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## Nothing is Real: Protecting the Regulatory Void Through Federal Preemption By Inaction

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**NOTHING IS REAL: PROTECTING THE REGULATORY VOID THROUGH  
FEDERAL PREEMPTION BY INACTION**

Robert L. Glicksman\*

I. INTRODUCTION

The provisions of the United States Constitution that define the roles of the national and state governments have always been a subject of interest and debate. In the 1990s, the Supreme Court, under Chief Justice William Rehnquist, began reexamining a variety of important federalism doctrines.<sup>1</sup> The Court's docket included cases raising significant questions about the degree to which the Constitution authorizes or constrains action by each level of government. Some of the cases required identification of the scope of federal power, most notably the federal legislative power under the Commerce Clause.<sup>2</sup> Others dealt with the manner in which provisions of the Constitution such as the Tenth Amendment<sup>3</sup> constrain federal legislative power.<sup>4</sup> The Court also addressed the extent to which the Eleventh Amendment<sup>5</sup> immunizes the states from suits by private individuals for violations of federal law<sup>6</sup> and the impact of the dormant Commerce Clause<sup>7</sup> on state regulatory authority.<sup>8</sup>

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<sup>1</sup> See Richard E. Levy & Stephen R. McAllister, *Defining the Roles of the National and State Governments in the American Federal System: A Symposium*, 45 U. KAN. L. REV. 971, 973 (1997) (asserting that "there is no disputing that the current Supreme Court is more interested than any Court in recent history in reexamining and reconsidering 'first principles' of our federal system"); Stephen R. McAllister & Robert L. Glicksman, *State Liability for Environmental Violations: The U.S. Supreme Court's "New" Federalism*, 29 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10665, 10665 (Nov. 1999) (claiming that, "[d]uring the 1990s, the 'Rehnquist' Court has revived debate about the fundamental principles of American federalism").

<sup>2</sup> U.S. CONST. art. I, § 8, cl. 3. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2006); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). The Court also relied on its reading of the Commerce Clause to assist it in interpreting the scope of agency authority under federal statutes. E.g., *Rapanos v. United States*, 126 S. Ct. 2208 (2006); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001). For commentary on the Court's recent Commerce Clause jurisprudence, see A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 *CORNELL L. REV.* 328 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 *MICH. L. REV.* 80 (2001); Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 *CASE W. RES. L. REV.* 695 (1996); Deborah Jones Merritt, *Commerce!*, 94 *MICH. L. REV.* 674 (1995); Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 *CORNELL L. REV.* 1199 (2003).

<sup>3</sup> U.S. CONST. amend. X.

<sup>4</sup> See, e.g., *Reno v. Condon*, 528 U.S. 141 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). For commentary on the Court's recent Tenth Amendment cases, see Erik M. Jensen & Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition Power: New York v. United States Revisited*, 15 *CONST. COMM.* 355 (1998); Richard E. Levy, *New York v. United States: An Essay on the Use and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power*, 41 *U. KAN. L. REV.* 493 (1993).

<sup>5</sup> U.S. CONST. amend. XI.

<sup>6</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999); *College Sav. Bd. v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bd.*,

Another constraint on the exercise of state power derives from the Supremacy Clause, which is the source of the doctrine of federal preemption.<sup>9</sup> That doctrine provides an important piece of the federal-state power allocation puzzle. Federal preemption law is important due to both the frequency with which it is raised and the impact it has on the availability of state law. According to one source, “preemption . . . is almost certainly the most frequently used doctrine of constitutional law in practice.”<sup>10</sup> In addition, the preemption doctrine is a critical aspect of the interplay between federal and state lawmaking authority because “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).”<sup>11</sup>

The Supreme Court has not neglected the preemption doctrine during its recent efforts to rethink, and in some cases reconfigure constitutional federalism. The Court has found that federal regulatory statutes preempted state statutes or administrative regulations.<sup>12</sup> It has held that federal statutes preempted state common law remedies.<sup>13</sup>

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527 U.S. 627 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). For commentary on the sovereign immunity cases, see Jonathan Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 397-402, 431-33 (2005); Hope Babcock, *The Effect of the United States Supreme Court's Eleventh Amendment Jurisprudence on Clean Water Act Citizen Suits: Muddied Waters*, 83 OR. L. REV. 47 (2004); McAllister & Glicksman, *supra* note 1.

<sup>7</sup> The Commerce Clause on its face contains an affirmative delegation of authority to Congress to regulate activities involving interstate and international commerce. The Supreme Court, however, has interpreted that provision as imposing implicit constraints on state activities that discriminate against interstate commerce. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1792 (2007) (explaining that “[a]lthough the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute”).

<sup>8</sup> See, e.g., *C & A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383 (1994); *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353 (1992); *Chemical Waste Mgmt. v. Hunt*, 504 U.S. 334 (1992). For analysis of the Supreme Court's recent dormant Commerce Clause cases, see Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965 (1998); Kirsten Engel, *Reconsidering the National Market in Solid Waste: Trade-Offs in Equity, Efficiency, Environmental Protection and State Autonomy*, 73 N.C. L. REV. 1481 (1995); Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1 (2003); Robert R.M. Verchick, *The Commerce Clause, Environmental Justice and the Interstate Garbage Wars*, 70 SO. CAL. L. REV. 1239 (1997); Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 UCLA L. REV. 153 (2005).

<sup>9</sup> U.S. CONST. art. VI, cl. 2 (stating that the Constitution and “the Laws of the United States which shall be made in Pursuance thereof . . . shall by the supreme Law of the Land,” notwithstanding state laws to the contrary).

<sup>10</sup> Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994).

<sup>11</sup> Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225 (2000).

<sup>12</sup> See, e.g., *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88 (1992). *But cf.* *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991) (holding that federal pesticide legislation did not preempt local ordinance applicable to pesticide applications).

<sup>13</sup> See, e.g., *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001). *Cf.* *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (holding that federal tobacco legislation preempted some state common law causes of action but not others). In *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), the court

The Court has identified federal administrative regulations that have the same effect.<sup>14</sup> The Court's interest in preemption has caught the eyes of legal academics, who in the last few years have generated a rich and extensive literature on the normative and doctrinal components of preemption law. Recent scholarly inquiries have dealt with issues such as the extent to which federal agency interpretations of the preemptive effect of the statutes they administer are entitled to judicial deference,<sup>15</sup> whether agency statements of preemptive intent found in regulatory preambles should be given effect,<sup>16</sup> the propriety of the adoption of anti-preemption rules of statutory construction,<sup>17</sup> and the role of preemption doctrine in product liability litigation.<sup>18</sup>

What many of these cases and articles have in common is their focus on the extent to which some kind of action by the federal government has the capacity to preempt state statutes, regulations, or common law theories of liability. The preemption doctrine has the potential to sweep even more broadly, however, than situations involving affirmative federal activity such as the adoption of statutes or administrative regulations. On occasion, even the federal government's failure to act has been deemed sufficient to preclude state governments from pursuing regulatory initiatives or adjudicating common law tort actions seeking redress for harms caused by the defendants' activities. Little attention has been paid in the academic literature to the propriety of this federal preemption by inaction.

The purpose of this article is to identify when inaction by either Congress or a federal regulatory agency should be deemed to preempt state law. This inquiry has important implications for the values reflected in our federal system of government, just as the resolution of preemption issues involving affirmative federal conduct does. But judicial recognition of preemption by inaction poses particular difficulties for the intended beneficiaries of the preempted state law regimes, such as those designed to protect the public health, the public safety, or the environment. If a court finds that federal legislative or administrative failure to act preempts state regulation, the activities that prompted the state (through its legislative, executive, or judicial branches) to create some kind of protective regulatory or liability mechanism will of necessity become completely unregulated. That result may have significant adverse consequences for health, safety, or welfare or the environment, the traditional focal points of the exercise of the state's police powers.

This article uses a timely and important reference point to illustrate what is at stake when federal inaction is alleged to preempt state law through: the battle over the

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held that the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y, did not preempt various fraud, breach of warranty, design defects, and related claims.

<sup>14</sup> See, e.g., *Geier v. Am. Honda Motor Co.*, 501 U.S. 597 (2000).

<sup>15</sup> See, e.g., Nina Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004).

<sup>16</sup> Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 277 (2007).

<sup>17</sup> See, e.g., Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007).

<sup>18</sup> See, e.g., Jean Macchiaroli Eggen, *The Normalization of Product Preemption Doctrine*, 57 ALA. L. REV. 725 (2006); David C. Vladeck, *Preemption and Regulatory Failure*, 33 PEPP. L. REV. 95 (2005).

authority of the states to regulate activities that contribute to global climate change in light of the federal government's largely sluggish response to the environmental and health risks posed by climate change.<sup>19</sup> Part II of the article sets the stage for the normative analysis that follows. The first subsection of Part II describes the federal legislation potentially applicable to the regulation of activities that contribute to global climate change as well as the litigation that has raised the prospect that ongoing and future state regulation of those activities is preempted by federal law. The second subsection of Part II briefly summarizes the tests enunciated by the Supreme Court to determine whether federal law explicitly or implicitly reflects the federal government's intent to preempt state law.

Based on the framework for analyzing preemption questions described in Part II, Part III identifies the circumstances in which the federal government's failure to act creates the potential for preemption of state law, explicit or implicit, and analyzes in each situation whether preemption by inaction is justifiable as a normative matter. It also analyzes the degree to which federal agencies which have declined to act under legislation vesting in them the authority to do so may affect the preemption result reached in court through their interpretations of the allegedly preemptive federal statutes. Finally, the article inquires whether state law should ever be preempted in a situation in which the federal government lacks the authority to address the subject of state regulation. The article illustrates the potential impact on the allocation of regulatory power between the federal government and the states of each component of the preemption principles urged in Part III by applying them to the global climate change context.

