditions on their compliance. "Obstacles" of this sort would contradict the treaty.

¹⁶⁰ 4 Secret Journals of Congress, *supra* note 92, at 282-83 (Jay's recommendations); *id.* at 295-96 (Congress's resolutions).

¹⁶¹ Indeed, we owe the federal Bill of Rights partly to their objections. Luther Martin, who introduced the prototype of the Supremacy Clause at the Philadelphia Convention, wanted courts to remain free to disregard federal statutes on the ground that they violated *state* bills of rights. See Luther Martin, Address No. II, Md. J., Mar. 21, 1788, *reprinted in* 16 DHRC, *supra* note 73, at 453 ("in the form I introduced the clause, . . . treaties and the laws of the general government were intended to be superior to the laws of our state government, where they should be opposed to each other, yet . . . they were not proposed, nor meant to be superior to our *constitution* and bill of rights"); cf. 2 Farrand, *supra* note 73, at 28-29 (reporting the form in which Martin proposed the Supremacy Clause). But after the Committee of Detail added state constitutions to the Supremacy Clause's *non obstante* provision, see *id.* at 169, it was clear that the state bills of rights would not limit Congress's powers. Many participants in the ratification debates saw this fact as a reason to adopt a federal bill of rights. See, e.g., Letter from George Turner to Winthrop Sargent (Nov. 6, 1787), *in* 2 DHRC, *supra* note 73, at 209; Cumberland County Petition to the Pennsylvania Convention (Dec. 5, 1787), *in* 2 DHRC, *supra* note 73, at 310; 2 DHRC, *supra* note 73, at 386, 392 (notes of John Smilie's remarks in the Pennsylvania convention); George Mason, Objections to the Constitution (Oct. 7, 1787), *in* 8 DHRC, *supra* note 73, at 43; Letter from George Lee Turberville to James Madison (Dec. 11, 1787), *in* 8 DHRC, *supra* note 73, at 233-34; The Impartial Examiner I, Va. Indep. Chron., Mar. 5, 1788, re-

even discussed preemption. Centinel, for instance, warned the people of Pennsylvania that Congress would be able to abrogate whatever state laws were alleged to “interfere with the execution of any of [its] powers.” But rather than claiming that the Supremacy Clause would make this abrogation automatic, Centinel simply noted that the Necessary and Proper Clause would give Congress the power to enact *new statutes* explicitly “repealing” those state laws.¹⁶² Thus, Centinel was writing within the framework of the logical-contradiction test; the specter of obstacle preemption does not seem to have crossed his mind.

An exchange between Brutus and Publius was to the same effect. In his essays to the citizens of New York, Brutus asked readers to imagine what would happen if Congress and a state both enacted tax laws, the combined burden of which was so heavy that the people would not or could not comply with both. Even in this situation, Brutus did not argue that the federal law would preempt the state law. Like Centinel, however, Brutus warned that the Necessary and Proper Clause would permit Congress to pass a new statute “suspend[ing] the collection of the state tax.”¹⁶³ Publius responded by rejecting this view of the Necessary and Proper Clause.¹⁶⁴ But Publius endorsed Brutus’s implicit premise about

printed in 8 DHRC, supra note 73, at 462; 9 DHRC, supra note 73, at 1157–58 (report of George Mason’s remarks in the Virginia convention); An Old Whig II, Philadelphia Indep. Gazetteer, Oct. 17, 1787, reprinted in 13 DHRC, supra note 73, at 403; Brutus II, supra note 78, at 529.

¹⁶² Centinel V, supra note 78, at 344–45.

¹⁶³ Brutus VI, N.Y. Journal, Dec. 27, 1787, reprinted in 15 DHRC, supra note 73, at 111. Others made the same basic argument. See Centinel V, supra note 78, at 345 (“[I]f a state should presume to impose a tax or excise that would interfere with a federal tax or excise, congress may soon terminate the contention, by repealing the state law, by virtue of the [Necessary and Proper Clause]. Indeed every law of the states may be controuled by this power.”); The Fallacies of the Freeman Detected by A Farmer, Philadelphia Freeman’s J., Apr. 23, 1788, reprinted in 17 DHRC, supra note 73, at 142 (observing that the Necessary and Proper Clause gives Congress “the power of repelling [sic] or forbidding the execution of any [state] tax law whatever that may interfere with or impede the exercise of the general taxing power, and it would not be possible that two taxing powers should be exercised on the same sources of taxation without interfering with each other”); cf. An Old Whig VI, supra note 78, at 216–17 (“[I]t will very soon be found inconvenient to have two sets of excise officers in each town or county in every state, they will be in danger of clashing with each other, it will then be found ‘necessary and proper . . .’ to forbid the individual states to levy any more excise.”).

¹⁶⁴ Among other things, Publius pointed out that Article I made a special provision for certain types of state taxes; each state had to secure Congress’s consent to “lay any

preemption: Even though the state tax might “render the collection [of the federal tax] difficult or precarious,” nothing in the principle of supremacy precluded enforcement of the state tax law.¹⁶⁵

In sum, neither Chief Justice Marshall’s landmark opinions in *Gibbons* and *McCulloch* nor the other evidence considered in this Section undermines the textual and historical analysis of the Supremacy Clause presented in Part I. As that analysis suggests, obstacle preemption has no place as a doctrine of constitutional law.

B. Can Obstacle Preemption Be Defended as a Doctrine of Subconstitutional Law?

Even if there is no *constitutional* doctrine of obstacle preemption, of course, my analysis of the Supremacy Clause does not keep obstacle preemption from surviving as a doctrine of *subconstitutional* law. It is theoretically possible, in other words, that every federal statute (or at least every federal statute that does not otherwise address preemption¹⁶⁶) should be read to establish a jurisdictional rule displacing all state law that hinders accomplishment of the purposes behind the federal statute.

The Supreme Court ordinarily presents obstacle preemption in just these terms, as a doctrine of statutory interpretation rather than constitutional law. According to the Court, the question in preemption cases “is basically one of congressional intent[:] Did

Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection Laws,” and all such laws were “subject to the Revision and Controul of Congress.” See U.S. Const. art. I, § 10. Publius argued that this restriction on particular types of state taxes carried a “negative pregnant”; it implied that other state taxes were *not* subject to congressional control. See *The Federalist* No. 32 (Alexander Hamilton).

¹⁶⁵ *The Federalist* No. 33, at 205 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Publius did say that the federal tax law “would be supreme in its nature and could not legally be opposed or controlled.” *Id.* But this simply meant that the states could not exercise sovereign authority over the federal tax itself; they could not reduce the federal tax rates or limit how frequently federal agents collected it. See *supra* note 159 (discussing the meaning of “to control”). As his discussion of the *state* tax indicates, Publius did not understand the principle of supremacy to invalidate state laws that merely had the practical effect of hindering accomplishment of the federal purposes.

¹⁶⁶ When a federal statute includes an express preemption clause, the Supreme Court is reluctant to use the doctrine of “obstacle preemption” to infer a more sweeping preemption clause. See *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288–89 (1995); *Cipollone v. Liggett Group*, 505 U.S. 504, 517 (1992).

Congress, in enacting the Federal Statute, intend to . . . set aside the laws of a State?"¹⁶⁷ Sometimes Congress addresses that question expressly. But the Court has said that "[i]n the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where . . . the state law stands as an obstacle to the accomplishment and execution of congressional objectives."¹⁶⁸ In the Court's opinion, federal statutes "reveal a clear, but implicit, preemptive intent" when state laws "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹⁶⁹

Of course, the Court is not claiming that members of Congress actually formulated this "pre-emptive intent" in their own minds. When a federal statute does not expressly address preemption, it is quite possible that members of Congress did not even consider preemption, or at least did not reach any actual collective agreement about how much state law to displace. To the extent the Court is talking about subjective intent at all, the Court appears to be conducting an exercise in "imaginative reconstruction": The Court is trying to reconstruct how the enacting Congress *would have* resolved questions about the statute's preemptive effect *if* it had considered them long enough to come to a collective agreement.¹⁷⁰

¹⁶⁷ *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 30 (1996); accord, e.g., *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 96 (1992) (plurality opinion) ("[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent.") (internal quotation marks omitted); *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990) ("Preemption fundamentally is a question of congressional intent . . ."); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987) (plurality opinion) ("In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress.").

