Understanding Federal Preemption

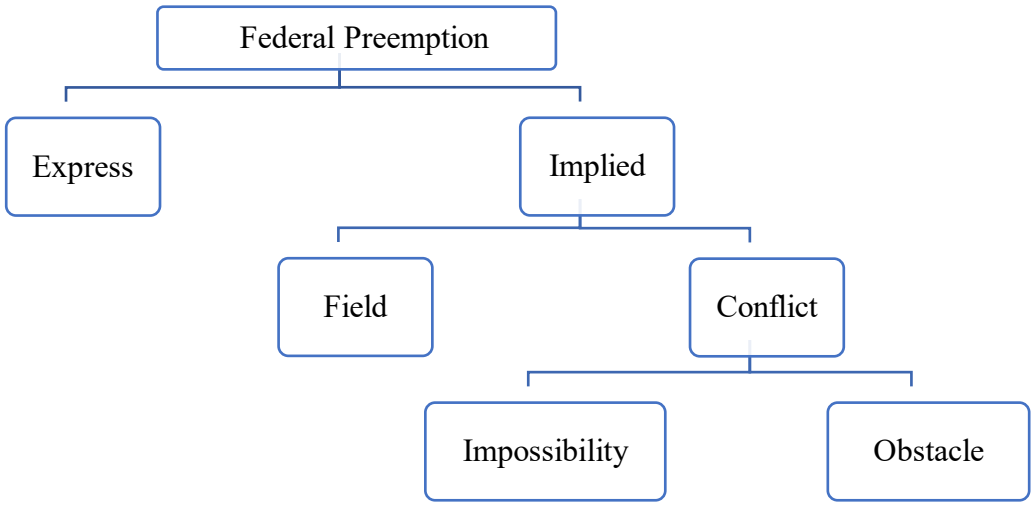
Federal preemption stems from the Constitution's Supremacy Clause:[1] "the Laws of the United States … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[2]

Federal preemption is when federal law overcomes ("preempts") state law within a given field or topic. Conversely, a savings clause is a provision within a federal statute to limit the preemptive effect of the statute by clarifying that federal law is not preempting certain categories of state law.[3] Both can be broken down into various sub-elements.

When dealing with preemption, the ultimate touchstone is Congress's intention.[4] To determine Congress's intent, courts look to the statute's text, structure, and purpose.[5]

Since preemption deals heavily with Congressional intention, it requires a fact-heavy, case-by-case analysis. In each law, Congress's intent is different, so there are not many generalized "rules" regarding preemption.

Federal Preemption



Preemption is either 1) express or 2) implied.[6] Express preemption occurs when the text of a federal statute or regulations explicitly notes what is preempted.[7] Express preemption is only in

[1] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 1, July 23, 2019.
[2] U.S. Const. Art. VI, Cl. 2.
[3] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 13, July 23, 2019.
[4] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 3, July 23, 2019.
[5] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 3, July 23, 2019.
[6] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 2, July 23, 2019.
[7] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 2, July 23, 2019.

these limited instances. On the other hand, implied preemption can exist regardless of the presence of an express preemption provision.[8]

Implied preemption is further sub-divided: field preemption and conflict preemption.[9] Field preemption follows when Congress manifests its intention to regulate an entire field.[10] When field preemption exists, Congress reserves regulation of the subject matter to the federal government only, thereby preempting all legislation or regulation of the topic by any State or subsidiary thereof.[11] Field preemption happens when either: 1) the legislation is all-encompassing, such that states can provide no supplement regulations, or, 2) where the federal interest is overly dominant.[12]

Conflict preemption can again be broken down into impossibility preemption and obstacle preemption.[13] Impossibility preemption, a "demanding defense,"[14] occurs when it is "physically impossible" for an entity to comply with both the federal law and state law.[15] In these circumstances, the state law is preempted. Obstacle preemption occurs when a State/local law is an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[16] Though it may technically be possible to comply with both regulations, obstacle preemption kicks in when doing so would undermine the federal goal.[17] Obstacle preemption is also known as "frustration of purpose.[18]" In these inquiries, the court asks: Does the regulation stand as an obstacle to the accomplishment of a significant federal regulatory objective?[19] A regulation may be an obstacle if 1) Congress intended to set a uniform, national standard, and a regulation breaks the uniformity, 2) Congress set a regulatory "ceiling" and state law imposes stricter standards, or 3) the state law impedes vindication of a federal right.[20]

Savings Clause

The legal effect of a savings clause will depend greatly on the specific words used. There are three general types of savings clauses: anti-preemption provisions, compliance saving clauses, and remedies saving clauses.