Part III sets forth four basic recommendations for the resolution of preemption problems, one of which is directed at Congress and rest of which are directed at the courts. First, in deference to state prerogatives in areas of traditional state concern, Congress should not preempt state regulation in areas in which it has chosen not to regulate unless it first determines either that a state's regulatory initiative would inappropriately impose adverse impacts on other states or that federal policies can best be achieved in the absence of positive regulation at any level of government. Second, in the absence of federal regulatory action, the courts should never find implied preemption based on occupation of the regulatory field in which the state is engaged. Third, the courts should find implied preemption in the absence of federal regulatory action based on a conflict with federal objectives only if Congress has explicitly delegated to a federal agency the power to preempt state law to prevent it from subverting federal goals and the agency has clearly, authoritatively, and persuasively exercised that authority. Fourth, the courts should never find implied preemption of state law if the federal actor involved lacks jurisdiction over the activities being regulated by the state. If the courts are willing to consider preemption in such circumstances, they should afford no deference to agency

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<sup>19</sup> For discussion of the federal government's lethargy in addressing the climate change problem, see Robert L. Glicksman, *Global Climate Change and the Risks to Coastal Areas from Hurricanes and Rising Sea Levels: The Costs of Doing Nothing*, 52 *LOY. L. REV.* 1127, 1159-70 (2006) (discussing the federal government's "sins of omission"). For an argument that California's regulation of mobile sources of pollutants that contribute to climate change should not be preempted because that regulation has the potential to contribute to environmental innovation, see Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 *U.C. DAVIS L. REV.* 281 (2003).

statutory interpretations that bear on the degree of displacement of state law arising from the allegedly preemptive statute. These recommendations strike an appropriate balance between federal and state power, while minimizing the risk that preemption of state law will create a regulatory void that creates unacceptable risks to health, safety, or the environment.

## II. SETTING THE STAGE

The next part of this article explores the degree to which preemption by federal inaction is appropriate in a variety of situations. It applies the principles of preemption urged there to the concrete example of global climate change to illustrate how those principles would affect the allocation of regulatory power between the federal and state governments in an important area of current legal controversy. The function of this part is to provide necessary background discussion. First, this part describes the allocation of authority between the federal government and the states under existing law to regulate activities that contribute to global climate change. Second, it summarizes the familiar array of categories in which the Supreme Court has recognized that federal law may preempt state law. As indicated below, preemption may be either express or implied, and there is more than one basis for finding implied preemption.

### A. Global Climate Change and Federal Preemption by Inaction

The potential implications of allowing federal inactivity to preempt state regulation are well illustrated by the preemption-based attacks that have been made on the constitutionality of state efforts to regulate activities that contribute to global climate change.<sup>20</sup> In 2004, a state regulatory agency, the California Air Resources Board, adopted regulations restricting emissions of carbon dioxide (CO<sub>2</sub>) from motor vehicles.<sup>21</sup> A coalition of motor vehicle manufacturers and dealers, an automobile trade association, and a county farm bureau sued the state, seeking to invalidate the regulations.<sup>22</sup> The plaintiffs argued, among other things, that California's regulations are preempted by section 209(a) of the federal Clean Air Act (CAA).<sup>23</sup> That provision declares generally that no state shall "adopt or attempt to enforce any standard relating to the control of

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<sup>20</sup> For discussion of a model for determining whether federal environmental laws provide a legitimate basis for preempting state environmental regulation that is based on analysis of the justifications for federal environmental regulation, see Robert L. Glicksman & Richard E. Levy, *Preemption and the Purposes of Federal Regulation*, \_\_ N.W. U. L. REV. \_\_ (forthcoming).

<sup>21</sup> Cal. Code Regs. tit. 13, § 1961.1(e)(4). The agency issued the regulations pursuant to authority delegated to it under Cal. Health & Safety Code § 43098.5(a).

<sup>22</sup> *Central Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160 (E.D. Cal. 2006). The district court denied the state's motion for judgment on the pleadings on the CAA preemption issue. *Id.* at 1174-75. See also *Central Valley Chrysler-Jeep, Inc. v. Witherspoon*, 2005 WL 2709508, at \*1 (E.D. Cal. Oct 20, 2005), *reconsideration denied*, 2005 WL 3470653 (E.D. Cal. Dec 19, 2005) (describing the plaintiffs' complaint as "very verbose").

<sup>23</sup> 42 U.S.C. § 7543(a).

emissions from new motor vehicles or new motor vehicle engines subject to<sup>24</sup> the provisions of the CAA that relate to motor vehicle emissions and fuel standards.<sup>25</sup>

Despite this prohibition, Congress has long allowed California to regulate motor vehicle emissions, “in recognition of the unique problems faced by California as a result of its climate and topography,” especially with respect to ozone pollution in southern California.<sup>26</sup> Congress believed that California had “compelling and extraordinary circumstances” that make California “sufficiently different from the Nation as a whole to justify standards on automobile emissions which may, from time to time, need [to] be more stringent than national standards.”<sup>27</sup> Accordingly, the CAA authorizes the federal Environmental Protection Agency (EPA) to waive the prohibition on state regulation of motor vehicle emissions found in section 209(a) for California if the state’s standards are “at least as protective of public health as any applicable federal standards”<sup>28</sup> In addition, EPA must find that the state standards are necessary “to meet compelling and extraordinary circumstances” and “are not inconsistent with” section 202(a) of the CAA.<sup>29</sup> That provision requires EPA to issue standards restricting motor vehicle emissions which, in the judgment of EPA’s Administrator, “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.”<sup>30</sup> The plaintiffs in the California climate change litigation argued that, because EPA has not issued a waiver allowing California to adopt standards to control CO<sub>2</sub> emissions from motor vehicles, the state’s regulations are subject to the general prohibition of section 209(a) and are therefore preempted.

The argument that the CAA preempts the California regulations restricting CO<sub>2</sub> emissions would seem to present a relatively straightforward, albeit important issue of statutory preemption, but for one additional fact: EPA has not regulated emissions of CO<sub>2</sub> from motor vehicles under the CAA. Indeed, at the time the plaintiffs sued California, EPA, in denying a petition filed by several states and environmental groups requesting that EPA regulate greenhouse gas (GHG) emissions from motor vehicles, had taken the position that it lacked the authority to do so under the CAA because GHGs do

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<sup>24</sup> *Id.*

<sup>25</sup> 42 U.S.C. §§ 7521-7554. The plaintiffs also alleged that the California regulations are preempted by the Energy Policy and Conservation Act of 1975, 49 U.S.C. § 32919(a), the statute that authorizes the Department of Transportation’s National Highway Traffic Safety Administration (NHTSA) to issue corporate average fuel economy standards. That argument involves preemption by federal regulatory action rather than inaction, and is therefore beyond the scope of this article. In any event, the argument was weakened considerably when the Supreme Court concluded that regulations limiting CO<sub>2</sub> emissions from motor vehicles (in that case, by the federal Environmental Protection Agency) would not be inconsistent with federal fuel economy standards. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1461-62 (2007). Finally, the plaintiffs in the California litigation alleged that state regulation of CO<sub>2</sub> emissions was preempted by the national government’s authority to conduct foreign affairs. That component of the preemption attack on California’s regulatory program is also beyond the scope of this article. For further discussion of the issue, see Notes, *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877 (2006).

<sup>26</sup> See H.R. Rep. No. 90-728 (1967), reprinted in 1967 U.S.C.C.A.N. 1938, 1958.

<sup>27</sup> H.R. Rep. No. 90-148 (1967), reprinted in 1967 U.S.C.C.A.N. 1938, 1956.

<sup>28</sup> 42 U.S.C. § 7543(b).

<sup>29</sup> *Id.*

<sup>30</sup> 42 U.S.C. § 7521(a)(1).

not qualify as air pollutants under the statute.<sup>31</sup> According to the plaintiffs in the suit challenging the California emission controls:

EPA concluded that section 202(a) of the Clean Air Act does not authorize regulation of carbon dioxide and greenhouse gases because Congress never intended that such emissions be considered “pollutants” for purposes of section 202(a). . . . [The state’s] regulation of carbon dioxide and other greenhouse gases would certainly not be “consistent with” section 202(a) of the Clean Air Act, either on the face of the statute or as interpreted by EPA. Congress never intended to permit California to present the issue of global climate change . . . as a “compelling and extraordinary” condition in California that would permit California to adopt its own emission standards, unlike every other state in the nation.<sup>32</sup>

In addition and in the alternative, EPA had also stated in denying the states’ petition that, even if it had the authority to regulate GHGs under section 202 of the CAA, it would refuse to exercise it. In particular, EPA provided several policy-based reasons for refusing to regulate. First, regulation under § 202 of GHG emissions from new motor vehicles, which are one of many sources of those GHGs, would “result in an inefficient, piecemeal approach to the climate change issue.”<sup>33</sup> Second, unilateral regulation by the United States of motor vehicle emissions might weaken efforts to persuade developing countries to reduce their own GHG emissions. Third, ongoing research into scientific uncertainties about the causes and effects of global climate change and into possible technological solutions made regulation premature. Fourth, with respect to one of the remedial mechanisms suggested by the petitioners (improved tire efficiency), EPA raised doubts that it has the authority under the CAA to regulate tire efficiency as an “emission” of an air pollutant.<sup>34</sup>

The petitioning states and environmental groups sought judicial review of EPA’s refusal to regulate GHG emissions under section 202 of the CAA. In 2007, the Supreme Court held that EPA does indeed have the power to regulate GHG emissions under the CAA and that the policy-based reasons EPA enunciated in its denial of the petition for refusing to do so were arbitrary and capricious and insufficient to justify its refusal to regulate.<sup>35</sup> Despite that decision, EPA has still not regulated any GHG emissions under the CAA.<sup>36</sup>

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<sup>31</sup> Control of Emissions From New Highway Vehicles and Engines; Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922, 52,925 (Sept. 8, 2003).

<sup>32</sup> Complaint for Declaratory and Injunctive Relief, *Central Valley Chrysler-Jeep v. Witherspoon*, 2004 WL 2846142 (Dec. 7, 2004), at ¶ 81.

<sup>33</sup> Control of Emissions From New Highway Vehicles and Engines; Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003).

<sup>34</sup> *Id.* at 52,929-31. The petitioners failed to suggest any actions that EPA could take to reduce emissions of other GHGs, including CH<sub>4</sub> and N<sub>2</sub>O from motor vehicles. *Id.* at 52,931.

<sup>35</sup> *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

<sup>36</sup> In May 2007, President Bush issued an executive order enunciating a federal policy “to ensure the coordinated and effective exercise of the authorities of the President and the heads of the Department of Transportation, the Department of Energy, and the Environmental Protection Agency to protect the environment with respect to greenhouse gas emissions from motor vehicles, nonroad vehicles, and nonroad engines, in a manner consistent with sound science, analysis of benefits and costs, public safety, and economic growth.” Exec. Order No. \_\_\_\_\_, § 1 (May 14, 2007), *available at*



Pending issuance of mandatory controls on GHG emissions either by Congress or EPA, a victory for the plaintiffs in the California climate change preemption litigation therefore would make it impossible for any state to regulate GHG emissions, leaving motor vehicle emissions completely unregulated. Given the consensus of mainstream scientific opinion that GHG emissions contribute to climate change – recognized by the Supreme Court in its 2007 decision<sup>37</sup> – this regulatory void is likely to pose threats to public health and the environment that at least some states deem worthy of immediate regulatory attention.