¹⁶⁸ *Northwest Cont. Pipeline v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509 (1989).

¹⁶⁹ *Barnett Bank*, 517 U.S. at 31 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹⁷⁰ Cf., e.g., *Felder v. Casey*, 487 U.S. 131, 149 (1988) (concluding that "the Congress which enacted § 1983 over 100 years ago would have rejected [the challenged state law] as utterly inconsistent with the remedial purposes of its broad statute"); *De Veau v. Braisted*, 363 U.S. 144, 153 (1960) (plurality opinion) (identifying "[t]he relevant question" as whether "Congress, with a lively regard for its own federal labor policy, [would] find in this state enactment a true, real frustration . . . of that policy").

If this approach is legitimate, and if the Court's doctrine accurately reconstructs how Congress would have wanted to deal with state law, then my analysis of the Supremacy Clause would have little impact on obstacle preemption: State laws that stand in the way of the purposes behind a federal statute would still be preempted, because they would contradict a jurisdictional rule established by the statute.¹⁷¹ Accordingly, I take a detour from the Supremacy Clause to address obstacle preemption as a doctrine of subconstitutional law. As I explain below, there can be no *general* doctrine of obstacle preemption; under widely shared interpretive conventions, it simply is not true that all federal statutes establish (or authorize courts to establish) an obstacle-preemption clause.

1. Obstacle Preemption and Congress's "Pre-emptive Intent"

One could view obstacle preemption either as a doctrine of statutory interpretation or as a doctrine of federal common law, under which judges seek to identify and fill "gaps" in statutory schemes.¹⁷² Whichever label one uses, the doctrine amounts to the

¹⁷¹ Making clear that obstacle preemption is a doctrine of subconstitutional law would have one practical consequence. If obstacle preemption does not flow directly from the Supremacy Clause, but instead depends on jurisdictional rules established by Congress, then one needs to ask whether the Constitution grants Congress the power to establish those rules. Even if Congress *wants* to displace all state law that stands as an obstacle to the accomplishment of certain purposes and objectives, the Constitution may not always give Congress the power to do so. Compare *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987) (plurality opinion) (asserting that the courts' "sole task" in preemption cases "is to ascertain the intent of Congress"), with Gardbaum, *supra* note 4, at 777-83 (noting that courts must also inquire into Congress's constitutional power to preempt state law). Given modern understandings of Congress's enumerated powers, however, this is not much of a limitation.

¹⁷² See, e.g., William D. Popkin, *Materials on Legislation: Political Language and the Political Process* 580-98 (2d ed. 1997) (discussing implied preemption under the rubric of federal common law); cf. Peter Westen & Jeffrey S. Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 Mich. L. Rev. 311, 332 (1980) ("The difference between 'common law' and 'statutory interpretation' is a difference in emphasis rather than a difference in kind. The more definite and explicit the prevailing legislative policy, the more likely a court will describe its lawmaking as statutory interpretation; the less precise and less explicit the perceived legislative policy, the more likely a court will speak of common law. The distinction, however, is entirely one of degree."); see also Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 4-5 (1985) (asserting that whether one sees a sharp distinction between statutory interpretation and the creation of federal common law

same thing—an attempt to resolve preemption questions in a way that the enacting Congress would have liked.

The courts' authority to engage in this project is controversial; statutory interpretation is a hotly contested field, and the sources and extent of the judiciary's power to create federal common law are also subjects of dispute.¹⁷³ But we can expose the shaky footing of any general doctrine of obstacle preemption by relying on propositions over which there are *not* major disputes. The Court's rationale for the doctrine assumes that the enacting Congress would have wanted to displace all state law that gets in the way of the "full purposes and objectives" behind its statute. If this assumption is flawed, then the Court's test fails even on its own terms.

To test the Court's assumption, imagine what would happen if a proposed bill actually included an obstacle-preemption clause of the sort envisioned by the Court: "No state shall enact or enforce any law or policy, of whatever type, to the extent that such state law or policy stands as an obstacle to the accomplishment and execution of the full purposes and objectives behind this statute." In some contexts, the enacting Congress might endorse this clause; in fact, at least one federal statute expressly includes a preemption clause to this effect.¹⁷⁴ But in many other contexts, members of Congress would surely object to the clause.

At the outset, any test that requires courts to identify the "full purposes and objectives" behind federal statutes will face some familiar problems. As commentators across the political spectrum have pointed out, each House of Congress is a collective body, and its individual members each have their own purposes.¹⁷⁵ Many statutes are the products of compromise; members of Congress who

turns on one's "assumptions about what can be legitimately described as textual interpretation").

¹⁷³ In particular, the technique of imaginative reconstruction—on which the Court's doctrine of obstacle preemption appears to rest—has its supporters and its detractors. Compare, e.g., Richard A. Posner, *The Federal Courts: Crisis and Reform* 286–90 (1985); Westen & Lehman, *supra* note 172, at 334; and *Borella v. Borden Co.*, 145 F.2d 63, 64–65 (2d Cir. 1944) (Hand, J.), *aff'd*, 325 U.S. 679 (1945), with, e.g., Ronald Dworkin, *Law's Empire* 317–37 (1986); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 21–25 (1994); and Frank H. Easterbrook, *Statutes' Domains*, 50 *U. Chi. L. Rev.* 533 (1983).

¹⁷⁴ See 49 U.S.C. § 5125(a) (1994); see also 22 U.S.C. § 3305(c) (1994) (setting out a more limited provision for obstacle preemption).

¹⁷⁵ See, e.g., Dworkin, *supra* note 173, at 317–21; Easterbrook, *supra* note 173, at 540, 547.

want to pursue one set of purposes agree on language that is acceptable to members of Congress who want to pursue a different set of purposes. Both sets of purposes shape the statute, but they may well have different implications for state law. To pretend that such statutes reflect a consensus about a full slate of collective "purposes and objectives" may be naive, and to extrapolate from those purposes risks upsetting the legislative bargains out of which the statutes were hammered.¹⁷⁶

But let us leave these problems aside, and suppose that all members of Congress can agree on the "full purposes and objectives" behind a particular federal statute. There still is no reason to assume that they would want to displace whatever state law makes achieving those purposes more difficult. As the Supreme Court itself has acknowledged outside of the realm of preemption, "no legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."¹⁷⁷

This observation applies readily to preemption. As the Court again has acknowledged in other contexts, our federal system is premised on the notion that members of Congress will not pursue federal policies to the total exclusion of state policies. One of the principal safeguards on which the Constitution relies to protect state authority is the composition of Congress: Rather than being chosen by the nation as a whole, each member is chosen by and an-

¹⁷⁶ Frank Easterbrook has taken this point a step further. Because of each House's mechanisms for agenda control, even a statute's words—let alone the "purposes and objectives" behind those words—may not command legislative majorities in any absolute sense. Some statutes, for instance, might look quite different if the relevant legislative bodies had simply considered proposed alternatives in a different order. It does not follow that these statutes are illegitimate; the Constitution gives each House authority to "determine the Rules of its Proceedings," U.S. Const. art. I, § 5, and it is not clear that alternative rules would do a better job of aggregating the different policy judgments (and different intensities of preference) of the various members of Congress. Still, the complexities of each House's aggregation mechanisms make it even harder for courts to predict "how the legislature would have decided issues it did not in fact decide." See Easterbrook, *supra* note 173, at 547-48.

¹⁷⁷ *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646-47 (1990); *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

swers to a state constituency.¹⁷⁸ Consistent with the Framers' expectations, indeed, half of all current members of Congress are themselves former state legislators.¹⁷⁹ Whether for these reasons or simply on policy grounds, members of Congress might often hesitate to accomplish federal purposes at the expense of state laws that (in the judgment of the relevant state authorities) serve worthwhile interests in their own right.

The mere fact that Congress enacts a statute to serve certain purposes, then, does not automatically imply that Congress wants to displace all state law that gets in the way of those purposes.¹⁸⁰ To draw this inference, one would need additional information about the particular statute in question. It follows that a general doctrine of "obstacle preemption" will displace more state law than its own rationale warrants: In the name of "congressional intent," it will read federal statutes to imply preemption clauses that the enacting Congress might well have rejected.

