Testimony of

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"Preserving The Vital Role Of Preemption In
Our Constitutional Scheme And National Economy"

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Preserving The Vital Role Of Preemption In Our
Constitutional Scheme And National Economy

Good morning Chairman Leahy, Ranking Member Specter, and other distinguished members of the Committee. I would like to thank you for the opportunity to testify today about a subject that is of substantial professional interest to me. I am testifying today on behalf of the United States Chamber of Commerce as well as the Chamber's Institute for Legal Reform. The views stated today are my own, based on my experience over the past 19 years of private practice during which I have represented business defendants, trade associations, and other clients in a wide variety of preemption cases.

The preemption doctrine is critically important to the business community and to the health of our national economy. In my experience, the positive impact of federal preemption very often gets lost in the sometimes heated debates over whether a particular court decision or agency action was correct. In recent years, these controversies have been particularly acute in the area of preemption of state requirements that are imposed by tort law or in product liability litigation. Although I will address those disputes later in my testimony, I think it is critically important for this Committee to keep in mind that the preemption doctrine has a far broader reach than this relatively narrow category of disputes - and that changes made to the preemption doctrine generally could have a far-reaching effect on the operations of the federal government.

I would like to begin today by reviewing the significant benefits that can occur when Congress - or an administrative agency acting pursuant to delegated authority - elects to regulate preemptively rather than merely concurrently with state and local governments.

The Benefits Of Preemption: Regulatory Uniformity, Unified National Markets, Efficiency, And Regulatory Expertise

We live in a large and sprawling country that is rich in many things - including government. In addition to the 50 state governments, each with its own legislature, executive branch and administrative agencies, and courts, by last count there were more than 87,500 local governmental units in the United States, including more than 3,000 counties, more than 19,000 municipalities, and more than 16,000 towns or townships. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 262 (2004). This multiplicity of government actors below the federal level ensures that businesses with national operations will be subject to complicated, overlapping, and sometimes even conflicting legal regimes.

These overlapping regulations have the potential to impose undue burdens on interstate commerce. That is why, as the Supreme Court has explained, it is "[a] fundamental principle of the Constitution ... that Congress has the power to preempt state law." Crosby v. National Foreign Trade Council, 530 U.S. 363, 372 (2000). When Congress elects to legislate preemptively by prescribing a single set of uniform rules for the entire country, it streamlines the legal system, reduces the regulatory burdens on business, and helps to create a unified national marketplace for goods and services. It also reduces the burdens to new entry by small businesses and lowers the cost of doing business (which in turn can result in reduced costs of goods and services to consumers). In many cases, Congress's adoption of a preemptive scheme also ensures that the legal rules governing complex areas of the economy or products are formulated by expert regulators with a broad national perspective and needed scientific or technical expertise rather than by decision makers - such as municipal officials, elected state judges, and lay juries - who have a far more parochial perspective and limited set of information. For businesses, having a single, uniform federal rule is usually far preferable to dealing with a welter of federal, state, and local requirements.

In light of these obvious benefits, it is not surprising that Congress has elected to pass scores of statutes that contain preemption clauses. According to one survey, between 1789 and 1992 Congress enacted "approximately 439 significant preemption statutes" - "more than 53 percent" of which were enacted between 1969 and 1992. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FEDERAL STATUTORY PREEMPTION OF STATE AND LOCAL AUTHORITY: HISTORY, INVENTORY, ISSUES, at iii (1992).1 Federal preemption is common in the areas of copyright, telecommunications, banking, and labor law. Not surprisingly given Congress's responsibility for regulating interstate commerce, a large number of these express preemption provisions are aimed at freeing up nationally distributed products of one kind or another - including mobile products such as automobiles that regularly cross jurisdictional borders - from the burdens imposed by different or additional state regulations concerning product labeling or design. Separate federal statutes accomplish this for recreational boats, automobiles, pesticides, cigarettes, medical devices, flammable fabrics, hazardous substances, and many other consumer products. These uses of the preemption doctrine reduce the burdens on interstate commerce and help to create unified national markets - and thus serve a central purpose underlying the Commerce Clause.

The Supremacy Clause And The Doctrine Of Implied Preemption

So far I have been talking mostly about what is usually called "express preemption" - the choice expressly made by Congress (or by an administrative agency delegated authority by Congress) to regulate preemptively instead of merely concurrently. But the preemption doctrine has another, vitally important function: it protects the authority of the federal government - and the full efficacy of federal law in all its various forms - against incursions and interference by state and local governments. The Framers of our Constitution understood the vital importance of ensuring the supremacy of federal law in the face of conflicting or contrary mandates imposed by state governments. That is why they included the Supremacy Clause, which provides that "the Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The Supremacy Clause is the fountainhead of the doctrine of implied preemption. The Supreme Court has identified several types of implied preemption. Implied field preemption occurs where federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Implied conflict preemption involves conflicts between state and federal law and

takes a number of forms. Conflict preemption occurs where "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or state and federal law otherwise conflict, or state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67 (1941). The first of these three variants of conflict preemption is sometimes referred to as "impossibility" preemption; the last, "obstacle" preemption.