The combination of the federal government's refusal to regulate GHGs and the contention made by the auto industry that the CAA nevertheless preempts state efforts to regulate GHG emissions from motor vehicles raises the following question: When, if ever, is it appropriate for the federal government to preclude regulatory initiatives such as California's efforts to control CO<sub>2</sub> emissions, despite its unwillingness to tackle the threat targeted by state regulation on its own?

## B. The Traditional Framework for Analyzing Preemption Issues

The Supreme Court has established a familiar framework for analyzing preemption questions, even if it has not always applied the framework in a consistent fashion.<sup>38</sup> The Court has indicated that “[t]he purpose of Congress is the ultimate

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<http://www.whitehouse.gov/news/releases/200705/20070514-1.html>. The Order does not require any federal entity to regulate GHG emissions from motor vehicles by any specified date. In announcing the promulgation of the Order, the President stated that “[t]his is a complicated legal and technical matter, and it's going to take time to fully resolve.” President Bush Discusses CAFE and Alternative Fuel Standards, available at <http://www.whitehouse.gov/news/releases/2007/05/20070514-4.html>. Federal regulation of GHG emissions from motor vehicles apparently is not imminent.

<sup>37</sup> The Court began its opinion in *Massachusetts* as follows:

A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe that the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat.

*Massachusetts v. EPA*, 127 U.S. at 1446. The Intergovernmental Panel on Climate Change concluded in 2007 that “it is *extremely unlikely* that global climate change of the past 50 years can be explained without external forcing, and *very likely* that it is not due to known natural causes alone.” IPCC, 2007: Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers 10 (Solomon et al. eds., 2007), available at <http://ipcc-wg1.ucar.edu/wg1/wg1-report.html>.

<sup>38</sup> See, e.g., Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since Cipollone*, 92 KY. L.J. 913, 968 (2003-2004) (stating that “Supreme Court preemption jurisprudence is in a terrible state. Lower courts are both confused and frustrated because the Court's recent preemption decisions have been neither clear nor consistent.”); Jennifer S. Hendricks, *Preemption of Common Law Claims and the Prospects for FIFRA: Justice Stevens Puts the Genie Back in the Bottle*, 15 DUKE ENVTL. L. & POL'Y F. 65, 66 (2004) (stating that “[t]he history of preemption doctrine . . . is a history of doctrinal confusion and frequent changes of course”); Mason A. Barney, Note, *Not as Bad as We Thought: The Legacy of Geier v. American Honda Motor Company in Product Liability Preemption*, 70 BROOK. L. REV. 949, 949 (2005) (describing preemption doctrine as “a powerful, confusing, and controversial area of federal law”).

touchstone of pre-emption analysis.”<sup>39</sup> The most obvious way for Congress to manifest its purpose to oust state law is to preempt state law explicitly in the text of the statute. Express preemption occurs when the statutory language itself provides that state law is preempted. The Court has indicated that “[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a ‘reliable indicium of congressional intent with respect to state authority,’ . . . ‘there is no need to infer congressional intent to preempt state laws from the substantive provisions’ of the legislation.”<sup>40</sup> The reviewing court’s task in a case involving express preemption is to “identify the domain expressly pre-empted by” the relevant federal statute.<sup>41</sup>

According to the Supreme Court, “analysis of the scope of the pre-emption statute must begin with its text,” but judicial interpretation of an express preemption provision “does not occur in a contextual vacuum. Rather, that interpretation is informed by” a judicially created presumption against preemption.<sup>42</sup> The Court has described the presumption and its rationale as follows:

First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt [state law]. In all pre-emption cases, and particularly in those in which Congress has “legislated . . . in a field which the States have traditionally occupied,” we “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>43</sup>

The presumption against the preemption of state police power regulations is relevant not only in determining whether preemption has occurred at all. The Court has also declared it appropriate to rely on the presumption “to support a narrow interpretation of . . . an express [preemptive] command. . . . That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.”<sup>44</sup> The Court also has stated that, in defining the scope of an express preemption provision,

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<sup>39</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

<sup>40</sup> *Id.* at 517 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978); *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 282 (1987)).

<sup>41</sup> *Id.*

<sup>42</sup> *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-85 (1996) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment)).

<sup>43</sup> *Id.* at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also* *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (stating flatly that “[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law”); *City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981) (stating that, in assessing whether federal law preempts state common law, the Supreme Court “begins ‘with the assumption that the historic police powers of the states were not to be superseded by federal legislation unless that was the clear and manifest purpose of Congress’”).

The Court’s adherence to the presumption against preemption has not been consistent, however. *See, e.g.*, *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347 (2001) (refusing to apply the presumption against preemption in the context of policing fraud against federal agencies because the field was not one involving traditional state regulation and “the relationship between a federal agency and the entity it regulates is inherently federal in character [and] the relationship originates from, is governed by, and terminates according to federal law”).

<sup>44</sup> *Medtronic*, 518 U.S. at 485.

the courts must rest mainly on congressional purpose, which “primarily is discerned from the text of the preemption provision and the statutory framework surrounding it. In addition, a court resolving express preemption challenges should consider the ‘structure and purpose of the statute as a whole,’ as revealed not only in the text, but through the reviewing court’s reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.”<sup>45</sup>

Even if a federal statute does not explicitly preempt state law, it may do so implicitly. The Court has recognized two types of implied preemption, occupation of the field and conflict preemption. With respect to the first form of implied preemption, the Court has “recognized that a federal statute implicitly overrides state law . . . when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively.”<sup>46</sup> Implied preemption based on conflict occurs where either it is impossible for a private party to comply with both state and federal requirements or state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>47</sup> In assessing whether state law represents an obstacle to the pursuit of federal objectives, “[w]hat 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.”<sup>48</sup>

The various categories of preemption are not airtight and mutually exclusive.<sup>49</sup> More than one form may apply to a given preemption inquiry, and the distinctions among the various forms of implied preemption are not always clear.<sup>50</sup> The Court has recognized, for example, that even if an express preemption provision does not cover a particular state law, that law may still be implicitly preempted.<sup>51</sup>

Despite the potential for overlap and confusion among the various categories of preemption, Part III analyzes the impact of federal inaction on the preemption of state law by reference to each of the traditional categories discussed above: express

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<sup>45</sup> *Id.* at 486 (quoting *Gade*, 505 U.S. at 908).

<sup>46</sup> *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002).

<sup>47</sup> *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). *See also* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (citation omitted) (stating that preemption may occur “by implication from the depth and breadth of a congressional scheme that occupies the legislative field or by implication because of a conflict with a congressional enactment”).

<sup>48</sup> *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000).

<sup>49</sup> *Id.* at 372 n.6 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990) (stating that “the categories of preemption are not ‘rigidly distinct’”).

<sup>50</sup> *Id.* (citing *Gade*, 505 U.S. 88, 104 n.2 (1992) (“noting similarity between ‘purpose-conflict pre-emption’ and preemption of a field, and citing *L. TRIBE, AMERICAN CONSTITUTIONAL LAW* 486 (2d ed. 1988)); 1 *L. TRIBE, AMERICAN CONSTITUTIONAL LAW* 1177 (3d ed. 2000) (noting that ‘field’ preemption may fall into any of the categories of express, implied, or conflict preemption”).

<sup>51</sup> *See, e.g.,* *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) (recognizing the validity of a theory that state law that is not expressly preempted might nevertheless be preempted by the entire statute); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000) (stating that the presence of either a savings clause or an express preemption provision “does not bar the ordinary working of conflict pre-emption principles,” such as implicit conflict preemption).

preemption, implied preemption by occupation of the field, implied preemption due to physical impossibility, and implied preemption due to frustration of federal objectives.

### III. THE PREEMPTIVE EFFECT OF THE FEDERAL GOVERNMENT'S FAILURE TO ACT

The general framework sketched out above for analyzing whether federal law preempts state law does not distinguish between those situations in which the allegedly preemptive impact derives from the federal government's action and those in which a federal failure to act is involved. Relatively little attention has been paid to whether policymakers and judges should address preemption questions differently if the basis for preemption is federal inaction rather than action, even though preemption may have disparate policy implications in the two sets of situations.

This part explores the circumstances in which preemption of state law by federal inaction is appropriate. It first provides criteria for determining as a normative matter whether Congress should explicitly preempt state regulation despite its decision not to create a federal regulatory presence in the area affected by state regulation. It then analyzes how the courts have addressed and should address claims that state law has been preempted by federal inaction. Finally, it illustrates the impact of the approach to preemption by inaction recommended here by applying that approach to determine whether efforts by the states to regulate activities that contribute to global climate change should be preempted.

#### A. Express Preemption

Preemption by inaction questions can arise in two different regulatory contexts. First, Congress must decide whether to preempt state law even though it is not willing to adopt federal laws controlling the activities subject to the state law in question. Second, if Congress has included an express preemption provision in a federal statute, the courts must determine the scope of that provision if its applicability to a particular state regulatory program is not clear from the face of the provision. For reasons discussed below, Congress should exercise its authority to preempt by inaction sparingly and the courts should interpret the scope of express preemption provisions narrowly when the basis for preemption is the federal government's failure to act.

##### 1. *The Limited Justifications for Preemption by Inaction*

Congress may preempt state law in its entirety, assuming it is authorized under the enumerated powers set forth in Article I of the Constitution to intervene in the area that would otherwise be covered by state law. The exercise of that power to preempt should be exercised carefully, however, in circumstances in which the federal government has not established its own presence in the relevant field of regulation.

The reasons why it may be advisable for Congress to refrain from readily preempting state law despite federal inaction in the area covered by state law are illustrated by considering the impact of preemption on state pollution control laws. States

may adopt these laws to address a perceived market failure, such as the failure of an unregulated market to force polluters to take into account the harmful impacts that their activities impose on others.<sup>52</sup> A state also may enact pollution control laws to reduce levels of health or environmental risks that it considers to be unacceptably high.