For a simple illustration of this tendency in practice, consider the federal statutes that subject imported goods to customs duties. If the owner or importer of the goods stores them in a "bonded warehouse," federal law defers the customs duties during the period of storage; the duties become due only when the goods are withdrawn from storage, and they are waived entirely if the goods are withdrawn for purposes of reshipment abroad.¹⁸¹ The Supreme Court has plausibly claimed that the purpose of this scheme is "to encourage merchants here and abroad to make use of American ports."¹⁸² But the Court has gone on to conclude that this purpose has ramifications for state property taxes; applying the doctrine of

¹⁷⁸ See, e.g., *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 550–54 (1985); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543 (1954).

¹⁷⁹ Compare *Americanus V* [John Stevens, Jr.], *N.Y. Daily Advertiser*, Dec. 12, 1787, reprinted in 1 *Debate on the Constitution* 487, 492 (Bernard Bailyn ed., 1993) (describing likely path from state legislature to Congress), with Mildred L. Amer, *Membership in the 106th Congress: A Profile* (last modified Jan. 7, 1999), <<http://www.usia.gov/usa/infousa/politics/congress/profile.htm>> (describing the career paths of current members of Congress).

¹⁸⁰ Cf., e.g., Wolfson, *supra* note 16, at 98 (arguing that under the Court's approach to preemption, "[c]ongressional 'intent' is analyzed as if the states did not exist").

¹⁸¹ See 19 U.S.C. §§ 1555(a), 1557(a) (1994).

¹⁸² *Xerox Corp. v. County of Harris*, 459 U.S. 145, 151 (1982).

obstacle preemption, the Court has held that states cannot impose property taxes on goods being stored in bonded warehouses pending reshipment abroad.¹⁸³

The relevant statutes offer no reason to think that Congress wanted to pursue its purposes so far. The fact that Congress waived federal customs duties to encourage the use of American ports does not automatically mean that Congress would have voted to maximize this encouragement by preempting state property taxes during the period of storage, any more than it means that Congress wanted to make states give merchants cash bonuses for using American ports. As Justice Powell noted in a lone dissent, it would have been perfectly reasonable for Congress to promote foreign trade by providing for duty-free storage without also providing an exemption from state property taxes.¹⁸⁴ Contrary to the Court's assumption, then, the federal customs statutes do not imply any policy regarding state property taxes.¹⁸⁵

¹⁸³ See *id.* at 151-54. The Court has subsequently drawn fine distinctions that are typical of its preemption jurisprudence, but that cannot plausibly be traced to the statutes that Congress enacted. See, e.g., *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 144-45 (1986) (distinguishing Congress's decision to *defer* customs duties on all imported goods stored in "bonded warehouses" from Congress's decision to *waive* the eventual duties on some of those goods, and concluding that only the latter decision preempts state property taxes during the period of storage).

¹⁸⁴ See *Xerox*, 459 U.S. at 156 (Powell, J., dissenting).

¹⁸⁵ For other examples of the Court's tendency to draw questionable inferences of preemption, see, e.g., *Bomito Boats v. Thunder Craft Boats*, 489 U.S. 141, 146-57 (1989) (unanimously concluding that the policy behind the federal patent statute bars states from offering "patent-like protection" within their own borders to creations that do not qualify for *nationwide* protection); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-12 (1988) (concluding, under the rubric of federal common law, that a federal policy evidenced by the Federal Tort Claims Act's discretionary-function exception bars state-law products-liability claims against private contractors that build military equipment to specifications approved by the federal government); *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986) (unanimously concluding that the National Labor Relations Act preempts a Wisconsin law purporting to bar repeat violators of the Act from doing business with the state).

The gap between the Court's inferences and the "congressional intent" actually reflected in federal statutes has been especially evident in labor law, where the Court historically has applied its preemption doctrines aggressively. *Gould*, for instance, is an application of so-called *Garmon* preemption, which holds that states may not regulate conduct that the National Labor Relations Act actually or even "arguably" protects (as a right of collective bargaining) or prohibits (as an unfair labor practice). See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-46 (1959) (ex-

2. *The Limits of Reliance on Congress's "Purposes and Objectives"*

A stylized example, inspired by Professors Eskridge and Frickey, helps flesh out the limits of reliance on Congress's "purposes and objectives." Suppose that a federal statute requires all drugstores to "be closed . . . at 10 p.m. on each and every day of the week," and suppose that this statute is a valid exercise of Congress's powers.¹⁸⁶ This requirement is ambiguous; among other things, it is not clear whether the word "closed" means "closed for a moment" (so that drugstores must be closed on the stroke of 10:00 but are free to reopen at 10:01) or "closed for the night" (so that drugstores must remain closed from 10:00 until some time the next day). Nearly everyone agrees that it is perfectly appropriate for courts to ask what the word "closed" means in the statute, and to enforce the statute in light of their answer to that question. In determining the meaning of the word "closed" in the statute, moreover, nearly everyone would permit courts to undertake some type of inquiry into Congress's apparent purpose—into the mischief that the statute apparently was addressing.

plaining that "to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes"). In *Garmon* itself, the Court conceded that reaching this conclusion required "a more complicated and perceptive process than is conveyed by the delusive phrase, 'ascertaining the intent of the legislature.'" *Id.* at 239–40.

For a particularly dramatic example of how the Court's preemption doctrines can transcend Congress's provisions, one need only consider § 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a) (1994). This provision appears simply to give federal district courts subject-matter jurisdiction over suits for violations of collective-bargaining agreements. According to the Court, however, Congress's purpose was "to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes." *Lingle v. Norge Div'n of Magic Chef*, 486 U.S. 399, 404 (1988). Because using state law to determine the meaning of collective-bargaining agreements would allegedly frustrate this purpose, the Court has long held that § 301 preempts state-law principles of contract interpretation and leaves a gap for courts to fill with rules of federal common law. See, e.g., *id.* at 403–04 (citing *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), and *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957)). Of late, the Court has described this result as an application of "obstacle" preemption. See *Livadas v. Bradshaw*, 512 U.S. 107, 120, 122–23 (1994). Any doctrine that can tease such sweeping consequences out of a simple grant of concurrent jurisdiction is hard to defend in terms of "congressional intent."

¹⁸⁶ Cf. William N. Eskridge, Jr. & Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 513 (2d ed. 1995) (citing an old Canadian ordinance to this effect).

To be sure, different theorists may well disagree with each other about what types of *evidence* this inquiry should consider. Some interpreters would consider the historical facts that led up to the statute but not the recorded statements of the bill's sponsors or the reports of the committees that considered it. Still, every theory of statutory interpretation permits some type of inquiry into the statute's context.¹⁸⁷ If, taking account of whatever evidence our theory of statutory interpretation lets us consider, we view the statute as a way to commemorate some highly publicized tragedy that occurred at a drugstore at exactly 10:00 p.m., then we might conceivably read "closed" to mean only "closed for a moment" (particularly if such moment-of-silence requirements were common ways of commemorating tragedies). If the context instead leads us to view the statute as a way to help late-night bookstores by giving them a period to sell books without competition from drugstores, we are more likely to read "closed" as "closed for the night."¹⁸⁸

Because everyone agrees that some type of context or purpose is relevant to interpreting a federal statute's words, and because the meaning of those words determines the statute's preemptive scope, it follows that everyone sees a role for the consideration of some type of context or purpose in preemption cases. After all, if we read "closed" to mean "closed for the night" rather than "closed for a moment," then the statute preempts state licensing laws that purport to let drugstores do business between 10:01 p.m. and midnight.

Just as surely, however, our widely shared interpretive conventions set limits on the relevance of congressional purpose.

¹⁸⁷ See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System, in A Matter of Interpretation: Federal Courts and the Law* 3, 30 (Amy Gutmann ed., 1997) (criticizing reliance on legislative history but indicating that courts may take account of "the public history of the times in which [the statute] was passed") (quoting *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845)).

¹⁸⁸ In the absence of any extratextual evidence (or any extratextual evidence that we are willing to consider) about the mischief that the statute addresses, we would probably adopt the latter reading. It seems improbable that a rational legislature would have required drugstores to shut down just for a moment; in the absence of special circumstances, such a requirement would be pointless and arbitrary, and we prefer an interpretation that makes the statute seem more sensible. Note, however, that this argument too relies on claims about Congress's probable purposes, even if it rejects specific evidence about the subjective purposes of the particular Congress in question.