Thus, under the Supremacy Clause as interpreted by the Supreme Court, any state or municipal law that conflicts with - or frustrates the purposes of - federal law is automatically nullified. And the Court has made clear that "[t]he phrase 'Laws of the United States'" in the Supremacy Clause "encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." City of New York v. FCC, 486 U.S. 57 (1988). Thus, with every new statute passed by Congress, with every new regulation issued by a federal administrative agency, state and local governments are precluded, "by direct operation of the Supremacy Clause" (Brown v. Hotel and Restaurant Employees & Bartenders Int'l Union Local 54,468 U.S. 491, 501 (1984)), from taking legislative, judicial or executive action that conflicts with, or frustrates the purpose of, the federal enactment.

In the last century (and particularly since the New Deal), there has been a vast expansion of federal law in all forms - especially statutes and regulations. By virtue of the Supremacy Clause, the inevitable consequence of that expansion is to restrict the residual authority and police power of state and local governments to take actions that conflict with federal law. See New York v. United States, 505 U.S. 144, 159 (1992) ("As the Federal Government's willingness to exercise power within the confines of the Constitution has grown, the authority of the States has correspondingly diminished to the extent that federal and state policies have conflicted."). This dynamic helps to explain why preemption is so common today and why preemption cases are a staple of the Supreme Court's docket. It also shows why critics of the preemption doctrine are wrong in suggesting that preemption is extraordinary, unusual, suspect, or contrary to principles of federalism embodied in the Constitution. To the contrary, preemption is an ordinary, ubiquitous and highly beneficial feature of our scheme of government. And it is not only consistent with but compelled by the Supremacy Clause.

The Preemption Doctrine Should Not Be Weakened By Congress

Let me turn now to some of the criticisms of the preemption doctrine and proposals for weakening it that have been made by critics. I plan to first discuss express preemption, then implied preemption, then finally preemption by administrative agencies. Most of the proposals for change would apply only prospectively, i.e., to statutes enacted and regulations promulgated in the future. Accordingly, I will generally leave to one side the set of problems that would arise if new limits on the preemption doctrine were applied retroactively to statutes enacted or regulations promulgated under entirely different ground rules.

I. Express Preemption

As previously explained, Congress has enacted a wide array of statutes that include provisions expressly stating that some defined area of state and local law is preempted. In such instances of "express preemption," the critical question is always what Congress intended - and courts deciding issues of express preemption apply all the usual tools of statutory construction by examining the text, structure, and legislative history of Congress's enactments.

Rules Of Construction Relating To Express Preemption Clauses

Although in the 1920s the Supreme Court briefly applied a presumption in favor of preemption to congressional statutes, see Stephen Gardbaum, The Nature of Preemption, 79 CORNELL L. REV. 767, 801-08 (1994), it soon thereafter shifted gears and made clear that at least where Congress has "legislated ... in [a] field which the States have traditionally occupied," courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218,230 (1947). In Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992), the Supreme Court made clear that this "assumption" (which in other cases has been called the "presumption against preemption") did not merely disappear once Congress made its preemptive intent unmistakably clear by including an express preemption provision in a statute. Rather, it continued as a rule of construction requiring courts to interpret express preemption clauses narrowly in seeking to ascertain Congress's intent. Two Justices dissented from this conclusion.

See 505 U.S. at 544 (Scalia, J., joined by Thomas, J., concurring in the judgment in part and dissenting in part) ("Under the Supremacy Clause, ... our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning.").

The presumption against preemption has been criticized by several prominent scholars, including Professor Viet Dinh, on the ground that it is inconsistent with the text of the Supremacy Clause. It has also been criticized by Justices Scalia and Thomas on the ground that it artificially skews the inquiry into Congress's intent. Although these criticisms are valid, the Supreme Court has shown no inclination to abandon the presumption, and indeed has reaffirmed it, even though in a number of recent cases business groups - including the U.S. Chamber of Commerce - have asked it do so. Thus, the presumption against preemption remains a part of preemption law.

Nevertheless, some have proposed that Congress codify the presumption against preemption by including it in a federal statute. In the view of these critics, Congress would do well to tie its own hands prospectively by mandating that no future federal statute will be understood to expressly preempt state or local law unless the statute states explicitly that such preemption is intended. It has also been proposed that Congress codify the rule of narrow construction of express preemption provisions set forth in Cipollone by stating that "[a]ny ambiguity" in any express preemption clause must be resolved against preemption. As an initial matter, it is difficult to see why Congress would want to codify such strictures on its own authority to exercise its legislative powers. If Congress's intent is the touchstone of preemption analysis, then why would Congress wish to put a distorting thumb on the scale of the inquiry into that intent? On the other hand, to the extent that these provisions merely restate the "presumption against preemption" that is already an accepted part of preemption law, they seem unnecessary. Finally, the proposal should be rejected because the criticisms leveled against the "presumption against preemption" by scholars and by Justice Scalia are valid.

Beyond these shortcomings, the proposal appears to rest on the assumption that Congress (or the courts) is insufficiently sensitive to federalism concerns when Congress expressly deploys its well-established power to regulate preemptively (or courts resolve disputes about the meaning of express preemption clauses included in federal statutes). As I will next explain, this assumption is mistaken.