The Framers of the Constitution sought to preserve state sovereignty at the same time that they created a new national government. The Supremacy Clause – the source of the preemption doctrine – undoubtedly allows appropriately adopted federal law to supplant state law. In light of the importance the Framers attributed to the preservation of state sovereignty, however, Congress should exercise that authority sparingly and only after careful consideration of the impact of the resulting infringements on state sovereignty. These considerations are particularly apt when the state law whose preemption is at issue falls within the realm of traditional state authority, such as the power to take actions to protect the public health and safety.<sup>53</sup>

Further, Congress should be even more reluctant to preempt environmental laws by inaction than it is to adopt a federal regulatory regime that displaces state law. If a state's pollution control law is preempted despite the absence of any federal regulation of the same activities, polluters will remain free to emit levels of pollution that the state deems inappropriately high because those levels lead either to inefficient resource allocation, inadequate protection of public health and the environment, or both. If state law is preempted as a result of the promulgation of a pollution control program by the federal government, the activities the state sought to regulate will at least be subject to some constraints other than those supplied by the market.<sup>54</sup>

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<sup>52</sup> See ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 11-13 (5<sup>th</sup> ed. 2007). See also SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, REGULATORY LAW AND POLICY: CASES AND MATERIALS 53 (3d ed. 2003):

The price that consumers pay for a product in an efficient market reflects the full value of the resources that are used in the production of that product. A market flaw exists when the producer of a product avoids paying for some of these production costs. For example, if the owner of a factory that emits pollution does not pay the medical expenses of persons who become ill from the pollution, the price of the product will not reflect such medical costs. The market will be inefficient because there will be more demand for the product than if the factory owner had paid for the damages caused by the pollution. If the factory owner had made such payments, the price of the firm's products would have been higher, and fewer products would have been sold.

"One of the key goals of environmental law is thus to bring environmental externalities into the marketplace." JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 20-21 (2d ed. 2007). Other types of regulation seek to promote economic efficiency by addressing other kinds of market failure, such as the absence of competition, barriers to entry into a market, inadequate or inaccurate information for consumers, or inadequate provision of public goods. Still other regulatory regimes pursue noneconomic goals, such as inequitable distribution of wealth or the pursuit of noneconomic collective values.

<sup>53</sup> Cf. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 591 (2001) (Stevens, J., concurring in part, concurring in the judgment in part, and dissenting in part) (characterizing the powers to regulate land use and protect the health and safety as "at the heart of the States' traditional police power").

<sup>54</sup> The difference between preemption by action and inaction may a difference of degree rather than kind. If a federal program to control pollution is weak, the resulting level of pollution may still be less efficient or less protective than the state whose law is preempted desires. Even if the federal is rigorous, a state may prefer an even more stringent program. If it is precluded from imposing one, the resulting level of polluting activity will remain too high from the perspective of the state.

These concerns should not preclude federal preemption of state environmental, health, and safety regulation across the board. Preemption by inaction is appropriate in two contexts. First, Congress should preempt a state regulation if it concludes that the state's approach to addressing a particular form of market failure (such as unaccounted for externalities) will adversely affect the interests of other states who are not capable of protecting themselves against the externalities created by the state regulatory regime whose fate is at issue. This justification for preemption mirrors the rationale the Supreme Court has developed for interpreting the Commerce Clause of the Constitution as imposing constraints on state activity that discriminates against interstate commerce or results in extraterritorial regulation.<sup>55</sup>

Second, it is appropriate for Congress to preempt state regulation, despite the absence of a federal regulatory program, if it concludes that federal interests are best served by confining legal constraints on the operation of the free market to those derived from traditional sources of law such as common law contract and property law rules. Congress might decide, for example, that the adoption of diverse state regulatory requirements threatens the development of a beneficial new technology and that, unless and until Congress decides to regulate the use of that technology, there should be no positive statutory or administrative regulation.<sup>56</sup> It is quite another thing for Congress to displace a state's regulatory efforts simply because it concludes that the state's perception that market failure exists is mistaken or that the regulatory regime the state has adopted to address market failure will be ineffective. The respect for state sovereignty reflected in our constitutional system of federalism supports allowing a state to regulate activities within the state's borders even if its chosen method of regulation is ill-advised or unnecessary because of the state's mistaken diagnosis of market failure.

If Congress determines that one of the two circumstances that justify preemption despite the absence of federal regulation exists, it should include in the statutory preemption provisions it adopts an explicit justification for preemption. The statute

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<sup>55</sup> See, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). As the Court recently explained, "when a law favors in-state business over out-of-state competition, rigorous scrutiny is appropriate because the law is often the product of 'simple economic protectionism.'" *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1795-96 (2007) (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992); *Philadelphia v. New Jersey*, 437 U.S. at 626-27). See also *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151 (7<sup>th</sup> Cir. 1999) (striking down as an improper "clog on interstate commerce" a Wisconsin statute allowing out-of-state waste to be disposed of within Wisconsin only if the community where the waste originates adopts an ordinance incorporating the mandatory components of Wisconsin's recycling program).

<sup>56</sup> Cf. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (describing Congress's decision in adopting the Telecommunications Act of 1996 to "encourage the rapid deployment of new telecommunications technologies" by reducing "the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers" and imposing "specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities"); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983) (describing "Congress' determination that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing").

should enunciate either that state regulation would impose unjustified externalities on states other than the adopting state or that state regulation would interfere with federal objectives that can best be promoted by freezing the status quo, thereby blocking the adoption of constraints on the free market that are not reflected in existing sources of law such as rules of contract and property law. In the first case, the statute should identify the externalities the preemption provision is designed to prevent. In the second case, Congress should identify the federal interests it seeks to protect and the manner in which state regulation would frustrate those interests.

2. *The Need for Narrow Judicial Construction of Express Preemption Provisions*

The same respect for state sovereignty, especially in areas of traditional state concern, which supports limited invocation of Congress's power to preempt in the face of federal inaction also supports narrow judicial construction of express statutory preemption provisions when the alleged preemption occurs in the context of inaction. Congress is fully capable of expressing clearly its desire to preempt state regulation even though the federal government has chosen not to act. If an express preemption provision does not clearly cover situations in which the federal government has failed to act, the courts should presume that Congress did not intend to preempt through inaction.

The Supreme Court has adopted precisely that approach in some cases in which federal statutes were alleged to preempt state law despite the federal government's failure to regulate the activities covered by the state regime. In *Puerto Rico Department of Consumer Affairs v. ISA Petroleum Corp.*,<sup>57</sup> for example, several oil companies sued Puerto Rico claiming that its regulations imposing excise taxes on oil refiners were preempted by federal law. In 1973, Congress adopted the Emergency Petroleum Allocation Act,<sup>58</sup> which authorized the President to issue regulations controlling the prices and allocation of crude oil and refined petroleum products. A subsequent statute extended the President's authority, but subjected it to a sunset provision.<sup>59</sup> The oil companies claimed that the 1973 Act "evinced a federal intent to enter the field of petroleum allocation and price regulation, and that [the subsequent Act] never countermanded that intent, but merely changed the nature of the federally imposed regime from one of federal hands-on regulation to one of federally mandated free-market control."<sup>60</sup>

The Court disagreed with that characterization of the second of the two federal statutes, rejecting the refiners' preemption challenge. It concluded that, although the Constitution allows Congress to create the kind of regime described by the refiners, the courts should not allow Congress to create one "subtly."<sup>61</sup> It stated that "[w]ithout a text

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<sup>57</sup> 485 U.S. 495 (1988).

<sup>58</sup> Pub. L. No. 93-159, 87 Stat. 627 (1973).

<sup>59</sup> *Puerto Rico Dep't*, 485 U.S. at 498 (citing the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975)).

<sup>60</sup> *Id.* at 500.

<sup>61</sup> *Id.*

that can . . . plausibly be interpreted as *prescribing* federal pre-emption it is impossible to find that a free market was mandated by federal law.”<sup>62</sup> The snippets of legislative history the oil companies supplied to demonstrate congressional intent to preserve a free market in petroleum products failed to provide the “clear and manifest” evidence of intent necessary to support preemption. The Court distinguished a case decided in 1983, in which it had stated that “[a] federal decision to forego regulation in a given area may imply an authoritative determination that the area is best left *unregulated*, and in that event would have as much pre-emptive force as a decision *to regulate*.”<sup>63</sup> According to the Court in the *Puerto Rico Department* case, Congress enacted the statute at issue in the 1983 case “to fill a regulatory gap, not to perpetuate one.”<sup>64</sup> The Court therefore concluded that Congress’s withdrawal from substantial involvement in regulation of the petroleum industry did not amount to an “extant action” sufficient to create an inference of preemption “in an unregulated segment of an otherwise regulated field[;] preemption, if it is intended, must be explicitly stated.”<sup>65</sup> Congress’s decision to repeal the 1973 Act “did not leave behind a pre-emptive grin without a statutory cat.”<sup>66</sup>

The *Puerto Rico Department* case highlights the need for an explicit statement by Congress that it intends its failure to regulate or authorize regulation by a federal agency to preempt state regulation. If anything, the inference that Congress intended to oust state regulatory authority is even weaker when the federal government has never regulated than where it has regulated and chosen to stop doing so. In the latter situation, it is at least plausible that, after reviewing the effects of federal regulation, Congress decided that regulation was not having the intended beneficial effects and that the absence of regulation was preferable. In any event, whether the federal government has regulated and chosen to cease doing so or has never regulated at all in the field chosen for state intervention, the courts should not find preemption unless Congress has clearly stated in the statute that states may not regulate despite the absence of federal regulatory activity.

The Supreme Court has followed this approach in cases involving alleged preemption of common law remedies as well as positive regulatory enactments.<sup>67</sup> In

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<sup>62</sup> *Id.* at 501.

<sup>63</sup> *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 384 (1983).

<sup>64</sup> *Id.*

<sup>65</sup> *Puerto Rico Dep’t*, 485 U.S. at 504.

<sup>66</sup> *Id.* Justice Scalia, who wrote the majority opinion in *Puerto Rico Dep’t*, was presumably referring to the Cheshire cat in Lewis Carroll, *Alice in Wonderland and Through the Looking Glass* 63-67 (Grosset & Dunlap 1946) (1865). See generally Parker V. Potter, *Wondering About Alice: Judicial References to Alice in Wonderland and Alice through the Looking Glass*, 28 WHITTIER L. REV. 175, 200-15 (2006).