Suppose that on the basis of whatever factors we are willing to consider, we view the statute as a way to give late-night bookstores a window to sell books without competition from drugstores. If a city ordinance required bookstores to close for the night at 10:00 p.m. too, the ordinance would seem to hinder the “full purposes and objectives” behind the federal drugstore statute. But the federal drugstore statute says nothing about bookstores. It certainly does not say in so many words that “bookstores—but not other establishments that we aren’t trying to benefit—have a right to stay open until midnight,” and most of us would not read it to imply any such rule (or to authorize the courts to establish one). Because nothing in the federal drugstore statute tells us that Congress wanted to pursue its purposes at the expense of local control over the hours of bookstores, we will not find the city’s bookstore ordinance preempted.

Indeed, this is probably true even if legislative history or other evidence outside the statute indicates that the enacting Congress would have liked to insulate bookstores from city regulations. “No one claims that legislative history is a statute, or even that, in any strong sense, it is ‘law’”; even its advocates support using legislative history only “to understand the meaning of the words that do make up the statute or the ‘law,’” not to give legal effect to policy judgments that did not make their way into the statute.¹⁸⁹ Everyone agrees, after all, that under Article I of the federal Constitution, legislative proposals do not become law simply because majorities in Congress favor them.¹⁹⁰ For commentators as diverse as Frank Easterbrook and Laurence Tribe, it follows that statutes should not automatically be read to incorporate whatever related proposals enjoyed support in Congress.¹⁹¹ Thus, even if courts can learn exactly how far members of the enacting Congress would have liked to carry the purposes behind a particular statute, courts still must

¹⁸⁹ Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 863 (1992).

¹⁹⁰ See, e.g., Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J. L. & Pub. Pol’y 59, 64 (1988).

¹⁹¹ See Easterbrook, *supra* note 173, at 539; Laurence H. Tribe, *Comment, in A Matter of Interpretation*, *supra* note 187, at 74–75 (criticizing “the statutory interpreter who would have us substitute unexpressed and unenacted thoughts for whatever text actually passed through the fires of bicameral approval and presentment to the president for signature or veto”) (emphasis omitted).

ask whether the statute reflects that decision (either expressly or by implication). Under our widely shared interpretive conventions, the federal drugstore statute probably will not be read to establish rules about the hours of bookstores.¹⁹²

The Supreme Court's own recent caselaw confirms the consensus on this point. Consider, for instance, the Court's 8-0 decision in *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*¹⁹³ In 1973, Congress authorized the President to regulate the allocation and prices of petroleum products. In 1975, Congress provided for gradual elimination of the President's regulatory authority. Relying on legislative history, oil companies argued that Congress had passed the 1975 statute in order to secure a free market in petroleum products, and that the 1975 statute therefore preempted state and local re-regulation of petroleum pricing. Assuming *arguendo* that the oil companies were right about the purpose behind the 1975 statute, however, the Court noted that "unenacted . . . desires are not laws," and nothing in the 1975 statute could "plausibly be interpreted as *prescribing* federal preemption."¹⁹⁴ In other words, state laws re-regulating petroleum prices were not preempted *even if they conflicted with the purposes of the 1975 statute*; the 1975 statute had merely eliminated the President's regulatory authority, and it could not be read to establish (or to authorize the courts to establish) a broader free-market requirement.

¹⁹² Judge Easterbrook would express this point by saying that the hours of bookstores are beyond the "domain" of the federal drugstore statute. See Easterbrook, *supra* note 173. The notion that statutes have limited "domains" is frequently associated with textualism. But while people might disagree about how to identify those domains, everyone accepts the basic point that such domains do exist; under our common interpretive conventions, there are plenty of issues about which statutes will not be understood either to establish any rules themselves or to authorize courts to establish any rules. To take an extreme example, suppose that Congress passes a statute regulating tiddlywinks. When courts confront a case about stock-car racing, we do not expect them to consider the tiddlywinks statute applicable, or to ask how the tiddlywinks Congress would have resolved questions about stock-car racing. Stock-car racing is almost certainly beyond the "domain" of the tiddlywinks statute, even if the purposes behind the tiddlywinks regulations might have some relevance in the field of stock-car racing too.

¹⁹³ 485 U.S. 495 (1988).

¹⁹⁴ *Id.* at 501.

Even the Supreme Court, then, appears to recognize the flaws in its formulation of “obstacle preemption” (though it has failed to narrow the formulation accordingly, and though some of its holdings continue to reflect the broad formulation’s confusions¹⁹⁵). The fact that state law prevents the full accomplishment of the purposes behind a federal statute does not automatically mean that state law is preempted. Congress can certainly enact express obstacle-preemption clauses, and some federal statutes may establish such clauses by implication. But there is no reason to assume that *all* federal statutes imply such clauses. Our interpretive conventions simply do not support a general doctrine of obstacle preemption.

3. *Do Feedback Effects Justify Inertia?*

Before we return to the Supremacy Clause, we must consider one final argument about subconstitutional law. One might conceivably claim that the Court’s broad formulation of “obstacle preemption” has become a self-fulfilling prophecy, because it now forms the background against which Congress drafts statutes. On this view, Congress knows that courts will read federal statutes to displace all state law that gets in the way of their “full purposes and objectives.” This knowledge will affect how Congress legislates: Congress will enact a savings clause whenever it does not want to displace so much state law. All statutes *without* such a clause therefore reflect a congressional intent to displace state law to the extent determined by the Court’s formulation.

This notion rests on questionable empirical premises. According to Abner Mikva, who served for ten years in the House of Representatives before being appointed to the United States Court of Appeals for the D.C. Circuit, “[t]he ‘canons of construction’ that courts use to interpret the legislative product are a foreign concept to the legislative process.”¹⁹⁶ Mikva reports that when he was in Congress, “the only ‘canons’ we talked about were the ones the Pentagon bought that couldn’t shoot straight.”¹⁹⁷

¹⁹⁵ See *supra* notes 181–185 and accompanying text.

¹⁹⁶ Abner J. Mikva, *Reading and Writing Statutes*, 28 S. Tex. L. Rev. 181, 183 (1986).

¹⁹⁷ *Id.*; see also, e.g., Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 806 (1983) (deeming it “improbable” that members of Congress follow the courts’ canons of construction). Some of the express preemption clauses that Congress has enacted in recent years tend to confirm

Some of the courts' canons may well influence legislation more than Mikva suggests. But the particular type of canon at issue here seems unlikely to have such feedback effects. The Court's test for obstacle preemption is designed to apply precisely when Congress has *not* thought about preemption; the test seeks to reconstruct what the Congress that enacted a particular statute *would have* done about preemption *if* it had thought about that issue. If the enacting Congress did not think about preemption, however, then its failure to opt out of the Court's test should not be taken as a deliberate endorsement of that test.

The unpredictability of the Court's test for obstacle preemption makes feedback effects even less likely. Over the last two decades, the Court has grown increasingly sensitive to the fact that its approach to preemption risks displacing too much state law. While the Court has retained its expansive formulation of the test for "obstacle" preemption, it has counterbalanced this test by stressing some version of a presumption against preemption, applicable either to all cases¹⁹⁸ or to "subject[s] traditionally governed by state law."¹⁹⁹ But the combination of a broadly worded test for obstacle

that Congress has not internalized the Court's approach to preemption. A few recent federal statutes expressly preempt all state law that is "inconsistent with" their provisions. E.g., 28 U.S.C. § 3003(d) (1994); 47 U.S.C. § 556(c) (1994). Other federal statutes expressly preempt state laws that purport to prohibit or penalize actions required by federal law. See 49 U.S.C. § 44936(g)(2) (Supp. III 1997). Given the Supreme Court's tests for conflict preemption, these clauses seem unnecessary.

¹⁹⁸ See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (referring to "the basic assumption that Congress did not intend to displace state law"); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (asserting that "[p]reemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons'"). But see *United States v. Locke*, 2000 WL 238223 at *12 (U.S. Mar. 6, 2000) (indicating that the presumption against preemption does not apply in areas "where there has been a history of significant federal presence").