Contrary to express preemption, an anti-preemption provision explicitly says what is *not* preempted by the federal statute.[21] Some examples of statutory language include: "Nothing in …

---

[8] *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874 (2000).
[9] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 3, July 23, 2019.
[10] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 17, July 23, 2019.
[11] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 17, July 23, 2019.
[12] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 17, July 23, 2019.
[13] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 24, July 23, 2019.
[14] *Wyeth v. Levine*, 555 U.S. 555, 572 (2009)
[15] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 24, July 23, 2019.
[16] *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).
[17] "The General Issue: Preemption," *Legal Information Institute*, Cornell Law School. https://www.law.cornell.edu/constitution-conan/article-1/section-8/clause-3/the-general-issue-preemption
[18] *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874 (2000).
[19] *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 330 (2011).
[20] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 25, July 23, 2019.
[21] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 14, July 23, 2019.

may be construed to preempt," or the federal law "does not annul, alter, or affect" state law "except to the extent that those laws are inconsistent" with the federal statute.[22]

Compliance savings clauses note that compliance with the federal statute does not relieve a person from liability under state law, thereby allowing state tort actions to proceed.[23] Though the clauses do not automatically insulate state laws from preemption, the Supreme Court has held that these clauses may support a narrow interpretation of the statute's preemptive effect.[24] Textual language creating a compliance savings clause includes "[compliance with the regulation] does not exempt any person from any liability under common law."[25]

Remedies savings clauses are not discussed in detail in this report. However, this clause may be read as Congress's intent to disavow field preemption.[26] Textual language supporting a remedies savings clause may be as follows: "nothing in" a federal statute "shall in any way abridge or alter the remedies now existing at common law or by statute."[27]

Other Preemptive Provisions

Some statutes will come with a sunset provision, which provides for an automatic repeal of the section or entire law.

When legislation expressly preempts state law in an area but has a savings clause for state laws that impose stricter requirements or prohibitions on the area, it is called floor preemption.[28] In essence, the floor is a set of minimum requirements.[29] Floor preemption is a combination of express preemption and a saving clause.

Ceiling preemption, also called "unitary federal choice preemption," represents the final legislative decision on a topic.[30] Congressional statutes with this provision provide no opportunity for states to offer additional more stringent protection.[31] Ceiling preemption completely displaces state or local actors.[32] Importantly, when Congress adopts ceiling preemption, it is *not* acting out of concern for clashing requirements; instead, it acts out of desire for exclusive control.[33]

A severability clause is not unique to preemption. It states that all clauses are independent of one another. So, if one section is held unconstitutional or otherwise invalid, the remainder of the statute will stand.

---

[22] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 14, July 23, 2019.
[23] 15 U.S.C. § 1397(k)
[24] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 15, July 23, 2019.
[25] Federal Preemption: A Legal Primer," *Congressional Research Service*, 15, July 23, 2019.
[26] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 16, July 23, 2019.
[27] "Federal Preemption: A Legal Primer," *Congressional Research Service*, 16, July 23, 2019.
[28] "Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction," 82 N.Y.U. L. Rev. 1547, 1566, William W. Buzbee (2007).
[29] 82 N.Y.U. L. Rev. 1547, 1567.
[30] 82 N.Y.U. L. Rev. 1547, 1569.
[31] 82 N.Y.U. L. Rev. 1547, 1569.
[32] 82 N.Y.U. L. Rev. 1547, 1569.
[33] 82 N.Y.U. L. Rev. 1547, 1569.

Presumption Against Preemption

The Presumption Against Preemption, also known as the *Rice* Presumption, states that when Congress regulates in an area of the historic police of the states, the state's power is not to be preempted unless that is Congress's "clear and manifest" purpose.[34] Notably, this presumption is not always consistently applied.[35]

Notable Supreme Court Cases

Hines v. Davidowitz, 312 U.S. 52 (1941) (link)

Preemption: Obstacle

Facts: In 1939, the Alien Registration Act was adopted in Pennsylvania. In 1940, Congress enacted its own Alien Registration Act. The laws had the same subject: "registration of aliens as a distinct group." Congressional legislative history indicated Congress' intent to create a "single integrated and all-embracing system." Consequently, Pennsylvania's statute disrupted the uniform national system, and it was preempted.

Holding: When the federal government creates a "complete scheme of regulation," the states cannot regulate inconsistent to the purpose of Congress. There is no rigid formula or universal pattern to determine when a state regulation conflicts with the purpose of Congress.

Holding: When a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of a federal regulation, the state law is preempted.