Congress's Sensitivity To Federalism Concerns Is Already Reflected
In The Express Preemption Schemes Congress Has Created

Congress often includes in preemptive federal statutes special safeguards - both substantive and procedural - that protect and preserve the authority of state and local governments to regulate and to meet their own operational needs. The existence of these provisions - which are so often overlooked by critics of preemption - confirms that the political safeguards of federalism are in very good working order and there is no need to codify the presumption against preemption.

Six examples of Congress's accommodation of state and local governments' interests in other preemption settings are illustrative. First, Congress often elects only to preempt state and local laws that relate to a particular, limited subject matter. For example, the preemption provision in the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136v, is limited to state and local "requirements for labeling or packaging." 7 U.S.C. § I36v(b). State requirements unrelated to "labeling or packaging" are left intact by Congress's careful limitation on FIFRA's preemption clause.

Second, Congress often elects only to preempt state and local laws that are different from federal law, thus leaving intact state and local laws that are identical or substantially similar to federal mandates. See, e.g., Consumer Product Safety Act, 15 U.S.C. § 2075(a) (preempting state safety standards "unless such requirements are identical to the requirements of the Federal standard"); Medical Device Amendments, 21 U.S.C. § 360k(a). Under these schemes, state and local governments retain the authority to enforce requirements that parallel those imposed by the federal government.

Third, Congress frequently places an exclusion within express preemption clauses for goods or products purchased by states or local governments for their own use. Examples include the preemption provisions of the Flammable Fabrics Act, 15 U.S.C. § 1203(b), the Federal Hazardous Substances Act, 15 U.S.C. § 1261 note, and the Poison

Prevention Packaging Act, U.S.C. § 1476(b). These exclusions preserve the authority and autonomy of state and local governments to make procurement and spending decisions.

Fourth, Congress sometimes includes in a preemption scheme an exception for state or local requirements that are needed to address special or unique local conditions. The Federal Railroad Safety Act, for example, excludes certain "additional or more stringent" measures taken by a state "related to railroad safety or security" where the state's regulation, among other things, "is necessary to eliminate or reduce an essentially local safety or security hazard." 49 U.S.C. § 20106. See also 46 U.S.C. § 4306 (Boat Safety Act) (excluding certain state or local regulations concerning "uniquely hazardous conditions or circumstances within the State").

Fifth, Congress often authorizes the granting of exemptions to state and local governments under an express preemption scheme. Although these provisions vary somewhat in form, they typically allow the administrative agency to grant exemptions if a state or local standard: (1) provides a higher degree of protection than applicable federal standards; (2) does not unduly burden interstate commerce; and (3) does not cause the product to be in violation of any federal requirements. See, e.g., Toxic Substances Control Act, 15 U.S.C. § 2617(b); Federal Hazardous Substances Act, 15 U.S.C. § 1261 note.

Sixth, Congress has sometimes specifically created a role for the states in setting the preemptive federal standards. The Federal Boat Safety Act, for example, provides for state input into the Coast Guard's process of formulating uniform federal design standards for recreational boats. The Coast Guard is required to "consult with" the National Boating Safety Advisory Council ("NBSAC"), 46 U.S.C. § 4302(c)(4), a group of experts and other persons interested in boat safety. One-third of the 21 members of the NBSAC must be state officials responsible for state boat safety programs. See id. § 13110(b)(1).

As these examples show, Congress is hardly inattentive to federalism issues in crafting preemptive legislation. The availability of these and other measures to accommodate the interests of state and local governments further demonstrates that the additional, across-the-board measures being proposed by some critics of preemption law are unwarranted.

There Is No Need To Further Restrict The Ability Of
Courts To Find Express Preemption

Equally unfounded is the suggestion of some critics that more stringent rules are needed to restrict the ability of courts to conclude, in express preemption cases, that Congress intended to preempt state or local laws. The state courts and lower federal courts are already bound, under the Supreme Court's cases, to apply a "presumption against preemption" in preemption cases involving areas of traditional state authority or the construction of express preemption clauses. The Supreme Court itself is also bound to follow that precedent.

Most of the criticism of the doctrine of express preemption is traceable to disagreements about the outcomes in a line of decisions of the U.S. Supreme Court in cases involving the preemption of state tort requirements. Those decisions include not only Cipollone, which involved the Cigarette Labeling Act, but also Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996), which involved the Medical Device Amendments, and more recent cases such as Sprietsma v. Mercury Marine, 537 U.S. 51 (2002), and Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005), involving other statutes containing express preemption provisions.

The point I would make about those decisions is that they turn on very specific differences in the wording of the preemption clauses at issue, the structure of the preemption schemes (including the presence of savings and other provisions that shed light on the meaning of the preemption clause), and the relevant legislative history. It is time that some of these decisions are complex and confusing. But that is largely a function of the complexity of the underlying statutes and the Supreme Court's statute-by-statute approach to these issues, which is entirely appropriate for an exercise in determining Congress's preemptive intent underlying a particular statute.

Moreover, these decisions hardly show that the Supreme Court is too quick to find express preemption. In Cipollone, there were actually two preemption provisions at issue - one contained in the 1965 Act and another in the 1969 Act. Notably, the Court rejected the express preemption argument with respect to the 1965 Act. It accepted the

preemption defense concerning the 1969 Act for certain claims, but rejected it for others. Beyond that, as explained above, Cipollone announced a new rule of narrow construction for express preemption clauses. Similarly, the Court in Medtronic held that all of the tort claims at issue in that case were not expressly preempted by Medical Device Act. And in Sprietsma, the Court also rejected the manufacturer's arguments for express preemption.