¹⁹⁹ See *CSX Transp. v. Easterwood*, 507 U.S. 658, 664 (1993); see also, e.g., *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) ("When considering preemption, '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.'") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (similar); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (1983) (similar); cf. *Hillsborough County v. Automated Med. Lab.*, 471 U.S. 707, 715 (1985) (referring to a presumption against preemption of "state or local regulation of matters related to health and safety"); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (recognizing a super-strong presumption against preemption of "state family law").

preemption with a broadly worded presumption *against* preemption has not made for clarity, either in the Supreme Court's own jurisprudence or in that of the lower courts. Scholars and members of Congress alike agree that the courts' preemption decisions are erratic.²⁰⁰ Indeed, a recent empirical study indicates that the policy preferences of individual judges play an important role in preemption decisions.²⁰¹ If Congress cannot reliably anticipate the results of the Court's test for preemption, Congress cannot approve those results in advance—unless every federal statute without a savings clause is read to delegate essentially standardless discretion to judges.

One might argue that even if Congress does not *actually* legislate in light of the Court's test for preemption, Congress still should be *presumed* to do so. Many theories of statutory interpretation distinguish between the objective "meaning" of federal statutes and what Congress subjectively intended those statutes to mean. On one such theory, Congress enacts statutes against the background of the Court's interpretive rules, and those statutes mean what the Court's interpretive rules say they mean—regardless of what members of Congress subjectively intended.²⁰²

We can readily agree that Congress's subjective intent does not determine (or at least does not *entirely* determine) the meaning of a statute. But it does not follow that the Court's interpretive rules *do* determine that meaning. Ordinarily, we think that the Court's interpretive rules have an external reference point; they strive to

²⁰⁰ See, e.g., S. Rep. No. 106-159, at 9 (1999) (agreeing with the author that "[t]he current preemption doctrine has been a source of considerable confusion and uncertainty"); 142 Cong. Rec. S3487-88 (1996) (remarks of Sen. Levin) (noting that the standards the courts have developed to decide preemption cases "are subjective and have not resulted in a consistent and predictable doctrine"); Paul E. McGreal, *Some Rice With Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 Case W. Res. L. Rev. 823, 833 (1995) (describing obstacle preemption as "a largely ad hoc policy analysis"); Weinberg, *supra* note 17, at 1751 (asserting that "today we cannot begin to predict when preemption will occur"); see also *supra* note 30 (citing additional sources to the same effect).

²⁰¹ See David B. Spence & Paula Murray, *The Law, Economics and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 Cal. L. Rev. 1125 (1999).

²⁰² Cf. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 676 (1997) (considering "the positivist claim that . . . legislative history has, by interpretive convention, become part of the background against which Congress enacts legislation, and thus an appropriate set of materials to impute to Congress, regardless of its 'genuine' legislative intent").

reflect how someone in a particular interpretive community would understand a particular text. But if statutes mean whatever the Court's existing interpretive rules say they mean, then the only relevant community is the Court itself. Even if the Court's rules were preposterous (such as the rule that all sentences shall mean the opposite of what they say, or that the word "not" must be inserted at the start of every fifth line, or that Congress should always be presumed to pursue its purposes at all costs), no one could criticize the Court for applying them.

Properly understood, the Court's interpretive rules are simply tools to help identify the statute's meaning in a broader community. The mere fact that the Court has articulated some interpretive rules relating to preemption, then, does not automatically mean that those rules are justified. In particular, when Congress enacts a statute that does not address preemption, there is no reason automatically to presume that Congress is endorsing a rule of obstacle preemption.

III. THE FAILURE OF THE COURTS' "PRESUMPTION AGAINST PREEMPTION"

Thus far, my analysis should cheer opponents of preemption. I have argued that the general doctrine of "obstacle preemption" should give way to a more particularized inquiry into whether the relevant federal statute establishes a valid rule that contradicts state law. But my discussion of the Supremacy Clause has another implication that cuts in the opposite direction. As I discuss in Section III.A, the Supremacy Clause's *non obstante* provision undermines the general "presumption against preemption" that both courts and commentators have embraced.

To be sure, this presumption makes some sense within the framework that the Supreme Court has developed for preemption cases (as opposed to the framework that the Supremacy Clause actually establishes). By telling judges to approach federal statutes with "the starting presumption that Congress does not intend to supplant state law,"²⁰³ the Supreme Court offsets its own expansive formulations of "implied" preemption. The presumption thus op-

²⁰³ *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).

erates as an artificial way to bring the courts' results closer to Congress's probable "pre-emptive intent." Still, the presumption is a second-best alternative to a broader overhaul of the Court's doctrine. Instead of sowing confusion by coupling a broad general test for "implied" preemption with an equally general presumption against preemption, it seems more reasonable for courts to apply the logical-contradiction test in conjunction with a realistic inquiry into the rules that particular federal statutes actually establish.

Some applications of the presumption against preemption, moreover, make little sense even within the current framework for preemption analysis. The presumption has taken on a life of its own; and is now being applied even to federal statutory provisions that plainly *do* manifest an "inten[t] to supplant state law." Ever since its 1992 decision in *Cipollone v. Liggett Group*,²⁰⁴ for instance, the Supreme Court has told judges to give express preemption clauses a "narrow reading," at least when they address the states' traditional powers over health, safety, welfare, and morals.²⁰⁵ As I explain in Section III.B, this general rule of construction not only is

²⁰⁴ 505 U.S. 504 (1992).

²⁰⁵ *Id.* at 518; see also *id.* at 523 (Stevens, J., plurality opinion) (asserting that "in light of the strong presumption against pre-emption," the Court must "narrowly construe the precise language of [the express preemption clause at issue]"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (reiterating *Cipollone's* direction to adopt "a narrow interpretation" of express preemption clauses, especially when they address fields that the states have traditionally occupied); cf. *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 330-32 (1997) (conceding that ERISA's express preemption clause "certainly contemplated the preemption of substantial areas of traditional state regulation," but nonetheless reading the clause in light of "the presumption that ERISA did not intend to supplant" the state law in question).

Before *Cipollone*, the Court did not regularly apply its presumption against preemption to express preemption clauses. See *Cipollone*, 505 U.S. at 544-46 (Scalia, J., concurring in the judgment in part and dissenting in part) (decrying the Court's application of the presumption as "unprecedented"). Indeed, only five days before it issued its opinion in *Cipollone*, the Court specifically refused to construe an express preemption clause narrowly, using logic that seems equally applicable to *Cipollone*. See *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 224 (1992) ("[W]e reject the proposition put forward by Wisconsin and its amici that we must construe § 381 narrowly Because § 381 unquestionably *does* limit the power of States to tax companies whose only in-state activity is 'the solicitation of orders,' our task is simply to ascertain the fair meaning of that term."). Justice Stevens, the author of the Court's opinion in *Cipollone*, joined Justice Scalia's majority opinion in *Wrigley*.

in tension with the Supremacy Clause's *non obstante* provision but seems likely to defeat the stated purpose of the Court's preemption doctrine. In the realm of "implied" preemption, the presumption against preemption may help counterbalance the excesses of the Court's other doctrines, which encourage judges to draw unwarranted inferences about Congress's preemptive intent. But in the realm of "express" preemption, the Court's presumption simply counterbalances Congress's own enactments. If the Court's normal rules of statutory interpretation are designed to give effect to congressional intent, then the Court's insistence on giving express preemption clauses a narrower-than-usual interpretation will drive preemption decisions *away from* that intent.

A. *The "Non Obstante" Provision and the Interpretation of Federal Law*

The Supreme Court's presumption against preemption has taken various forms. On occasion, the Court has suggested that judges have a general obligation to harmonize federal law with whatever state law happens to exist. The Court has said, for instance, that "the proper approach [in preemption cases] is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'"²⁰⁶ Asserting that the Supremacy Clause "is silent" on this subject, some commentators have advocated precisely this type of harmonization.²⁰⁷

²⁰⁶ *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 & n.8 (1973) (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)); cf. *Hawaiian Airlines v. Norris*, 512 U.S. 246, 255-56 (1994) (arguably suggesting that if a substantive provision of federal law "is susceptible of more than one interpretation," courts should favor interpretations that minimize conflict preemption). The Court has not been entirely consistent on this point. See, e.g., *United States v. Smith*, 499 U.S. 160, 172 (1991) (correctly assuming that "the rule disfavoring implied repeals" does not apply in preemption cases); cf. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980) (rejecting the notion that "the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law"); see also *infra* text accompanying notes 222-225.