NOTE: This is seen as the origin of "obstacle" preemption.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (link)

Preemption: Field

Facts: Rice, a customer, alleged Santa Fe Elevator Corp. with various violations of Illinois state law, enforced by the Illinois Commerce Commission. Santa Fe argued the Illinois Commerce Commission was superseded by the United States Warehouse Act. When the Warehouse Act was amended in 1931, Congress added "the power, jurisdiction, and authority" of the Secretary "shall be exclusive with respect to all persons" licensed through the Act. Because of the language, combined with legislative history, the Warehouse Act became paramount, irrespective of an existing conflict.

Holding: When Congress regulates in an area of the historic police power of the states, courts assume that the state's power is not to be preempted unless that was the "clear and manifest" purpose of Congress.

Note: This is seen as the "*locus classicus* of modern preemption doctrine."[36]

---

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

[35] Ernest A. Young, 'The Ordinary Diet of the Law': The Presumption Against Preemption in the Roberts Court, 2011 *Supreme Court Review* 253-344

[36] Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L Rev 767, 807 (1994).

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)[37]

Preemption: Express

Facts: Rose Cipollone, petitioner's mother, died of lung cancer after smoking for 42 years. Petitioner instituted this common-law suit against cigarette manufacturers. The Federal Cigarette Labeling and Advertising Act of 1969 requires a specific warning to appear on every cigarette package. The FCLAA contains an express preemption clause. Based on that clause, the Court held the 1969 Act preempted failure to warn claims that rely on omissions/inclusions in advertising/promotion; however, the 1969 Act did not preempt claims for intentional fraud and misrepresentation, express warranty, or conspiracy.

Holding: When there is an express preemption provision, the court must "identify the domain expressly pre-empted."

Holding: A preemption clause that bars "requirements or prohibitions … imposed under State law" is sufficiently broad to include, and preempt, state tort actions. The phrase suggests no difference between positive enactments and common law.

Holding: A federal statute can preempt a state tort suit.

Medtronics, Inc. v. Lohr, 518 U.S. 470 (1996)

Preemption: Not express

Facts: In 1976, Congress enacted the Medical Device Amendments. Lora Lohr was injured when her pacemaker failed; she brought this suit under Florida common law. All three of Lohr's claims – negligent design, negligent manufacturing, and failure to warn – were not preempted.

Holding: Interpreting the language of an express preemption statute is guided by two presumptions: the presumption against preemption and the understanding that Congressional purpose is "the ultimate touch-stone."

Holding: When Congress delegates its implementation authority to a federal agency, that agency is uniquely qualified to determine if obstacle preemption exists.

Geier v. American Honda Motor Co., 529 U.S. 861 (2000) (link)

Preemption: Not express, conflict

Facts: Under authority from the National Traffic and Motor Vehicle Safety Act of 1966 (NTMVSA), the Department of Transportation created Federal Motor Vehicle Safety Standards (FMVSS). The NTMVSA contains an express preemption provision. A 1987 regulation, FMVSS 208, requires some vehicles to be equipped with passive restraints. Geier was seriously injured in an accident while driving a 1987 Honda Accord, which met the safety standard and was not equipped with passive restraints, such as airbags. Geier sued Honda under common-law tort theories, claiming that the car should have nonetheless been equipped with airbags. The Court held FMVSS 208 did not expressly preempt this lawsuit, but nonetheless it was superseded as conflict preemption.

Holding: A savings clause does not bar implied preemption.

Holding: A federal regulation can preempt a state tort suit.

---

[37] After the Eleventh Circuit interpreted *Cipollone* as holding the presence of an express preemption provision prohibits the application of implied preemption principles, the Court clarified its *Cipollone* decision in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995).

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002)

Preemption: Not express, not conflict, not field

Facts: After Sprietsma's wife died in 1995 from a accident while on a boat manufactured by respondent, petitioner filed a complaint alleging state-law tort theories. Respondent argues three theories by which the complaint is preempted: 1) the Federal Boat Safety Act of 1971, 2) the Coast Guard's 1990 decision not to promulgate a regulation on propeller guards, or 3) the ordinary working of conflict preemption. The Court held the suit was not preempted.

Holding: An express provision preemption "a [state or local] law or regulation" does not encompass common-law claims.[38]

Holding: A decision by a federal law-making body not to regulate is not an authoritative prohibition on regulating the subject.