Why then are these cases so controversial? The only reason, I would suggest, is because they recognized that Congress's specification that state-law "requirements" in an express preemption clause can include requirements imposed under state tort law. Thus, Justice Stevens' plurality opinion in Cipollone stated that a preemption clause nullifying certain "requirement[s] or prohibition[s] ... imposed under State law" "sweeps broadly and suggests no distinction between positive enactments and common law" and indeed "easily encompass obligations that take the form of common-law rules." 505 U.S. at 521 (plurality) (emphasis added). Justices Scalia and Thomas agreed with that conclusion. Id. at 548-49. In Medtronic, a majority of the Court endorsed Justice O'Connor's conclusion that the "ordinary meaning" of a provision preempting state "requirements" "clearly pre-empts any state common-law action." 518 U.S. at 511. In agreeing with that conclusion, Justice Breyer pointed out the "anomalous consequences" of "grant[ing] greater power ... to a single state jury than to state officials acting through state administrative and legislative lawmaking." Id. at 504 (Breyer, J., concurring). Justice Breyer also gave as an example of a claim that would be preempted "a state law tort action that premises liability upon the defendant manufacturer's failure to use a 1-inch wire," where "a federal ... regulation requires a 2-inch wire." Ibid. The Court has reached the same conclusion in cases involving other preemption provisions. See Bates v. Dow Agrosciences LLC, 544 U.S. 431,443 (2005) ("the term 'requirements' in [7 U.S.C.] § 136v(b) reaches beyond positive enactments, such as statutes and regulations, to embrace common-law duties"); CSX Tramp. v. Easterwood, 507 U.S. 658, 664 (1993).

Contrary to the suggestion of some critics, this aspect of the Court's decisions in Cipollone, Medtronic, and other cases is not entirely new but rather builds on older decisions that recognize the same principle or acknowledge the clear regulatory effect of common-law judgments. In San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), the Court observed that "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." Id. at 247. Similarly, in Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117 (1991), the Court held that the phrase "all other law, including State and municipal law" simply "does not admit of [a] distinction ... between positive enactments and common-law rules of liability." Id. at 128. Indeed, "[a]t least since Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), [the Court] ha[s] recognized the phrase 'state law' to include common law as well as statutes and regulations." Cipollone, 505 U.S. at 522.

It is worth pointing out, however, that in other cases involving differently worded preemption clauses the Supreme Court has reached the opposite conclusion: that Congress intended to exclude requirements imposed under state tort or common law. One example is Geier v. American Honda Co., 529 U.S. 861 (2000), which held that the preemption clause of the National Traffic and Motor Vehicle Safety Act, which refers to state "safety standards," does not encompass standards imposed under the common law. Id. at 867-68. Another is Sprietsma, which held that the Boat Safety Act's preemption clause does not cover common-law claims. See 537 U.S. 51, 63-64 (2002). Cf. also Bates. 544 U.S. at 445 ("A requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement. The proper inquiry calls for an examination of the elements of the common-law duty at issue ... "). The differences in outcomes in these cases turn on subtle differences in language used by Congress in the specific statutes at issue.

Underlying these disputes about Congress's meaning in specific cases are vigorous disagreements about the regulatory effect of tort law and large-scale products liability litigation today and whether tort law's compensatory function makes it qualitatively different from all other types of legal obligations imposed by states. Business defendants in these cases tend to argue that it is illogical to draw a distinction between the requirements imposed under the common law of torts and requirements imposed by statute because many states have codified their tort law. They also argue that it simply ignores practical realities to suggest that massive common-law liability, for example, for a design defect does not "require" any future action by a product manufacturer. A manufacturer that ignored a multimillion-dollar verdict in a design defect case would risk not only similar verdicts but also punitive damages in the future. In arguing that modem tort litigation has a clear regulatory effect, business defendants also often point to the rise of mass tort litigation and large punitive damages awards. See Hensler, The New Social Policy Torts: Litigation As A Legislative Strategy, Some Preliminary Thoughts On A New Research Project, 51 DEPAUL L. REV. 493,498 (2001) ("What seems to most distinguish the new tort actions from conventional damage class actions

is that, in addition to seeking damages and enforcement of current regulations, the plaintiffs seek to change the rules that govern industry-wide business practices.").

On the other side of the debate, plaintiffs' lawyers argue that tort requirements are qualitatively different - or not "requirements" at all. They point out that the necessary effect of upholding preemption of a state tort requirement is to deprive injured persons of a right to recover damages - at least on the preempted theory.

Reasonable minds can also differ on the federalism implications of preempting state tort law. Some view any federal limitation on tort law as a serious interference with a core area of the states' police powers. But others may view modem-day products liability litigation as imposing exactly the kind of burdens on interstate commerce that the Framers had in mind in conferring on Congress the power to regulate interstate commerce. 2 And still others may agree with Justice Breyer's suggestion that the federalism implications of nullifying the action of a single state-court jury would appear to be far less serious than nullifying an Act of a state legislature. See Medtronic, 518 U.S. at 504 (Breyer, J., concurring) (pointing out the "anomalous consequences" of "grant[ing] greater power ... to a single state jury than to state officials acting through state administrative and legislative lawmaking"). As explained above, Congress has passed many preemptive statutes that, albeit in measured and limited ways, indisputably preempt state statutes or ordinances that relate to product labeling and/or design.