<sup>67</sup> The Supreme Court at one time applied the presumption against preemption with particular force when the body of law allegedly preempted was state common law. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984), the Court found it “difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct” by preempting state common law remedies. That analysis reflected “two important assumptions about congressional purposes: that Congress would not destroy traditional means of legal recourse without acknowledging it openly, and that, therefore, Congress presumably intends that [these means of] recourse remain.” Mary J. Davis, *On Preemption, Congressional Intent, and Conflict of Laws*, 66 U. PITT. L. REV. 181, 202 (2004). More recently, the Court has “backed away” from the application of a presumption against federal preemption of state common law damage actions and adopted instead an approach “which incorporates an assessment of legislative purposes without the use of any presumptions, coupled with a default to federal law in the case of an actual conflict.” *Id.* at



*Sprietsma v. Mercury Marine*,<sup>68</sup> for example, the surviving spouse of a woman who died when she fell out of a boat and was struck by the propeller of the boat's outboard motor brought a tort action against the manufacturer of the outboard motor used on the boat. The manufacturer asserted that the Federal Boat Safety Act of 1971 (FBSA)<sup>69</sup> preempted the tort action. That statute authorizes the Secretary of Transportation, acting through the Coast Guard, to issue regulations establishing minimum safety standards for recreational vessels and associated equipment.<sup>70</sup> The FBSA includes a preemption provision, which bars the states from establishing or enforcing "a law or regulation establishing a recreational vessel or associated equipment performance standard or imposing a requirement for associated equipment . . . that is not identical to a regulation" issued by the Coast Guard under the FBSA.<sup>71</sup> Although the Coast Guard issued regulations that included boat performance and safety standards, they did not include any propeller guard requirement. After an advisory committee recommended that the Coast Guard require the adoption of propeller injury avoidance methods, the Coast Guard indicated that it would do so in subsequent regulations, but at the time of the accident, it had not yet done so.<sup>72</sup> The Supreme Court quickly disposed of the manufacturer's express preemption claim, concluding that the FBSA's preemption provision does not apply to common law claims.<sup>73</sup> It reasoned that it made sense for Congress not to preempt common-law claims, "which – unlike most administrative and legislative regulations – necessarily perform an important remedial role in compensating accident victims. Indeed, compensation is the manifest object of the [FBSA's] saving clause, which focuses not on state authority to regulate, but on preserving 'liability at common law or under State law.'"<sup>74</sup>

### 3. *Express Preemption by Inaction of State Climate Change Regulation*

Assuming the federal government continues to refrain from regulating activities that contribute to global climate change, what implications would the adoption of the standards for congressional and judicial preemption by inaction described in this section have for preemption of state regulation of those activities? The standards would support

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200. See also *id.* at 202 (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)); *id.* at 211 (noting that in *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), the Court "never mentions the presumption against preemption," suggesting that "the previous 'default' to state law that might have occurred under such a presumption is gone, and a 'default' to federal law inherent in the Supremacy Clause has taken its place"); Ausness, *supra* note 38, at 959 (pointing out that, instead of applying the presumption against preemption, the Court in *Geier* "relied heavily on elusive 'ordinary pre-emption principles' to interpret the statutory text").

<sup>68</sup> 537 U.S. 51 (2002).

<sup>69</sup> 46 U.S.C. §§ 4301-4311.

<sup>70</sup> *Id.* § 4302(a).

<sup>71</sup> *Id.* § 4311.

<sup>72</sup> *Sprietsma*, 537 U.S. at 61-62.

<sup>73</sup> *Id.* at 63-64. The express pre-emption clause applied to "a [state or local] law or regulation." 46 U.S.C. § 4306. The Court determined that "the terms 'law' and 'regulation' used together in the pre-emption clause indicate that Congress pre-empted only positive enactments. If 'law' were read broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to 'regulation' in the pre-emption clause superfluous." *Sprietsma*, 537 U.S. at 63.

<sup>74</sup> *Sprietsma*, 537 U.S. at 64 (quoting 46 U.S.C. § 4611(g) and citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)).

partial preemption of state laws regulating GHG emissions from motor vehicles, but would not support preemption of state regulation of stationary sources.

a. Should Congress Preempt State Regulation of Activities that Contribute to Climate Change?

The preceding discussion suggests that Congress should preempt state regulation despite federal inaction only if state regulation would adversely affect the interests of other states unable to protect themselves or federal interests are best served in the absence of positive regulation. One state's regulation of GHGs would not impose any environmental externalities on other states. If a regulated source, mobile or stationary, complies with the state's controls, adverse impacts on the environment will be reduced, not increased. Even if a stationary source subject to state A's constraints on GHG emissions decides to locate elsewhere to avoid state A's regulation, other states will not suffer additional adverse GHG-related environmental effects because the emission of GHGs will have the same adverse impacts on the environment regardless of where they take place.<sup>75</sup> Thus, the degree to which a source subject to state A's regulation contributes to global climate change that adversely affects state B will be the same regardless of whether the source continued to operate in state A free of regulation, moves to state C to avoid regulation, or even locates in state B.<sup>76</sup>

State regulation also has the potential to impose economic externalities on other states.<sup>77</sup> If, for example, state A restricts motor vehicle emissions of GHGs and the auto manufacturers decide to continue to market their products in those states, the economic interests of other states could be affected. Compliance with state A's regulation is likely to increase the auto manufacturers' production costs. Professor Daniel Esty described the problem as follows:

Many pollution-control or resource-use decisions have economic impacts that cannot be dismissed simply as a function of welfare-enhancing resource reallocation. California's adoption of auto emissions standards that exceed national requirements may reflect the fact that Californians stand to benefit greatly from lower emissions and to pay relatively little of the extra pollution control costs that will be borne largely by out-of-state

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<sup>75</sup> “[G]reenhouse gas emissions do not impact locally, but globally: no matter where the gases are emitted, they contribute to global warming at any place on Earth.” Isabel Rauch, *Developing a German and an International Emissions Trading System – Lessons from U.S. Experiences with the Acid Rain Program*, 11 FORDHAM ENVTL. L.J. 307, 431 (2000). See also Karl S. Coplan, *The Intercivilizational Inequities of Nuclear Power Weighed Against the Intergenerational Inequities of Carbon Based Energy*, 17 FORDHAM ENVTL. L. REV. 227, 231 (2006) (stating that “[g]reenhouse gas impacts are global, not local or regional”).

<sup>76</sup> If the stationary source locates in state B, it might adversely affect state B's environment in other ways, such as by contributing to air pollution that is localized in nature or to water pollution. Those effects may justify preemption under federal regulatory programs that address those types of pollution, but preemption would not be justified on the basis of the impact in state B of state A's regulation of GHG emissions.

<sup>77</sup> “An [economic] externality may be viewed as either an economic gain or loss accruing to one or more ‘recipient’ agents as the result of an economic action ‘initiated’ by another agent – with the gain or loss not being reflected in price.” Jesse Ratcliffe, Comment, *Reenvisioning the Risk Bubble: Utilizing a System of Intra-Firm Risk Trading for Environmental Protection*, 92 CAL. L. REV. 1779, 1789 n.51 (2004) (quoting BERNARD P. HERBER, MODERN PUBLIC FINANCE 36 (3d ed. 1975)).

automakers. In this case, there is no market mechanism to ensure that California's action is nationally welfare-enhancing. Californians may pay part of the bill for their more stringent pollution controls through higher prices for cars, but consumers elsewhere may also be forced to pay increased prices, essentially subsidizing California's reduced-pollution benefits. In particular, we have no guarantee that the benefits to California outweigh the sum of the costs imposed both inside and outside of California.<sup>78</sup>

Thus, a state like Michigan may suffer as a result of state A's regulation if the manufacturers experience reduced profits, and therefore reduced state tax liability. If the manufacturers decide to market the same cars nationwide and to build them all to comply with state A's regulations, the costs of purchasing cars is likely to increase in all states. The creation of these adverse external economic consequences provides a stronger justification for preempting state A's regulation than the non-existent adverse environmental externalities that flow from state A's regulation.<sup>79</sup> As the discussion immediately below of the other policy ground for preemption despite federal inaction indicates, however, even this ground justifies only partial preemption of state regulation of motor vehicle emissions of GHGs.

The second ground for express preemption of state regulation in the face of federal inaction is the potential for state regulation to thwart federal goals such as uniformity and minimization of transaction costs. Section 209(a) of the CAA limits the degree to which the states may regulate motor vehicle emissions.<sup>80</sup> The justification for preempting state regulation has always been that multifarious state regulatory regimes would create havoc for the auto manufacturers, whose transaction costs would increase significantly if they were forced to manufacture cars with different kinds of emission controls to meet the requirements of each state in which they do business. A 1965 Senate committee report explained that "it would be more desirable to have national standards rather than for each State to have a variation in standards and requirements which could

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<sup>78</sup> Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 594 (1996). Professor Esty asserts that "[f]rom a utility-maximizing perspective, parties suffering from economic or psychological spillovers also should have their interests factored into the regulatory calculus." *Id.* at 593. Early federal air pollution legislation reflected the desire to prevent a state's environmental controls from imposing economic externalities elsewhere. A House committee report recognized that one way for the auto manufacturers to meet diverse state tailpipe emission standards would be to manufacture vehicles that comply with the most stringent controls, federal or state. It found this solution objectionable, however: While manufacturers could meet [the] problems [stemming from separately issued and administered standards] by building vehicles that meet whichever standard is the more stringent, this would lead to increased costs to consumers nationwide, with benefit only to those in one section of the country.

Air Quality Act of 1967, H.R. REP. NO. 90-728 (1967), reprinted in 1967 U.S.C.C.A.N. 1938, 1958.

<sup>79</sup> See Thomas W. Hazlett, *Is Federal Preemption Efficient in Cellular Phone Regulation?*, 56 FED. COMM. L.J. 155, 181 (2003) (quoting Robert P. Inman & Daniel L. Rubinfeld, *Rethinking Federalism*, 11 J. ECON. PERSP. 45, 45 (1997)) ("[E]conomic federalism prefers the most decentralized structure of government capable of internalizing all economic externalities. . . ."); Darin Michael Lowder, *Strange Watershed Bedfellows? Will the EPA's Water Quality Trading Policy Encourage Unlikely Clean Water Alliances?*, 13 GEO. MASON L. REV. 411, 422 (2005) ("Some argue that regulations should be centralized because local regulation fails to account for economic externalities . . . .")

<sup>80</sup> 42 U.S.C. § 7543(a).

result in chaos insofar as manufacturers, dealers, and users are concerned.”<sup>81</sup> The committee supported prohibiting the states from adopting their own controls on emissions from new motor vehicles or new motor vehicle engines on the ground that “a provision such as this is necessary in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles.”<sup>82</sup> Exclusive federal regulation of tailpipe emissions ensures that the auto companies will have to deal with only one standard.

This desire for uniformity and reduced transaction costs obviously has some bearing on the desirability of allowing the states to regulate GHG emissions from motor vehicles. Congress has already determined, however, that a complete prohibition on state tailpipe emissions standards is unwarranted. Section 209(b) of the CAA authorizes EPA to waive the statutory prohibition on state regulation for California.<sup>83</sup> Further, the CAA allows other states to adopt standards identical to those adopted by California and approved by EPA.<sup>84</sup> Allowing California to adopt GHG emission controls and allowing other states to piggyback onto the California standards would seem to pose no greater obstacles to the federal interest in uniformity and minimal transaction costs than the current CAA does for the air pollutants already being regulated by EPA, even if Congress or EPA eventually adopts motor vehicle emission controls for GHGs. The justification for preempting state regulation of GHG emissions from factories and other stationary sources is even weaker, because such sources and the pollution controls they use tend to be designed on a site-specific basis.<sup>85</sup> The transaction cost problem upon which federal preemption of motor vehicle emissions is based therefore exists only to a very limited degree, if at all.

b. Has Congress Expressly Preempted State Regulation of Activities that Contribute to Climate Change?