Wyeth v. Levine, 555 U.S. 555 (2009)

Preemption: Not impossibility, not conflict

Facts: Although the FDA deemed the labels for Wyeth's new drug, Phenergan, sufficient, a Vermont jury found that Wyeth failed to provide adequate warning of its risk. Phenergan, an antihistamine used to treat nausea, causes irreversible gangrene if it enters an artery. This happened to Levine, a professional musician, whose right forearm had to be amputated. The Court held the tort claim was not preempted.

Holding: There are two cornerstones in preemption cases. First - the purpose of Congress is the "ultimate touchstone." (To determine Congressional purpose, courts should review the regulation's history.) Second, the Presumption Against Preemption applies, especially when regulating in an area of historic state police power.

Holding: "Impossibility pre-emption is a demanding defense."

Williamson v. Mazda Motor of Am., Inc., 562 U.S. 323 (2011) (link)

Preemption: Not obstacle

Facts: Under the National Traffic and Motor Vehicle Safety Act, the Department of Transportation created Federal Motor Vehicle Safety Standard 208 (1989 version)[39] (FMVSS) requiring all seatbelts on rear seats in passenger vehicles. In the middle rear seats, manufacturers can choose either simple lap belts or lap-and-shoulder belts. This suit started after Thanh Williamson died from a car accident in a 1993 Mazda minivan while wearing a lap belt in the rear seat. The Court determined that providing manufacturers with the seatbelt choice was not a significant objective of the federal regulation; thus, the tort suit was not preempted.

---

[38] The Court based its reasoning on two interpretations: 1) "the article 'a' before 'law or regulation' implies a discreteness – which is embodied in statutes and regulations – that is not present in the common law," 2) "the terms 'law' and 'regulation' used together … indicate that Congress pre-empted only positive enactments." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002)

[39] A previous Supreme Court case, *Geier*, addressed a different provision of an earlier version of FMVSS 208. Many lower courts relied on *Geier* to decide that FMVSS 208 preempts state tort suits with similar situations in *Williamson*. However, in *Williamson*, the Supreme Court elaborates that its *Geier* decision rests on the determination that "giving auto manufacturers a choice among different kinds of passive restraint devices was a *significant objective* of federal regulation. 562 U.S. at 330. The determination of a significant regulatory objective is where the analysis *Williamson* diverges from *Geier*: "But unlike *Geier* we do not believe here that choice is a significant regulatory objective." *Id.* at 332.

Holding: When a federal regulation includes multiple options that can be used to satisfy the regulation, a state tort suit should only be preempted when the protection of choice is a significant regulatory objective. To determine if the choice is a significant regulatory objective, courts should look to 1) the history of the choice, 2) the agency's understanding of the choice at the time the regulation was enacted, and 3) the agency's understanding of the choice now.

Breaking Down Statutory Text

This chart details which preemption sections of various omnibus and sectoral statutes deal with federal preemption.

Statute	Codified Section	Type of Preemption	Are the circuit courts in general agreement on what this means?
CRA Title VII	42 U.S.C. § 2000e–7	Compliance Savings	Yes – cases focus on applying facts, not on divulging theories.
	42 U.S.C. § 2000e–7	Express Preemption	Yes – cases focus on applying facts, not on divulging theories.
	42 U.S.C. § 2000h–4	Anti-Preemption Provision – Not Field Preemption	Yes – cases focus on applying facts, not on divulging theories.
	42 U.S.C. § 2000h–4	Express Preemption	Yes – cases focus on applying facts, not on divulging theories.
	42 U.S.C. § 2000h–6	Severability Clause	Not litigated
Clean Water Act	33 U.S.C. § 1370	Anti-Preemption Provision	Somewhat – litigation is centered around determining if a type of claim, such as federal common law or state common law, is preempted.
COPPA	15 U.S.C. §6502(d)	Express Preemption	Yes – courts determine if litigation will "impose any liability" or if the conduct is "inconsistent" with obligations under COPPA.
	15 U.S.C. §6504(a)	Anti-Preemption Provision	Not litigated
	15 U.S.C. §6504(c)	Anti-Preemption Provision	Not litigated
	15 U.S.C. §6504(d)	Express Preemption	Not litigated
FCRA	15 U.S.C. §1681h(e)	Anti-Preemption Provision	NO. Split over how to reconcile with §1681t
	15 U.S.C. §1681h(e)	Express Preemption	NO. Split over how to reconcile with §1681t
	15 U.S.C. §1681h(e)	Anti-Preemption Provision	NO. Split over how to reconcile with §1681t
	15 U.S.C. §1681t(a)	Anti-Preemption Provision	Not litigated
	15 U.S.C. §1681t(a)	Express Preemption	Not litigated
	15 U.S.C. §1681t(b)	Anti-Preemption Provision	NO. Split over how to reconcile with §1681h(e). NO. Split over if Congress is preempting private rights of actions
	15 U.S.C. §1681t(c)	Express Preemption	Not litigated
	15 U.S.C. §1681t(d)	Anti-Preemption Provision	Not litigated
FHA	42 U.S.C. §3615	Anti-Preemption Provision	Yes – most litigation is centered on determining if the State law