The only point I would like to make today about these recurring debates is that I suspect they would not be resolved the same way by every Member of Congress. Reasonable people can and do disagree over these issues. And that is why courts look to the actual language used by Congress in preemptive statutes to discern how Congress has resolved the issue in each particular case.

II. Implied Preemption

Let me turn next to the doctrine of implied preemption. Some have suggested that implied "conflict" preemption should be eliminated by statute except for situations where there is a "direct" conflict between federal and state law that is incapable of being resolved. Presumably, this would do away with "obstacle" preemption and leave in place only "impossibility" preemption and some subset of ordinary conflict preemption (where the conflict is "direct," whatever that means).

Congress's Authority To Restrict Implied Conflict Preemption

As an initial matter, there is a serious question, in my view, whether Congress has the power to limit implied preemption in this fashion. As previously explained, the implied preemption doctrine flows directly from, and is based upon the Supreme Court's interpretation of, the Supremacy Clause. The classic formulation of obstacle preemption is often traced back to Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (assessing whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). In Perez v. Campbell, 402 U.S. 637 (1971), the Supreme Court observed that "[s]ince Hines the Court has frequently adhered to this articulation of the meaning of the Supremacy Clause." Id. at 649-50 (emphasis added; citing multiple cases); accord Geier v. American Honda Motor Co., 529 U.S. 861, 873-74 (2000). In Perez, the Court further noted that obstacle preemption has roots extending back to Gibbons v. Ogden, where the Court noted that state laws that "'interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution,' are invalid under the Supremacy Clause." 402 U.S. at 649 (quoting 22 U.S. (9 Wheat.) at 211); see also Savage v. Jones, 225 U.S. 501, 533 (1912) ("[W]hen the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished - if its operation within its chosen field must be frustrated and its provisions refused their natural effect - the state law must yield ....") (emphasis added). Plainly, Congress lacks the authority to rewrite the Supremacy Clause.

Obstacle Preemption Protects The Efficacy
Of Federal Law In All Of Its Forms

Putting the issue of authority to one side, I think it would be profoundly unwise to eliminate "obstacle preemption." Why would Congress want to permit state and local governments to subvert Congress's objectives? Beyond that, it is well settled that obstacle preemption can occur not only where the goals of state and federal law are incompatible, but also where state law "interferes with the methods by which the federal statute was designed to reach [its] goal." International Paper Co. v. Ouellette, 479 U.S. 481,494 (1987) (emphasis added). Why would Congress want to permit state and local governments to interfere with or subvert the methods Congress has chosen to carry out its objectives? In Geier v. American Honda Co., 529 U.S. 861 (2000), the Supreme Court recently refused to impose on a pat1y claiming obstacle preemption a "special burden" when the relevant federal statute includes a "savings" provision. The Court explained: "We see no grounds ... for attempting to distinguish among types of federal-state conflict for purposes of analyzing whether such a conflict warrants pre-emption in a particular case." Id. at 873-74.

Obstacle preemption plays a vitally important role in ensuring the supremacy - and full effectiveness of federal law against incursions by the states. Those who advocate eliminating obstacle preemption, moreover, should bear in mind that the doctrine serves to protect the supremacy of all federal laws against encroachments by the states. For example, in Felder v. Casey, 487 U.S. 131 (1988), the Court ruled that 42 U.S.C. § 1983 preempted a Wisconsin notice-of-claim statute that required a civil rights plaintiff to provide written notice (of at least 120 days before filing suit) to putative government defendants of the circumstances giving rise to her constitutional claims, the amount of the claim, and her intent to bring suit. In the absence of such notice, the Wisconsin law required the state courts to dismiss the plaintiff's Section 1983 lawsuit. Writing for the Court, Justice Brennan explained that the Wisconsin statute was barred under the doctrine of obstacle preemption because, among other things, it "burdens the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with a requirement that is entirely absent from civil rights litigation in the federal courts." Id. at 141; see also id. at 138, 144-56. That conclusion necessarily depended on a robust doctrine of obstacle preemption, because it plainly was not impossible to comply with both the Wisconsin statute and the requirements of Section 1983, and there was no direct conflict between the federal and state laws. Thus, the doctrine of obstacle preemption serves to protect all federal laws - those one likes as well as those one dislikes - against unwarranted subversion by the states. Before taking steps to weaken or eliminate obstacle preemption, Congress should get a very clear picture of all the varied contexts in which it has operated.

The Issue Of Judicial Discretion In Obstacle Preemption Cases

Why has obstacle preemption come under attack by some commentators and judges? The dissenting Justices in Geier v. American Honda Co., 529 U.S. 861 (2000), expressed concern about the prospect of "federal judges ... running amok with our potentially boundless ... doctrine of implied conflict pre-emption based on frustration of purposes" and stated that "the Supremacy Clause does not give unelected federal judges carte blanche to use federal law as a means of imposing their own ideas of tort reform on the States." [d. at 894, 907 (dissenting opinion of Stevens, J.) (emphasis added). Thus, the central concern appears to be that the doctrine of obstacle preemption accords judges too much leeway or discretion in determining whether state law frustrates the purposes of federal law in a given case.