²⁰⁷ E.g., Hoke, *supra* note 60, at 853, 890 (arguing that in most preemption cases, courts should "channel their interpretive energies toward harmonizing the law of the two sovereigns into a functional scheme"). It is not clear how this rule would play out when there are more than two relevant sovereigns. In some cases, the only construction that would harmonize a federal statute with the law of State A would cause the statute to contradict the law of State B.

As we have seen, however, the Supremacy Clause is not silent on this subject at all. Its *non obstante* provision rejects a general presumption that federal law does not contradict state law.²⁰⁸ This, indeed, is the whole point of the last fourteen words of the Supremacy Clause. To the extent permitted by state law, courts are certainly free to alter their construction of *state* law in order to harmonize it with federal law. But the mere fact that a particular interpretation of federal law would contradict (and therefore preempt) a state law is not, in and of itself, reason to seek a different interpretation of the *federal* law.

Another version of the presumption against preemption is subtly different. Rather than suggesting that the presumption makes the meaning of federal statutes depend on whatever state law happens to exist, the Court more commonly invokes the presumption to support two other conclusions: (1) judges should generally be “reluctant to infer pre-emption,”²⁰⁹ and (2) judges should give express preemption clauses a “narrow reading,” at least in areas of traditional state authority.²¹⁰

As applied by the Court, the first of these conclusions is inoffensive. No one can quarrel with the Court’s view that judges should identify “persuasive reasons” before they read federal statutes to establish preemptive rules by implication.²¹¹ Indeed, one hopes that the Court applies this principle more generally; *unpersuasive* reasons are a poor basis for statutory interpretation of any sort.

The second conclusion, however, is more troublesome. A general rule that express preemption clauses should be read “narrowly,” so that they contradict the fewest potential state laws, is hard to square with the Supremacy Clause’s *non obstante* provision. After all, if the Supremacy Clause tells courts not to bend over backward to harmonize federal statutes with existing state laws, it is hard to see why courts should bend over backward in order to harmonize federal statutes with *potential* state laws.

²⁰⁸ See *supra* Sections I.A.2, I.B.3.

²⁰⁹ E.g., *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978).

²¹⁰ See *supra* note 205 and accompanying text.

²¹¹ E.g., *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140 (1986) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (same).

One should not take this point too far. The Supremacy Clause's *non obstante* provision tells courts that the general presumption against implied repeals does not apply in preemption cases, and it suggests that courts should not automatically seek narrowing constructions of express preemption clauses. But aside from the general presumption that the *non obstante* provision rejects, there may well be other reasons to believe that Congress did not intend a particular statute to have much preemptive effect. Even if the statute's words are ambiguous, its context may suggest that Congress meant to preserve existing state laws or to leave ample room for future state authority. Congress's pattern of legislation may also be relevant: If Congress has traditionally left a certain field to the states, and if the federal statute is ambiguous *about whether it enters that field at all*,²¹² then it may well make sense for courts to resolve the ambiguity in light of Congress's established practices. While the *non obstante* provision tells courts not to apply the general presumption against implied repeals in preemption cases, it does not require them to discard their other tools of statutory interpretation.

For the same basic reason, nothing in the *non obstante* provision prevents courts from giving effect to rules of construction that Congress actually adopts. If Congress wants courts to harmonize a particular federal statute with existing state law, it can certainly enact a savings clause to that effect. Indeed, if Congress favors a more general clear-statement rule, it can enact legislation telling courts to construe federal statutes narrowly insofar as they affect the states.²¹³ The *non obstante* clause instructs courts that in the absence of other indications, they should not automatically assume that Congress intends to avoid contradicting state laws. But if Congress does give other indications, courts do not have to ignore them.

²¹² Courts face a different issue if the federal statute plainly *does* enter the field and the only question is the extent of the incursion. As I discuss below, Congress's established practices do not necessarily shed light on this latter situation. See *infra* notes 231-235 and accompanying text.

²¹³ A bill that would prescribe this rule of construction is currently pending in the House of Representatives. See H.R. 2245, 106th Cong. § 9(c) (1999). Parallel language in a bill pending in the Senate has now been deleted. See S. 1214, 106th Cong., § 6 (1999). I have testified on S. 1214 before the Senate Governmental Affairs Committee.

To the extent that we can distinguish between the courts' role as *interpreters* of law and their role as *makers* of law,²¹⁴ moreover, the *non obstante* provision of the Supremacy Clause applies only to the former role. When courts are trying to identify which rules a federal statute establishes, the *non obstante* clause warns them not to assume automatically that Congress did not want to displace state laws. But if the courts conclude that the federal statute, properly interpreted, validly delegates some policymaking authority to them, then courts are free to consider state interests when exercising this delegated authority (unless the "intelligible principle" that the statute lays down for their guidance²¹⁵ bars them from doing so).

To take a concrete example, suppose that one interprets the Sherman Act of 1890²¹⁶ as a valid delegation of power to develop antitrust policy in the style of the common law. Although the statute borrows some key terms from the common law developed in England and in state courts, it does not necessarily freeze the understanding of those terms as of 1890; the statute can instead be understood "to transform a body of existing common law . . . into federal law and to authorize federal courts to continue to build upon that law through the incremental case-by-case process."²¹⁷ To the extent permitted by the "intelligible principles" that the

²¹⁴ See *supra* note 172.

²¹⁵ The Supreme Court has indicated that all federal statutes that delegate power must lay down some "intelligible principle" to guide the exercise of this delegated authority. Although this requirement has not been terribly demanding, statutes cannot give judges completely blank checks to establish whatever rule the judges want to establish. See, e.g., *Touby v. United States*, 500 U.S. 160, 165 (1991) ("Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. So long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)); cf. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497-99 (1982) (discussing similar issues raised by the doctrine of "void for vagueness").

²¹⁶ 15 U.S.C. § 1 (1994).

²¹⁷ Merrill, *supra* note 172, at 44-45; see also, e.g., *McNally v. United States*, 483 U.S. 350, 372-73 (1987) (Stevens, J., dissenting) (discussing the 19th-century style of legislation that produced the Sherman Act, the Civil Rights Acts, and the federal mail-fraud statute, and concluding that "[t]he wide open spaces in statutes such as these are most appropriately interpreted as implicit delegations of authority to the courts to fill in the gaps in the common-law tradition of case-by-case adjudication").

Sherman Act lays down,²¹⁸ courts can take state interests into account when exercising this delegated authority.

One might claim that this caveat swallows my attack on the general presumption against preemption. When statutory language is genuinely ambiguous—when, in the absence of a presumption against preemption, our tools of statutory interpretation do not identify one possible interpretation as being better than other possible interpretations—few people think that the courts should automatically deem the statute unenforceable. Unless we favor an unusually robust view of the nondelegation doctrine, most of us view genuinely ambiguous statutory language as a delegation to the courts of authority to pick one interpretation from among the group of interpretations that are best. Once judges have identified this group, they are free to pick any of the interpretations in it, including the one that displaces the least state authority. Can't the Supreme Court tell judges that they should *always* exercise their discretion in this way, and can't the Court label this principle a general "presumption against preemption"?

There are at least two responses to this point. First, even if this argument were valid, it would allow courts to apply the presumption only *after* they have used whatever tools our theory of statutory interpretation permits, and have only been able to identify a group of possible interpretations that are all equally good. The courts have not limited the general presumption against preemption to such cases. To the contrary, they have consistently invoked the presumption at the outset of their process of interpretation, without first identifying any genuine ambiguity that can be taken as a delegation of independent policymaking authority. As a

²¹⁸ Identifying those intelligible principles may be tricky. See Phillip Areeda & Louis Kaplow, *Antitrust Analysis: Problems, Text, Cases* 51 (4th ed. 1988) ("[T]he Sherman Act may be seen not as a prohibition of specific classes of conduct but as a general authority to do what common-law courts usually do: to use certain customary techniques of judicial reasoning, consider the reasoning and results of other common-law courts, and develop, refine, and innovate in the dynamic common-law tradition. But since the antitrust laws clearly constitute a departure from the substantive content of preexisting common law, one must ask where such development should begin and by what substantive values it should be guided.").

result, they have used the presumption to reject interpretations that would otherwise be more natural than the one they adopt.²¹⁹

Second, even in cases of genuine ambiguity, judges do not have complete discretion to base their selection on whatever factors they like. In exercising their delegated authority, they must adhere to whatever "intelligible principles" the statute lays down,²²⁰ and those principles will sometimes undermine any presumption against preemption. To be sure, the "intelligible principles" laid down by the statute will not tell the court which of the possible interpretations to pick; if they do, then the statute was not genuinely ambiguous in the first place. But they still constrain the factors that the court can consider, and they may tell the court *not* to base its selection on a desire to preserve state authority. For example, although the Civil Rights Act of 1866 may have been genuinely ambiguous in many respects,²²¹ it would have been odd for courts to conclude that each ambiguity should be resolved in favor of maximizing state authority.