			requires or permits a discriminatory housing practice.
	42 U.S.C. § 3615	Express Preemption	Yes – most litigation is centered on determining if the State law requires or permits a discriminatory housing practice
Federal Cigarette Labeling and Advertising Act	15 U.S.C. § 1334(a)-(b)	Ceiling Preemption	Yes – *Cipollone*, *Lorillard*, *Altria Group*
	15 U.S.C. § 1334(c)	Anti-Preemption Provision	Yes – *Cipollone*, *Lorillard*, *Altria Group*
FDA	21 USCS § 391	Severability Clause	Yes – most of the decisions are focused on determining if state law claims and federal law are impossible to reconcile
HIPAA	42 U.S.C. §1320d–7(a)(1)	Express Preemption	Yes
	42 U.S.C. §1320d–7(a)(2)	Anti-Preemption Provision	Yes
	42 U.S.C. §1320d–7(b)	Anti-Preemption Provision	Yes
	42 U.S.C. §1320d–7(c)	Anti-Preemption Provision	Yes
	45 CFR §160.202	Definitions	This section provides definitions to aid in the understanding of "contrary" and "more stringent."
	45 CFR §160.203	Express Preemption	Yes – most litigation is centered on determining if the State law is contrary to HIPAA.
	45 CFR §160.203	Anti-Preemption Provision	Yes – most litigation is centered on determining if the State law is more stringent than HIPAA.
	45 CFR §160.203(b)	Floor Preemption	Yes – most litigation is centered on determining if the State law is more stringent than HIPAA.
Natural Gas Act	15 U.S.C. § 717b(d)	Anti-Preemption Provision	Yes
	15 U.S.C. § 717b(e)	Ceiling Preemption	Yes
	15 U.S.C. § 717b(e)(3)(C)	Sunset Provision	Not litigated
NTMVSA	49 U.S.C. §30103(b)(1)	Conflict Preemption	Not litigated
	49 U.S.C. §30103(b)(1)	Anti-Preemption Provision	Not litigated
	49 U.S.C. §30103(b)(2)	Anti-Preemption Provision	Not litigated
	49 U.S.C. §30103(e)	Compliance Savings Clause	Yes – *Williamson v. Mazda Motor* provides a framework to

			evaluation statute's implied preemptive scope.
Securities Act	15 U.S.C. §77p(b)	Express Preemption	Not litigated
	15 U.S.C. §77p(c)	Express Preemption	Not litigated
	15 U.S.C. §77p(d)	Anti-Preemption Provision	Not litigated
	15 U.S.C. §77p(e)	Anti-Preemption Provision	Not litigated
	15 U.S.C. §77r(a)	Express Preemption	Not litigated
	15 U.S.C. §77r(c)	Anti-Preemption Provision	Not litigated
	15 U.S.C. §77r-1(b)	Savings Clause w/ Sunset Provision	Not litigated
	15 U.S.C. §77r-1(b)	Anti-Preemption Provision	Not litigated
	15 U.S.C. §77r-1(c)	Express Preemption	Not litigated
	15 U.S.C. §77r-1(c)	Savings Clause w/ Sunset Provision	Not litigated
	15 U.S.C. §77r-1(d)(1)	Savings Clause w/ Sunset Provision	Not litigated
	15 U.S.C. §77r-1(d)(2)	Savings Clause w/ Sunset Provision	Not litigated
	15 U.S.C. §78bb(f)(1)	Express Preemption	No – after *Dabit*, the Court of Appeals have different interpretations of what "coincide" means.
	15 U.S.C. §78bb(f)(1)	Anti-Preemption Provision	No – after *Dabit*, the Court of Appeals have different interpretations of what "coincide" means.
	15 U.S.C. §78bb(f)(1)	Anti-Preemption Provision	No – after *Dabit*, the Court of Appeals have different interpretations of what "coincide" means.
TCPA	47 U.S.C. §227(f)(1)	Floor Preemption	Yes – courts have considered this provision uniformly, without of Supreme Court guidance
	47 U.S.C. §227(f)(2)	Express Preemption	Not litigated
EU: GDPR	Art. 96	Anti-Preemption Provision	