These concerns are overstated. To be sure, obstacle preemption does require federal and state judges to make subtle judgments in identifying the relevant congressional "purpose" or "purposes" and in deciding when the federal purposes are being frustrated by state law. See Crosby v. National Foreign Trade Council, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects[.]"). But Congress often declares its purposes explicitly in the statute (or in the accompanying legislative materials). More importantly, such judgment calls are no different from a wide array of decisions made by federal and state courts every day. The law is filled with broad concepts - reasonableness, probable cause, excusable neglect, good cause, ordinary care - that call for the exercise of discretion by judges. Beyond that, issues relating to obstacle preemption also require judges, as a threshold matter, to construe the state and federal laws that are claimed to be in tension. That type of statutory construction, however, is the bread and butter of what judges do and hardly a basis for concern over unbridled judicial discretion.

Nor is there anything unusual or suspect about federal or state judges interpreting and applying the Supremacy Clause (as they do in all cases involving implied conflict preemption). The notion that federal judges lack institutional competency to engage in such tasks - or that their decisions should be systematically skewed in one direction because the federal Judiciary is unelected - is incorrect. Finally, the concerns about judicial competence voiced by

the critics of obstacle preemption overlook that the Supremacy Clause is a provision that was intended by the Framers to be enforced by the courts. Federal courts are the institutions entrusted by the Constitution with the authority to police incursions by the states on the supremacy of federal laws.

III. Administrative Agencies And Preemption

There are at least three separate issues raised by the preemption doctrine as applied to administrative agencies. The first is the threshold question of an agency's authority to regulate preemptively. The second is the amount of deference that should be accorded by courts to an agency's interpretation of an express preemption clause. And the third is the amount of deference that should be given, in an implied preemption case, to the agency's judgment concerning the extent to which state law conflicts with or frustrates the purposes of either a federal law the agency administers or the agency's own regulations. I will discuss these in turn below.

Agency Power To Regulate Preemptively

The first question has a settled answer. In a line of cases, the Supreme Court has made clear that an administrative agency's authority to regulate preemptively is not dependent on an express grant by Congress of the power to preempt state law. Thus, in Fidelity Federal Savings & Loan Ass 'n v. de la Cuesta, 458 U.S. 141 (1982), the Court explained:

Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is similarly limited: "If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." A pre-emptive regulation's force does not depend on express congressional authorization to displace state law ....

de La Cuesta, 458 U.S. at 153-54 (emphasis added) (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)); accord City of New York v. FCC, 486 U.S. 57,63-69 (1988); Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 714-15, 721 (1985); Capital Cities Cable. Inc. v. Crisp, 467 U.S. 691, 699-705, 708-09 (1984).

Recently, in New York v. FERC, 535 U.S. 1 (2002), the Supreme Court reaffirmed its traditional approach, squarely rejecting the argument that the "presumption against preemption" should be applied in deciding whether an agency has the authority to take regulatory action that preempts state law. The "presumption against preemption," the Court explained, has no bearing on issues relating to "the proper scope of ... federal power" (including an agency's power to preempt state law). Id. at 18. The only question is "whether Congress has given [the agency] the power to act as it has," and that question is resolved "without any presumption one way or the other." Ibid.

This approach is sensible. Once Congress has delegated rulemaking power to an agency, the agency steps into Congress's shoes as the decision maker - its job becomes implementing the statute in whatever way best accomplishes the statutory aims. See, e.g., Smiley v. Citibank (South Dakota), NA., 517 U.S. 735,740-41 (1996) ("We accord deference to agencies under Chevron ... because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."). Because an agency is left to make policy choices, it need not shy away from preemption; it need adhere only to the presumption that Congress wanted the statute administered effectively. The agency is no more obligated to avoid preemption than is Congress when determining whether federal regulation should be exclusive.

Once a court determines that the agency has the power to administer the statute, the focus shifts to whether the agency (not Congress) intended its regulations to preempt state law. For example, in Hillsborough County, the Food and Drug Administration (FDA) issued a statement at the time its regulations were promulgated disclaiming an intent to preempt state law. The Court found this disclaimer "dispositive on the question of implicit intent to pre-empt"; so long as the agency acted within the scope of its statutory authority, it (not Congress) had the discretion to decide

whether to preempt state law. 471 U.S. at 714-15 (citing Chevron, 467 U.S. at 842-45) (emphasis added). Moreover, this Court observed that "the FDA possesses the authority to promulgate regulations pre-empting local legislation that imperils the supply of plasma and can do so with relative ease." Id. at 721 (emphasis added).

Despite the settled nature of these principles, some critics of preemption have suggested that the basic ground rules should be fundamentally altered so that administrative agencies would be powerless to issue preemptive regulations unless and until specifically authorized by Congress to do so. This would obviously result in a sea-change in the rules governing regulatory preemption. As explained above, the preemption doctrine has numerous benefits for the national economy. It can result in the reduction or elimination of regulatory burdens on business and on interstate commerce, help to create unified national markets for goods and services, and lower the costs of production and prices. In my view, it would be unwise to deprive agencies of all authority to bring about these benefits for the American public unless and until Congress has specifically authorized preemptive regulation.