²¹⁹ Consider, for instance, how lower courts have approached the preemption clause that was at issue in *Cipollone* itself. The clause forbids states to impose any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of . . . cigarettes" labeled in conformity with federal law. 15 U.S.C. § 1334(b) (1994). In 1997, the United States District Court for the Western District of Washington held that a local health board's ban on virtually all outdoor advertising of cigarettes was not such a "requirement or prohibition," and hence was not preempted. See *Lindsey v. Tacoma-Pierce County Health Dep't*, 8 F. Supp. 2d 1213, 1220-22 (W.D. Wash. 1997). Although the Ninth Circuit has now reversed that decision, 195 F.3d 1065 (1999), the Seventh and Second Circuits apparently agree with the district court; they have both suggested that while the preemption clause limits the states' power to regulate the content of whatever tobacco billboards they choose to permit, it does not keep the states from prohibiting such billboards altogether, even when the prohibitions are "based on smoking and health." See *Greater New York Metropolitan Food Council v. Giuliani*, 195 F.3d 100, 106 (2d Cir. 1999) (asserting that "an overly-expansive, literal interpretation [of the preemption clause] could subvert the presumption against preemption"); *Federation of Adver. Indus. Representatives v. Chicago*, 189 F.3d 633 (7th Cir. 1999) (similar).

²²⁰ See *supra* note 215.

²²¹ See, e.g., Civil Rights Act of 1866, § 1, 14 Stat. 27, 27 (providing, among other things, that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, . . . shall have the same right, in every State and Territory in the United States, . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, . . . any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding").

Most of the time, of course, Congress will leave courts free to take account of state interests when exercising their delegated authority. But the fact that a statute's "intelligible principles" permit courts to base a decision *partly* upon concerns for state authority does not mean that they permit courts to base the decision *entirely* on those concerns. The "intelligible principles" laid down by the statute probably will require courts to take account of other considerations too; no one thinks, for instance, that courts should strive *only* to maximize state power when exercising their delegated authority under the Sherman Act. Even in cases of genuine ambiguity, then, a general "presumption against preemption" is insufficiently nuanced and neglects important variations among statutes.

B. The Illogic of the Supreme Court's Rule of Construction

Thus far, this Part has focused on the implications of the Supremacy Clause's *non obstante* provision. But even apart from the *non obstante* provision, there are reasons to question the Supreme Court's general presumption against preemption.

The Court itself has applied the presumption only half-heartedly. As we have seen, the Court seeks to minimize what it calls "express" preemption; at least in areas traditionally regulated by the states, it advocates a "narrow reading" of express preemption clauses. Quite properly, however, the Court usually does not insist that other express provisions of federal law should also be read narrowly in order to minimize what the Court calls "conflict" preemption. How courts construe a statutory provision therefore seems to depend on whether the provision is cast as a preemption clause or as a substantive rule.

For a simple illustration of the illogic that results, consider the Federal Arbitration Act. Section 2 of the Act provides that a written arbitration agreement in a "contract evidencing a transaction involving commerce" shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."²²² As interpreted by the Supreme Court, this provision "creates federal substantive law requiring the parties to

²²² 9 U.S.C. § 2 (1994).

honor arbitration agreements.”²²³ Like all substantive provisions of federal law, § 2 preempts whatever state law it contradicts.²²⁴ The Court has never held that judges should therefore construe § 2 narrowly; to the contrary, the Court has self-consciously adopted a “broad interpretation” of the statutory phrase “contract evidencing a transaction involving commerce,” which determines what § 2 covers.²²⁵ But § 2 can readily be recast in the form of an express preemption clause; for most purposes, it is identical to a provision that “no state or local government shall adopt or enforce any law or policy that makes a written arbitration agreement in a contract evidencing a transaction involving commerce invalid, revocable, or unenforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” There is no obvious reason why the meaning of the phrase “contract evidencing a transaction involving commerce” in this context should depend upon which formulation Congress happens to use.

The same point applies more generally. Every substantive provision of federal law with preemptive effects can be recast as a combination of an express preemption clause and some other provision, and many (like § 2 of the Federal Arbitration Act) can be recast as *pure* express preemption clauses. It is hard to see why the same words, implementing the same policy, should be construed “narrowly” when they take one form but not when they take the other.

Such logical problems, of course, do not necessarily support abandoning the general presumption against preemption; they could also be solved by expanding it. Some commentators have hinted at precisely that solution: They have suggested a broader presumption against preemption, potentially applicable to express provisions of substantive law no less than to express preemption clauses.²²⁶ They have supported this idea by invoking the “political

²²³ *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984). The Court’s interpretation of § 2 is questionable. See *id.* at 21–35 (O’Connor, J., dissenting); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285–97 (1995) (Thomas, J., dissenting). For present purposes, however, this dispute is irrelevant.

²²⁴ See, e.g., *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996); *Perry v. Thomas*, 482 U.S. 483, 489–92 (1987); *Southland*, 465 U.S. at 10–16.

²²⁵ See *Allied-Bruce*, 513 U.S. at 275.

²²⁶ See, e.g., Wolfson, *supra* note 16, at 111–14; cf. Grey, *supra* note 16, at 607–27 (suggesting similar presumption at least where state tort law is at stake); 1 Tribe, *su-*

safeguards of federalism”—the Framers’ notion, emphasized by the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*,²²⁷ that members of Congress who are chosen by and accountable to state constituencies will be sensitive to states’ interests.²²⁸ According to Laurence Tribe, “to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states’ interests.”²²⁹ The report of a task force headed by Kenneth Starr agrees that in light of the political safeguards of federalism, judges should not find preemption “in the absence of clear congressional indication to that effect.”²³⁰

As my criticisms of the Court’s efforts at “imaginative reconstruction” reflect,²³¹ I agree that the political safeguards of federalism may affect Congress’s policy choices. The extent to which members of Congress take account of state interests will affect how they word the bills that they propose and how they vote on the bills that others propose. Because of the political safeguards of federalism, members of Congress may well conclude that some proposed language intrudes too far on state authority, and they may reject that language in favor of more modest alternatives.

Once Congress has decided upon the proposal that it will enact, however, the political safeguards of federalism have done their work. For courts always to adopt narrowing constructions of *the language that Congress enacts* would be to give the political safe-

pra note 108, at 1176 n.21 (arguing that the clear-statement requirement of *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991), “plainly ought to be relevant to the question whether (and, if so, to what degree) a federal statute preempts state legislation”).

²²⁷ 469 U.S. 528 (1985).

²²⁸ Cf., e.g., The Federalist No. 46 (James Madison) (predicting that because of its composition, Congress would be “disinclined to invade the rights of the individual States, or the prerogatives of their governments”); 1 Farrand, *supra* note 73, at 355 (Madison’s notes of remarks by James Wilson in the Philadelphia Convention, to the effect that state legislatures were to select members of the Senate and “[t]he State Legislatures . . . by this participation in the Genl. Govt. would have an opportunity of defending their rights”); A Citizen of Philadelphia [Pelatiah Webster], *Remarks on the Address of Sixteen Members of the Assembly of Pennsylvania (1787)*, *excerpted in* 13 DHRC, *supra* note 73, at 299 (arguing that “the two houses being by their election taken from the body of the state, and being themselves principal inhabitants, will naturally have the interest of the commonwealth sincerely at heart”).