The CAA does not currently include provisions that specifically identify the degree to which state regulation of GHGs is allowed. The statute does have more general preemption provisions. One provision bars state regulation that is less stringent than standards adopted by EPA.<sup>86</sup> This provision has no bearing on state regulation of GHGs because EPA has not adopted any standards restricting GHG emissions. Another provision is the one that bars state regulation of motor vehicle emissions, but allows EPA to exempt California from that prohibition.<sup>87</sup> Narrow construction of that provision might support the conclusion that the prohibition only applies when EPA has adopted

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<sup>81</sup> S. REP. NO. 89-192, at 6 (1965).

<sup>82</sup> *Id.* at 8.

<sup>83</sup> 42 U.S.C. § 7543(b).

<sup>84</sup> 42 U.S.C. § 7507 (providing that, notwithstanding the preemptive provisions of § 209(a), states containing EPA-approved plans for controlling pollution in nonattainment areas may adopt and enforce standards controlling emissions from new motor vehicles if they are identical to California’s standards for which EPA has granted a waiver).

<sup>85</sup> See, e.g., Regan J.R. Smith, *Playing the Acid Rain Game: A State’s Remedies*, 16 ENVTL. L. 255, 315 (1986) (explaining that “nitrogen oxide reductions are dependent on very site specific factors, such as types of fuel, type of burner, and type of plant”).

<sup>86</sup> 42 U.S.C. § 7416.

<sup>87</sup> 42 U.S.C. § 7543(a)-(b).

motor vehicle emission controls for the particular air pollutant involved. Because it has not done so for GHGs, the states are free to regulate them. At a minimum, the provision allows California to seek EPA's approval to regulate GHG emissions from motor vehicles.<sup>88</sup> If EPA approves of California's request, other states can adopt controls identical to California's EPA-approved standards.<sup>89</sup>

## B. Implied Preemption

Assuming that Congress has not adopted any express preemption provision or that any such provision does not cover the activities subject to state regulation, the next question is whether federal inaction nevertheless implicitly preempts state law. This section argues that even if the Supreme Court does not jettison the implied preemption doctrine entirely or significantly narrow the scope of its application, as some have urged, implied preemption based on occupation of the field is never appropriate in the face of federal inaction. The courts should refuse to preempt in the face of inaction based on an alleged conflict between federal and state law unless Congress has explicitly delegated to a federal agency the authority to preempt state law and the agency has appropriately exercised that authority.

### 1. *Should Courts Ever Recognize Implied Preemption?*

Although it is well established that federal law may preempt state law implicitly even if it does not do so explicitly,<sup>90</sup> it is not so clear when implicit preemption may be triggered by federal inaction. It is obvious that the complete absence of any federal activity can never provide a basis for preempting state law. The Supremacy Clause provides that the Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land," anything in state law to the contrary notwithstanding.<sup>91</sup> In the absence of any federal "Law," the Supremacy Clause simply does not apply and preemption is therefore impossible. As the Supreme Court recognized in the *Puerto Rico Department* case, "[t]here is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it."<sup>92</sup> Thus, if Congress considers but decides not to adopt legislation that would authorize federal regulation of particular activities, the legislature's refusal to adopt the legislation has no preemptive effect. Federal law becomes effective only if it is passed by both Houses of Congress and is signed by the President.<sup>93</sup> The failure to enact regulatory legislation does not satisfy

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<sup>88</sup> EPA may issue a waiver only if it determines "that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(b)(1). EPA may not issue a waiver if it finds that the state's action is arbitrary and capricious, the state does not need its own standards "to meet extraordinary and compelling conditions," or the state's adoption and enforcement procedures are not consistent with the statutory provisions authorizing EPA to control motor vehicle emissions. *Id.*

<sup>89</sup> 42 U.S.C. § 7507.

<sup>90</sup> Indeed, the Supreme Court acknowledges that state law may be preempted even when the allegedly preemptive federal statute includes an express preemption provision that does not apply to the activities subject to state regulation. *See supra* note 51.

<sup>91</sup> U.S. CONST. art. VI, cl. 2-3.

<sup>92</sup> *Puerto Rico Dep't of Consumer Affairs v. ISA Petroleum Corp.*, 485 U.S. 495, 503 (1988).

<sup>93</sup> The bicameralism and presentment requirements derive from U.S. CONST. art. I, § 7.

either the bicameralism or presentment requirements of Article I of the Constitution, and therefore has no effect whatsoever, including preemptive effect on state law.<sup>94</sup>

The harder cases involve situations in which Congress has adopted legislation that does not cover the activities subject to state regulation, or Congress has authorized a federal agency to regulate the activities subject to state regulation but the agency has chosen not to do so. Some scholars have argued that the Supreme Court should abolish the implied preemption doctrine entirely (except in situations in which compliance with both federal and state law is impossible),<sup>95</sup> constrain the application of implied preemption principles,<sup>96</sup> or strengthen the presumption against preemption.<sup>97</sup> Each of these approaches makes a finding of implied preemption by federal inaction unlikely.

One justification for doing so is that Congress is fully capable of including in a statute an explicit declaration of preemption and defining the scope of the preempted field. If Congress fails to adopt an express preemption provision, the respect for state sovereignty reflected in the federalism structure of the Constitution supports judicial refusal to oust state law implicitly. Further, if the courts refuse to recognize implicit preemption, Congress will have strong incentives to consider whether preemption is appropriate and, if so, state the rationale for and the scope of the preemption it desires on the face of the statute. Although this approach represents a significant departure from established Supreme Court preemption doctrine, those who support it tend to claim that it is desirable as a means of encouraging Congress to make the difficult policy choices associated with preemption instead of foisting them upon the courts.<sup>98</sup> Some state courts

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<sup>94</sup> Cf. *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (holding that legislative veto violated the bicameralism and presentment requirements).

<sup>95</sup> Cf. Betsy J. Gray, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 621-22 (1997) (arguing that “when a federal statute either has no preemption clause or has a clause that does not explicitly refer to state tort claims, courts should rarely find implied preemption of tort claims, under either the ‘occupation of the field’ or ‘direct conflict’ rubric,” but that, “in the absence of language expressly preempting state tort claims, a court may still be justified in finding implied preemption when compliance with both the state tort duty and the federal statute would be impossible”).

<sup>96</sup> See, e.g., Nelson, *supra* note 11, at 232 (asserting that “a general doctrine of obstacle preemption is misplaced”); *id.* at 304 (supporting preemption framework under which, “[i]n 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”).

<sup>97</sup> See, e.g., Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 469 (1980) (“In the system of American public law, the basic assumption is that states have authority to regulate their own citizens and territory. This assumption justifies an interpretive principle requiring a clear statement before judges will find federal preemption of state law.”); Hills, *supra* note 17 (supporting a clear statement rule presumption against preemption on the ground that it will enhance the democratic accountability of Congress); Larry J. Obhof, *Federalism, I Presume? A Look at the Enforcement of Federalism Principles Through Presumptions and Clear Statement Rules*, 2004 MICH. ST. L. REV. 123.

<sup>98</sup> See, e.g., Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 511-12 (2002) (stating that “clear statement” rule in the context of implied preemption “operates to ensure that the federal political process has focused upon the displacement of state authority before it acts to do so. Without such a rule there is no assurance that in fact Congress has attended to the consequences of displacing state authority.”).

have already abolished implied preemption, at least in certain areas such as the authority to tax.<sup>99</sup>

Whether or not the abolition or significant restriction of implied preemption is appropriate as a general matter, the argument in favor of eliminating or confining implied preemption in cases that do not involve physical impossibility is perhaps at its strongest when the federal government has not intervened in the area affected by state regulation. The same considerations that support limited invocation of *Congress's* authority to preempt explicitly in the face of inaction are relevant when litigants ask *courts* to find that state regulation is implicitly preempted despite the absence of federal action. A court should not lightly assume that Congress wanted to preempt to avoid the adverse spillover effects of state regulation or to prevent interference with federal goals such as uniformity because Congress is fully capable of making such intent explicit. In addition, preemption in the face of federal inaction leaves the state whose law is preempted at the mercy of the market failure that prompted it to regulate in the first place because no substitute federal regulatory regime exists. Courts should be reluctant to conclude that Congress chose to divest the states of their traditional authority to protect the health, safety, and welfare of their citizens without providing some assurance that it was taking alternative steps to address the states' concerns.<sup>100</sup>

## 2. *Occupation of the Field Preemption*

One of the two bases for a court's conclusion that a state regulatory law is implicitly preempted is the conclusion that Congress has occupied the entire field in which the state seeks to regulate, leaving no room for supplemental state regulation of any kind. In the context of federal preemption by inaction, the question is whether a failure to regulate should ever be regarded as tantamount to occupation of the field and, if so, under what circumstances. The Supreme Court has not precluded occupation of the field based on federal inaction, although that result seems appropriate. Its decisions indicate, however, that occupation by inaction rarely occurs, and that neither a desire for uniformity nor the presence of a purportedly comprehensive regulatory program should be regarded as sufficient grounds for preempting a state's authority to regulate activities that are not subject to federal regulation.

### a. *Occupation of the Field Preemption by Inaction*

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<sup>99</sup> See, e.g., *Cincinnati Bell Tel. Co. v. Cincinnati*, 81 Ohio St. 3d 599, 693 N.E. 2d 212 (1998).

<sup>100</sup> See, e.g., *H.P. Welch Co. v. New Hampshire*, 306 U.S. 79, 84-85 (1939) (concluding that, "[i]n view of the efforts of governmental authorities everywhere to mitigate the destruction of life, limb and property resulting from the use of motor vehicles, it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed."). Cf. *Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 59, 88 (1978) (raising the possibility that the due process clause "requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy," but finding it unnecessary to decide whether it does because the federal statute in question did so). Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 179-82 (1985) (arguing that courts should avoid interpreting federal statutes as preempting state common law damage actions in the absence of a comparable statutory substitute).