Finally, the proposed new approach would create an anomaly because, under settled principles of implied preemption, every agency regulation automatically has preemptive effect under the Supremacy Clause with respect to state and local laws that conflict with the terms of the federal regulation. Yet under the change proposed by some, the same agency whose regulations have automatic preemptive effect under the Supremacy Clause would be powerless to expressly preempt non-conflicting state and local law by design through its own regulation. That is anomalous, to say the least.

The Deference Owed To Agency Interpretations
Of Express Preemption Clauses

The important thing to remember about agency interpretations of express preemption clauses is that they can go in either direction, either upholding or defeating the preemptive effect of a statute. In Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996), the Supreme Court gave "substantial weight" to the FDA's narrowing interpretation of the preemption provision of the Medical Device Amendments, 21 U.S.C. § 360k(a). Although the statute, among other things, broadly preempts "any requirement" under state law that "relates to the safety or effectiveness" of a medical device and is not identical to the applicable federal requirements, the FDA had issued a regulation (21 C.F.R. § 808.1) interpreting Section 360k(a)'s references to "any requirement" as being limited to requirements that were "specific" in nature (or not of "general applicability"). See 518 U.S. at 498-500.

In previous cases, the Supreme Court had rejected the invitations of litigants to read similar limitations into the broad language of other express preemption provisions. In Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992), for example, the Court interpreted a provision of the Airline Deregulation Act of 1978 ("ADA") that "pre-empts the States from 'enact[ing] or enforc(ing) any law, rule, regulation, standard or other provision ... relating to rates, routes, or services of any air carrier.'" Id. at 383 (quoting 49 U.S.C. App. § 1305(a)(1)). The Court categorically rejected the argument that "only state laws specifically addressed to the airline industry are preempted, whereas the ADA imposes no constraints on laws of general applicability." Id. at 386 (emphasis added). Such an interpretation, the Supreme Court explained, would create "an utterly irrational loophole." Ibid. (emphasis added); accord Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47-48 (1987) (ERISA preemption is not limited to state measures targeting ERISA plans but also includes more general common-law tort and contract causes of action); San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 & n.3 (1959) ("Nor has it mattered [in cases involving NLRA preemption] whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations.").

Nevertheless, writing for the Court in Medtronic, Justice Stevens explained that "our interpretation of the pre-emption statute is substantially informed by" the FDA's regulation and there is a "sound basis" for giving "substantial weight to the agency's view of the statute." Id. At 495-96 (emphasis added). The Court explained that, as the agency to which Congress "has delegated its authority to implement the provisions of the Act," the FDA was "uniquely qualified to determine whether a particular form of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ... and, therefore, whether it should be pre-empted." Id. at 496. In a concurring opinion, Justice Breyer also placed substantial weight on the FDA's interpretation of the express preemption provision. See id. At 505-06 (Breyer, J.) (it "makes sense" to infer that FDA "possesses a degree of leeway to determine which rules, regulations, or other administrative actions will have pre-emptive effect"). Justice

Stevens' and Justice Breyer's opinions both cite Chevron, but neither explicitly says that full-blown Chevron deference is owed to the FDA's interpretation.

This holding was not free of controversy. In dissent, Justice O'Connor pointed out that the majority did "not admit to deferring to these regulations" under Chevron. 518 U.S. at 512 (O'Connor, J., joined by Rehnquist, C.J., and by Scalia and Thomas, J1., concurring in part and dissenting in part). Justice O'Connor's opinion also noted that "[i]t is not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference." Ibid. (emphasis added).

As the division in the Court in Medtronic suggests, this is not an easy issue. On the one hand, it is certainly possible to conclude that express preemption provisions are, by their very nature, intended to be judicially enforced and interpreted in lawsuits between private parties rather than interpreted by administrative agencies. See Adams Fruit Co. v. Barrett, 494 U.S. 638, 649-50 (1990) (Chevron deference is not owed to an agency interpretation of provisions that were meant to be interpreted by the judiciary rather than the Executive Branch; "[a] precondition to deference under Chevron is a congressional delegation of administrative authority") (emphasis added); Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., joined by O'Connor & Kennedy, JJ., concurring in the judgment) (Chevron deference is not owed to agency interpretations of provisions that are "not administered by any agency but by the courts"). Moreover, it is certainly possible that an administrative agency might seek to reduce the scope of a preemption provision enacted by Congress in a way that is contrary to Congress's intent.

Whatever the correct answer to this question should be, the Supreme Court's decision in Medtronic has provided a substantial answer. Agency interpretations of express preemption clauses are entitled to "substantial weight." There is no reason why an agency's expansive interpretation of an express preemption clause should be treated differently from a narrowing interpretation.