²²⁹ 1 Tribe, *supra* note 108, at 1176.

²³⁰ Starr et al., *supra* note 16, at 48–49.

²³¹ See *supra* text accompanying notes 178–180.

guards of federalism a kind of double weight. In effect, this strict-constructionist approach would give states an *extrapolitical* safeguard—a safeguard that makes it difficult for Congress to preempt state law to the extent it wants.

A stylized example makes the point clearer. Suppose that Congress is choosing among three alternative provisions (be they express preemption clauses or substantive rules). Clause *A* would preempt relatively little state law, Clause *B* would preempt more, and Clause *C* would preempt the most. Taking account both of state interests and of federal purposes, members of Congress decide to adopt Clause *B*. The fact that members of Congress are supposed to take account of state interests does not give courts any particular reason to read Clause *B* “narrowly”; members of Congress took those interests into account when they chose Clause *B* over Clause *C*. If the alternative to a “narrow” construction is a “normal” construction, then it seems perfectly consistent with the political safeguards of federalism for courts to read Clause *B* normally.²³² In sum, even though the political safeguards of federalism may affect Congress’s policy choices, they do not compel any particular rules for construing the resulting statutes.

Nothing in this example changes if we are told that the new federal statute addresses an area that Congress had previously left to the states. To be sure, the fact that a particular area has traditionally been regulated only by the states may well affect our interpretation of a federal statute that is unclear about whether it regulates the area at all,²³³ as we have seen, the Supremacy Clause’s rejection of an artificial presumption against preemption does not keep courts from paying attention to Congress’s established practices. But when it is clear that Congress *is* entering a field traditionally occupied by the states, there is no automatic reason to adopt a “narrow reading” of the words that Congress enacts.

²³² This argument applies even if the legislative history does not reflect explicit consideration of Clauses *A* and *C* (or even if our theory of statutory interpretation does not let us consult legislative history). Whenever Congress enacts a provision, majorities in each House have voted in favor of the provision’s language and have at least tacitly accepted that language over other possible alternatives.

²³³ See *Cipollone v. Liggett Group*, 505 U.S. 504, 545 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); see also *supra* note 212 and accompanying text.

One might respond that Congress will tend to defer more to state interests when it enters a field for the first time than when it legislates in a field that it has long occupied. But even if this assumption is more often right than wrong, it is not automatically relevant to the courts' task: Congress's chosen level of deference to state interests will be reflected in the language that Congress enacts, and there is no reason automatically to give that language a narrowing construction. Considered purely as a rule of construction, then, a general presumption against preemption has little to recommend itself.

This conclusion does not necessarily end the debate, because the commentators who support such a presumption may be trying to serve other policy goals. Instead of portraying clear-statement rules as a way to figure out what Congress actually meant by the language that it enacted, Professor Tribe and others present them as a way to improve the legislative process—a way to create the conditions necessary for the political safeguards of federalism to work.²³⁴ In the absence of a clear-statement rule, after all, laws may be more likely to have preemptive effects that some or all members of Congress did not anticipate. If members of Congress are unaware of a bill's preemptive effects when they vote for it, the political safeguards of federalism are unlikely to check those effects.

This fact, however, is simply a manifestation of a more general problem. *Whatever* competing interests Congress is trying to balance, the lawmaking process does not function in an ideal way when members of Congress vote for bills without fully understanding what they mean. It is not clear, then, why we should apply a *special* clear-statement rule in preemption cases.²³⁵

²³⁴ See *supra* text accompanying note 229.

²³⁵ Some commentators may be less concerned about latent ambiguities than about *deliberate* efforts by members of Congress to duck the difficult policy choices that preemption questions entail. When members of Congress focus on a particular issue but fail to reach a collective decision about how to resolve it, they sometimes compromise by enacting intentionally ambiguous language that transfers the issue to the courts. A clear-statement rule would frustrate such efforts; it would function, in effect, as a nondelegation doctrine (or at least as a doctrine requiring Congress to make its delegations express rather than concealing them). Again, however, the arguments for and against such a rule have nothing special to do with preemption. There is no obvious reason why Congress should be able to delegate to the courts all types of policy decisions *except* those having to do with preemption.

My criticisms of such a rule, of course, do not mean that courts should err in the opposite direction, by being too quick to give broad preemptive effects to statutes that do not really call for them. As Professor Tribe and others note, Article I of the Constitution sets out the exclusive procedure for the federal government to exercise its legislative power, and courts that base preemption decisions entirely on legislative history—or on speculations about what Congress *would have* enacted *if* it had thought about the issue—are in grave danger of circumventing that procedure.²³⁶ Plenty of Supreme Court decisions in the realm of “implied” preemption can be criticized for reading preemption clauses into statutes that did not really imply them.²³⁷ By the same token, however, courts should not give artificially crabbed constructions to preemption clauses that statutes really do contain.

IV. CONCLUSION

This Article has proposed returning the “most frequently used doctrine of constitutional law”²³⁸ to its constitutional roots. The Supremacy Clause requires that courts apply valid federal law when it bears on the cases before them. But the Supremacy Clause does not impose any independent obligation to disregard state law. Instead, the Supremacy Clause puts questions about whether federal law preempts state law into the same framework as questions about whether one statute repeals another. The Supremacy Clause requires preemption only when the rules provided by state and federal law contradict each other, so that a court cannot simultaneously follow both.

²³⁶ See Laurence H. Tribe, *American Constitutional Law* 480 n.12 (2d ed. 1988) (invoking *INS v. Chadha*, 462 U.S. 919 (1983)); see also Tribe, *supra* note 191, at 74 (“If an Act of Congress would be deemed to mean X but for some body of extratextual evidence adduced to show that one or more lawmakers in the House or Senate hoped, expected, assumed, or feared that the enacted text would instead achieve Y, then giving binding legal effect to that body of evidence so as to *transmute* X into Y would, in a fairly strong sense, circumvent the only process by which, under Article I of the United States Constitution, federal legislation may be enacted.”).

²³⁷ See *supra* notes 181–185 and accompanying text; see also 1 Tribe, *supra* note 108, at 1177 (“[P]reemption analysis is, or at least should be, a matter of precise statutory construction rather than an experience in free-form judicial policymaking.”).

²³⁸ See *supra* note 4 and accompanying text.

It follows that the modern doctrine of "obstacle" preemption has no place as a doctrine of constitutional law. Some federal statutes may establish (or authorize courts to establish) a subconstitutional rule of obstacle preemption. But others do not. The general doctrine of obstacle preemption must therefore give way to a more careful analysis of the rules established by the particular federal statute in question.

The same is true of the general presumption against preemption. When understood in its historical context, the *non obstante* provision in the Supremacy Clause tells courts that the general presumption against implied repeals does not apply in preemption cases. The *non obstante* provision rejects an artificial presumption that Congress did not intend to contradict any state laws and that federal statutes must therefore be harmonized with state law. It also undermines the notion that courts should automatically give federal statutes "narrow" readings in order to preserve the maximum possible scope for state authority.

In a sense, my analysis of the Supremacy Clause points in two different directions. Recognizing that preemption is all about contradiction would tend to rein in the potential breadth of "implied" preemption. In the realm of "obstacle" preemption, for instance, courts could no longer find preemption simply because they think that state law hinders accomplishment of the "full purposes and objectives" behind a federal statute; courts would first have to determine that the federal statute expresses or implies a rule of obstacle preemption broad enough to cover the state law (and that this rule is within Congress's constitutional powers to establish). On the other hand, eliminating the general presumption against preemption would tend to cut in the opposite direction: Although courts would find preemption only when state and federal law contradict each other, they would not indulge an artificial presumption against reading federal statutes to establish rules that contradict state law. The net effect would probably be to reduce the scope of "implied" preemption and to expand the scope of "express" preemption.

Of course, if Congress *wants* the courts to continue applying a general doctrine of "obstacle" preemption, it is free to enact preemption clauses to that effect. In the absence of such legislation, however, the Court's current tests for "implied" preemption let

judges infer obstacle-preemption clauses that are hard to attribute to Congress. Conversely, the Court's tests for "express" preemption encourage judges to give crabbed readings to the preemption clauses that Congress actually does enact. If one accepts the common premise that "[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts,"²³⁹ these results seem precisely backward.

²³⁹ *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