Suppose that Congress has adopted legislation that addresses some aspects of a particular form of market failure but not others. A state regulates in one of the areas not explicitly addressed by the federal statute. In such cases, courts should never find implied preemption based on occupation of the field subject to state regulation. If Congress wants to preempt an aspect of the field that it decides not to address in its larger regulatory program it is easy enough for it to say so in the statute. If it does not, respect for state sovereignty and preservation of the states' ability to protect their citizens from market failures that threaten the public health, safety, or welfare dictate that the state regulatory regime survive. Even if Congress did not regulate the activities that the state has now chosen to address because it did not anticipate the problem when it initially adopted the statute, Congress has the authority to amend the statute to preempt state law explicitly on the basis of its capacity to foist problems on other states or interfere with federal goals such as uniformity. Unless and until Congress exercises that power, the state regulatory program should survive.

Although the Supreme Court has not enunciated an absolute prohibition on implied occupation of the field preemption based on federal inaction, it has been reluctant to preempt in that context. The *Sprietsma* case discussed above is illustrative. After rejecting the boat manufacturer's claim that the FBSA explicitly preempted state common law tort actions for damages arising from accidents involving propellers, the Court acknowledged that the plaintiff's tort claim might nonetheless be implicitly preempted.<sup>101</sup> It held, however, that the statute clearly did not occupy the field of recreational boat safety so as to foreclose state common law remedies. The Act neither required that the Coast Guard adopt "comprehensive regulations covering every aspect of recreational boat safety and design," nor reflected "a clear and manifest intent to sweep away state common law."<sup>102</sup> The manufacturer asserted that state common law damage awards would thwart the uniformity in regulation sought by Congress, but the Court found that the federal government's interest in uniformity was "not unyielding," as reflected in the Coast Guard's previous decisions to exempt some state regulations from the explicit statutory preemption provision.<sup>103</sup>

Other federal and state courts also have rejected a purported congressional desire for uniform federal regulation as a sufficient basis for finding implied preemption based on occupation of the field in cases of federal inaction. As one state court put it, a "generic concern for uniformity" should be regarded as inadequate to displace state law.<sup>104</sup> According to the Supreme Court, there must, instead, be evidence that "Congress intended to centralize all decisionmaking authority in one decisionmaker: the Federal Government."<sup>105</sup> On the other hand, affirmative evidence of Congress's disavowal of a

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<sup>101</sup> The Court indicated that the presence of an express preemption provision "does *not* bar the ordinary working of conflict pre-emption principles." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000)).

<sup>102</sup> *Id.* at 69.

<sup>103</sup> *Id.* at 70.

<sup>104</sup> *Kohn v. Burlington N. & Santa Fe R.R.*, 77 P.3d 809, 813 (Colo. App. 2003).

<sup>105</sup> *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286 (1995).



desire for national uniformity should defeat an argument of field preemption by federal inaction.<sup>106</sup>

Nor should the apparently comprehensive nature of the regulations adopted by a federal agency under a regulatory statute provide the basis for the conclusion that the federal program occupies the field, thereby preempting state regulation of activities left unregulated by the agency. The Supreme Court has indicated that the “pervasive nature” of a federal regulatory statute may “make reasonable the inference that Congress left no room for the States to supplement it.”<sup>107</sup> If the federal government has not regulated at all, of course, it is difficult to characterize its regulatory presence as “pervasive” in any normal sense of that term. Similarly, the Supreme Court has explained that the traditional presumption against preemption is inapplicable when a state “regulates in an area where there has been a history of significant federal presence.”<sup>108</sup> Inaction by definition will normally preclude a finding of such a significant presence.

In addition, the Court has cautioned that courts should be wary of relying on the comprehensiveness of a federal regulatory program to find occupation of the field so as to preclude state regulation of activities falling within federal regulatory lacunae.

To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

. . . Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt. Given the presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations, we will seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety.<sup>109</sup>

Preemption by occupation of the field tends to be rare.<sup>110</sup> It should be rarer still if the basis for preempting state regulation is the federal government’s failure to regulate.

b. Has Congress Preempted State Regulation of Activities that Contribute to Climate Change by Occupation of the Field?

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<sup>106</sup> See, e.g., *Toy Mfrs., Inc. v. Blumenthal*, 986 F.2d 615, 624 (7<sup>th</sup> Cir. 1993). Even in the absence of such evidence, *Sprietsma* indicates that the issuance of exemptions from any express statutory preemption provision by an agency explicitly authorized by statute to create such exemptions strengthens the argument that a regulatory field has not been exclusively occupied by the federal government to the exclusion of the states. *Sprietsma*, 537 U.S. at 70.

<sup>107</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>108</sup> *United States v. Locke*, 529 U.S. 89, 108 (2000).

<sup>109</sup> *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 717-18 (1985).

<sup>110</sup> See Mark C. Levy & Gregory C. Wartman, *Amicus Curiae Efforts to Reform Product Liability at the Food and Drug Administration: FDA’s Influence on Federal Preemption of Class III Medical Devices and Pharmaceuticals*, 60 *FOOD & DRUG L.J.* 495, 497 (2005) (“Preemption through occupation of a field is rare.”)

Whether one applies an approach that prohibits all types of implied preemption other than when compliance with both federal and state regulation is physically impossible or one that reflects a disinclination to recognize implied occupation of the field by inaction, state regulation of GHG emissions by motor vehicles should not be preempted on the ground that the CAA has implicitly occupied the field of regulation of GHG emissions.<sup>111</sup> Nothing in the CAA supplies evidence of “a clear and manifest intent to sweep away” state regulation of GHG emissions.<sup>112</sup> Even in the context in which the benefits of uniform regulation are strongest – regulation of motor vehicle emissions – the CAA contains a concrete manifestation of Congress’s willingness to allow at least one set of state standards that depart from EPA’s.<sup>113</sup> Finally, it would be ludicrous to describe federal regulation of either air pollution in general or GHG emissions in particular as comprehensive in light of the glacial pace at which the federal government has been willing to address global climate change.

### 3. *Conflict Preemption*

Even if Congress has not occupied a particular field of activity to the complete exclusion of state regulation, state law may be preempted based on a conflict between federal and state law. Conflicts exist if either it is physically impossible to comply with both federal and state law or compliance with state law would frustrate federal statutory objectives. Preemption by physical impossibility makes no sense if the alleged basis for preemption is federal inaction. Preemption based on conflict of purpose is more appropriate in the face of federal inaction, but should nevertheless be rare.

Finally, the approach courts take in reviewing an agency’s interpretation of the preemptive effects of a federal statute that the agency is responsible for administering ought to be affected by the fact that the argument for preemption arises from federal inaction. If the agency has failed to exercise any authority it has to regulate the activities subject to state regulation, its conclusion that the statute was intended to preempt state law should be afforded no deference unless Congress has explicitly delegated to the agency the authority to make preemptive judgments.

#### a. *Conflict Preemption by Inaction*

Of the two types of conflict preemption, the analysis of whether federal inaction should be able to preempt state law due to physical impossibility presents a fairly straightforward question. The inquiry into the appropriate circumstances in which federal inaction may frustrate federal statutory purposes is more complex.

#### (1) *Physical Impossibility*

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<sup>111</sup> The outcome of occupation of the field preemption cases often turns on how the court decides to define the scope of the allegedly occupied field. It is obvious that Congress did not intend for the CAA to occupy the broader field of regulation of air pollution. *See, e.g.*, 42 U.S.C. §§ 7407(a), 7416.

<sup>112</sup> *Sprietsma*, 537 U.S. at 69.

<sup>113</sup> 42 U.S.C. § 7543(a)(1).

Conflict preemption based on the impossibility of complying with both federal and state law is unusual in the field of environmental regulation. Emission controls that take the form of performance standards should not pose impossibility problems because they dictate the level of pollution allowed, but not the manner of achieving it. If both the federal and state governments have adopted emissions controls applicable to the same industry and neither one mandates a particular method of compliance, regulated entities can comply with both sets of standards by achieving the more stringent of the two standards. Emissions controls that take the form of design standards are more problematic. If federal and state standards applicable to the same activities both mandate the method of compliance but do so in different ways, it may be impossible to comply with both.<sup>114</sup> Because performance standards predominate under the federal pollution control statutes,<sup>115</sup> instances of conflict due to physical impossibility should be rare.

Even if a state standard takes the form of a design standard, the absence of any federal standard applicable to the activities subject to state regulation would undercut any claim that compliance with both federal and state law is impossible. If state law requires installation of technology “x” and federal law requires nothing at all, it is not physically impossible to comply with the laws of both jurisdictions. It is clearly not physically impossible, for example, for a car manufacturer subject to state controls on GHG emissions to comply with both federal and state law because there is no federal law with which to comply. If state regulation restricts GHG emissions, compliance with that constraint will not violate federal law; the absence of federal restrictions does not preclude a manufacturer from installing emission control equipment either voluntarily or in order to be able to comply with state emission standards.

## (2) Frustration of Federal Purposes

The analysis of whether state regulation frustrates federal objectives in the event that the federal government has not addressed the activities subject to state regulation is more complicated. The mere fact that there is no federal regulation, however, is not enough to support a finding that state regulation would interfere with the accomplishment of federal statutory purposes.

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<sup>114</sup> The difference between performance and design standards has been described as follows:

Both types of standards typically specify a goal that the agency defines by ascertaining the level of pollution abatement that is technologically and economically possible for regulated entities to achieve. The difference is that under a design standard the agency defines the method by which regulated entities are required to achieve the goal – such as by installing and operating a particular kind of pollution control technology or work practice – whereas under a performance standard, regulated entities are free to achieve the goal any way they want. They can use the model technology or work practice identified by the agency as the one that makes compliance possible, or they can devise alternative means of meeting the goal.

Sidney A. Shapiro & Robert L. Glicksman, *Goals, Instruments, and Environmental Policy Choice*, 10 DUKE ENVTL. L. & POL'Y F. 297, 305 (2000).

<sup>115</sup> GLICKSMAN ET AL., *supra* note 52, at 76 (“Despite often being derided as inefficient ‘command and control’ regulation, technology-based standards typically do not mandate the use of any particular technology, but instead require achieving the performance level of the benchmark group.”).