The Deference Owed To An Agency's Views
Concerning Whether State Law Conflicts With Or
Frustrates The Purpose Of Federal Law

Finally, let me turn to the question of how much weight should be given to an administrative agency's determination that state law either conflicts with federal law or stands as an obstacle to the full accomplishment and execution of Congress's purposes. Here again, the Supreme Court's decisions point to the answer. In Medtronic, the Court stated that a federal agency may be "uniquely qualified to determine whether a particular form of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 518 U.S. at 496 (internal quotations omitted). Similarly, in Geier v. American Honda Co., 529 U.S. 861 (2000), the Court "place[d] some weight" on the agency's interpretation of the objectives underlying its own regulation and the extent to which a tort suit would stand as an obstacle to those objectives. Id. at 883. The Court explained:

Congress has delegated to [the Department of Transportation I authority to implement the statute; the subject matter is technical; and the relevant history and background are complex and extensive. The agency is likely to have a thorough understanding of its own regulation and its objectives and is "uniquely qualified" to comprehend the likely impact of state requirements. Medtronic, 518 U.S. at 496 .... And DOT has explained [the regulation's] objectives, and the interference that "no-airbag" suits pose thereto, consistently over time. In these circumstances, the agency's own views should make a difference.

529 U.S. at 883 (citations omitted).

This approach makes sense and should not be altered by legislation. An agency's assessment of whether state law poses an obstacle to Congress's purposes requires an understanding not only of how a complex regulatory scheme works and affects the real-world conduct of regulated parties but also of how the imposition of diverse state and local requirements affects that scheme and those regulated parties. It may also involve an identification of Congress's various purposes (which may be in tension with each other) and an assessment of the likely impact of state and local regulations on those purposes. Although (as explained above) the doctrine of implied conflict preemption is rooted in the Supremacy

Clause, an agency's interpretations in these settings are little different from other interpretations that draw on the agency's expertise and specialized knowledge and to which Chevron deference is accorded.

Conclusion

Contrary to the suggestion of some, the law of federal preemption as it stands today is not in need of radical revision - and, indeed, it would be unwise to place additional limitations on the preemption doctrine, as some have proposed. Such additional limits would impair the ability of Congress and administrative agencies to bring about the many significant benefits that flow from preemptive statutes and regulations. By the same token, Congress should not allow controversies over a limited subset of preemption cases involving state tort requirements to drive far-reaching changes to the basic ground rules of preemption - changes that no doubt would have unintended effects across a wide range of federal law and federal programs.

1 Examples include the Federal Election Campaign Act, 2 U.S.C. § 453: the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v; the Packers and Stockyard Act. id. § 228c: the Agricultural Marketing Act, id. § 1626h; the Plant Protection Act, id. § 7756: the National Bank Act. 12 U.S.C. § 484(a); the Flammable Fabrics Act, 15 U.S.C. § 1203(a); the Federal Hazardous Substances Act, id. § 1261 note; the Child Safety Protection Act, id. § 1278 note; the Federal Cigarette Labeling and Advertising Act, id. § 1334; the Fair Packaging and Labeling Act, id. § 1461; the Poison Prevention Packaging Act, id. § 1476(a); the Consumer Product Safety Act, id. § 2075(a): the Magnuson-Moss Warranty Act, id. § 2311(c); the Terrorism Risk Insurance Act of 2002, id. § 6701 note; the Nutritional Education and Labeling Act, 21 U.S.C. § 343-1: the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act. 21 U.S.C. § 360k(a): the Poultry Products Inspection Act, id. § 467e; the Federal Meat Inspection Act, id. § 678; the Egg Products Inspection Act, id. § 1052; the Occupational Safety and Health Act, 29 U.S.C. § 667; the Employee Retirement Income Security Act ("ERISA"), id. § I l44(a): the Price-Anderson Act, 42 U.S.C. §§ 2210(n)(2), 2014(hh): the Clean Air Act, 42 U.S.C. §§ 7543(a), 7573; the Volunteer Protection Act of 1997. id. § 14502: the Boat Safety Act, 46 U.S.C. § 4306; the Hazardous Materials Transportation Uniform Safety Act, 49 U.S.C. § 5125: the Federal Aviation Administration Authorization Act, id. § 14501(c); the Safety Appliance Acts, id. §§ 20301-20306; the National Traffic and Motor Vehicle Safety Act, id. § 30103(b)(I); the Surface Transportation Assistance Act, id. § 31 114(a): the General Aviation Revitalization Act, id. § 40 101: and the Airline Deregulation Act, id. § 41713(b).

2 See Michael McConnell, Federalism: Evaluating The Founders' Design, 54 U. CHI. L. REV. 1484, 1499 (1987) ("S]tate-by-state determination of the law of products liability seems to have created a liability monster. This is because each state can benefit in-state plaintiffs by more generous liability rules, the costs being exported to largely out-of-state defendants; while no state can do much to protect its in-state manufacturers from suits by plaintiffs in other states."); Michael McConnell, A Choice-of-Law Approach to Producers Liability Reform, in NEW DIRECTIONS IN LIABILITY LAW 90, 92 (Walter Olson ed., 1988) (discussing the reasons why "the cost of a given state's liability laws, as they apply to mass-marketed products, is borne by consumers nationwide"); Robert Gasaway, The Problem of Tort Reform: Federalism and The Regulation of Lawyers, 25 HARV. J. LAW & PUB. POLICY 953, 958 (2002) ("[T]he stringent regulation of a truly national activity by a single State can have the effect of taking the power to regulate interstate commerce away from the national government.").