(a) Frustration in the Context of Federal Inaction

A decision by Congress or a federal administrative agency not to regulate particular activities is not sufficient to demonstrate that state regulation of those activities would frustrate federal goals, as Supreme Court preemption decisions recognize. In *Sprietsma*, the outboard motor manufacturer claimed that the plaintiff's tort claims were implicitly preempted by the Coast Guard's decision not to regulate propeller guards. The Court held to the contrary, insisting that "[i]t is quite wrong to view that decision as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation."<sup>116</sup> Instead, the agency's decision not to regulate only maintained the status quo of no federal regulation. According to the Court, "history teaches us that a Coast Guard decision not to regulate a particular aspect of boating safety is fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standards."<sup>117</sup>

The *Sprietsma* decision recognizes that the absence of federal regulation is not necessarily indicative of a judgment by the federal government that federal policies are best promoted by exempting the activities the state seeks to regulate from positive regulation by all levels of government. There are other possible explanations for the absence of federal regulation. Congress or a federal agency may have decided not to regulate, for example, because they do not feel comfortable regulating yet based on the available information. A decision not to regulate may have been based on the perception that a problem that has been identified is not common enough or important enough to warrant the commitment of federal regulatory resources. Neither of these reasons is tantamount to a conclusion that federal purposes would be thwarted if state regulation proceeds in the absence of federal regulation. If a state takes a more precautionary approach to a health and environmental risk than the federal government has done, and is willing to regulate on the basis of less information than the federal government deems necessary to support its own regulatory initiatives, federal purposes are not thwarted if state regulation proceeds. If a problem that is not widespread is nevertheless concentrated in a state that desires to regulate its causes, there is no reason to anticipate that state regulation will frustrate federal purposes. If the only reason that federal and state policymakers reach a different decision on the desirability of regulation is that the two levels of government assess comparative risks differently – the state places a higher priority than the federal government does in addressing a particular form of market failure, as compared to alternative uses of government resources – conflict preemption is not justified on the ground that state regulation would interfere with the achievement of federal objectives. Thus, preemption due to conflict is appropriate only if the federal government "affirmatively decides that no regulation is needed."<sup>118</sup>

(b) The Relevance of the Agency's Position on Preemption by Inaction

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<sup>116</sup> *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002).

<sup>117</sup> *Id.*

<sup>118</sup> *Burlington N. & Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 801 (7<sup>th</sup> Cir. 1999).

Assuming that purpose-based conflict preemption should rest on more than just the absence of federal regulation of the activities that the state has decided to regulate, does it make any difference who decided not to act? Should the preemption analysis differ depending on whether Congress has delegated to the agency the authority to act but the agency has chosen not to do so or Congress has chosen not to even delegate to the agency the authority to regulate?

Even though Part III A.1 above argues as a normative matter that Congress should preempt state regulation despite federal inaction in limited circumstances, if Congress does decide to preempt, and makes that intent explicit,<sup>119</sup> the courts should abide by that determination.<sup>120</sup> By definition, however, if the form of preemption at issue is implied preemption based on a conflict between state regulation and federal policies, Congress has failed to enunciate whether it wants the federal government's unwillingness or inability to act to preclude a particular state regulation. It is not unusual for federal agencies to take a position on whether state regulation would interfere with the achievement of federal statutory goals.<sup>121</sup> The courts should defer to such an assessment only in limited situations.

In particular, a court should not preempt state law based on frustration of federal statutory objectives unless Congress has explicitly delegated to the federal agency that has found state regulation to be inconsistent with federal purposes the authority to preempt a state law that is not explicitly ousted by statute.<sup>122</sup> A broad, general delegation of authority to an agency to implement the federal law should not suffice. The preemption doctrine has the potential to alter radically the balance of state and federal power. Moreover, a federal agency may have an incentive to declare state law preempted because doing so vests in it exclusive authority to regulate in the affected area, thereby enhancing its own power or insuring that it can promote the interests of favored constituencies.<sup>123</sup> If Congress wants to turn over the power to affect the federal-state

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<sup>119</sup> For an example of a provision that delegates to an agency the authority to preempt, see 47 U.S.C. § 253(d) (authorizing the Federal Communications Commission the authority to make preemption determinations).

<sup>120</sup> They ought not to do so, however, if they conclude that Congress lacked the constitutional authority to render judgment on the advisability of regulation.

<sup>121</sup> *See, e.g.*, Food and Drug Administration, Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3935 (Jan. 24, 2006); National Highway Traffic Safety Administration, Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 70 Fed. Reg. 49,223, 49,245 (Aug. 23, 2005) (notice of proposed rulemaking); Office of Comptroller of the Currency, Notice: Preemption Determination, 68 Fed. Reg. 46,264, 46,271 (Aug. 5, 2003).

<sup>122</sup> *Cf.* Union Pac. R.R. Co. v. California Pub. Util. Comm'n, 346 F.3d 851, 866 (9<sup>th</sup> Cir. 2003) (quoting *Indus. Truck Ass'n v. Henry*, 125 F.3d 1305, 1311 (9<sup>th</sup> Cir. 1997)) (stating that an agency's interpretation of the preemptive effect of its own regulations is entitled to deference only if, among other things, "Congress has delegated authority to the agency").

<sup>123</sup> Professor Nina Mendelson described the problem as follows:

. . . While an agency would not directly expand its own jurisdiction in reading an ambiguous statute to preempt state law, it could, through a preemption decision, indirectly lay the groundwork for an increase in the agency's importance by making itself the primary regulator – as a practical matter, the only game in town. This would enable it to demand a larger budget and more employees in order to properly regulate the field. Alternatively, to the extent one accepts a public

balance in that fashion to a federal agency through the latter's determinations to preempt state law, it should therefore say so explicitly. In the absence of such an explicit delegation, the courts should refuse to interpret a general delegation of authority to implement the federal law as encompassing the power to declare state law ousted on the basis of the agency's perception of the presence of a conflict between state law and federal objectives.

This approach to ascertaining the impact of an agency's declaration that state law must be preempted to prevent interference with federal policies is consistent with the Supreme Court's resolution of a different but related issue involving an agency's ability to affect the balance of federal and state regulatory authority. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,<sup>124</sup> the issue before the Supreme Court was how much weight to accord to EPA's and the Army Corps of Engineers' interpretation of their own authority under the federal Clean Water Act (CWA) to require dredge and fill permits for the development of isolated intrastate waters. The Court refused to defer to the expansive interpretation of the scope of the CWA's permit program adopted by the two agencies because of the adverse implications such an interpretation would have on the maintenance of a proper balance between federal and state power. The Court stated:

Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. See *United States v. Bass*, 404 U.S. 336, 349 (1971) (“[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”).<sup>125</sup>

Finding that the agencies' interpretation would result in “a significant impingement of the States' traditional and primary power over land and water use,” the Court concluded that it was obliged to “read the statute as written to avoid the significant constitutional and federalism questions raised by [the agencies'] interpretation,” and therefore reject the agency's request that it defer to its broad reading of its statutory permitting authority.<sup>126</sup> Similarly, in a later case involving the same statutory provision, a plurality of the Court refused to defer to the same agencies' interpretation of the scope of the permit program in

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choice view of agency regulation, an agency's power to preempt conflicting state law would make it better able to deliver on 'deals' with well-organized interest groups. For one example, journalists suggested that an OSHA chief in the Reagan administration might be responding to industry by arguing for the preemption of state law by 'weaker Federal labeling regulation.' Either self- or interest-group capture could conceivably lead an agency to discount state interests in rendering preemption decisions.

Mendelson, *supra* note 15, at 794-95.

<sup>124</sup> 531 U.S. 159 (2001).

<sup>125</sup> *Id.* at 172-73.

<sup>126</sup> *Id.* at 174.

another context because it did not qualify as a “‘clear and manifest’ statement from Congress to authorize an unprecedented intrusion into traditional state authority.”<sup>127</sup>

The question of whether the courts should defer to an agency’s statutory interpretation that stretches the limit of the federal government’s exercise of an enumerated power is a somewhat different question than the question of whether Congress intended, in an area within the scope of an enumerated power, to allow federal agencies to oust state regulatory power. Both questions, however, have the potential to adversely affect the exercise of state regulatory authority. Particularly if the affected activities are within the scope of the traditional state police power,<sup>128</sup> the courts ought to be just as reluctant to defer to a federal agency’s interpretation that federal inaction ousts state power as the Supreme Court indicated they should be in interpreting statutes in a way that pushes the agency’s authority to the outer limits of an enumerated federal power such as the Commerce Clause. Both kinds of interpretation can impinge on state power. The Court has acknowledged that “‘conflict pre-emption analysis must be applied sensitively . . . , so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role.”<sup>129</sup>

Moreover, the state interests might not be protected to the same extent if agencies rather than Congress make the decision on whether to preempt state law. The states are represented in Congress. They can block legislation adverse to their interests (including legislation that would preempt state regulatory authority), for example, by mustering 51 votes in the Senate against the legislation.<sup>130</sup> The states have no similar mechanism for protecting their interests if agencies make the decision on whether to preempt. Agencies promulgating regulations are usually required to provide public notice and solicit comments,<sup>131</sup> but the views of the states are not necessarily afforded any greater weight by the agency than those of any other affected interest. Judicial deference to agency determinations of a statute’s preemptive effect therefore runs the risk of reducing the

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<sup>127</sup> *Rapanos v. United States*, 126 S. Ct. 2208, 2224 (2006) (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)).

<sup>128</sup> The Supreme Court has been especially solicitous of claims that it is necessary to protect traditional state power to regulate land and water use. See, e.g., James R. May & Robert L. Glicksman, *Justice Rehnquist and the Dismantling of Environmental Law*, 36 *Envtl. L. Rep. (Envtl. L. Inst.)* 10585, 10600-10602, 10603-04 (Aug. 2006) (describing the jurisprudence of Chief Justice Rehnquist). It is possible that other areas of potential state regulation will fit less comfortably within the parameters of “traditional” state regulatory authority, and thus will invoke less judicial skepticism over federal efforts to intrude into the states’ regulatory realm.

<sup>129</sup> *Northwest Central Pipeline Corp. v. State Corp. Comm’n*, 489 U.S. 493, 517 (1989).

<sup>130</sup> See *United States v. Morrison*, 529 U.S. 598, 647 (2000) (Souter, J., dissenting) (protesting the majority’s “rejection of the Founders” considered judgment that politics, not judicial review, should mediate between state and national interests”); *National League of Cities v. Usery*, 422 U.S. 833, 876 (1976) (Brennan, J., dissenting) (citing *The Federalist* No. 45, at 311-12 (J. Cooke ed. 1961) (J. Madison)); *The Federalist* No. 46, at 317-18 (J. Cooke ed. 1961) (J. Madison)) (stating that “the political branches of our Government are structured to protect the interests of the States, as well as the Nation as a whole, and that the States are fully able to protect their own interests in the premises. Congress is constituted of representatives in both the Senate and House Elected from the States.”). See generally Notes, *The Lesson of Lopez: The Political Dynamics of Federalism’s Political Safeguards*, 119 *HARV. L. REV.* 609 (2005).

<sup>131</sup> 5 U.S.C. § 553(b)-(c).

ability of the states to protect their interests from what they regard as unwarranted federal intrusion.

Indeed, of the two kinds of intrusion, the exercise of preemptive authority may be the more devastating to the integrity of state sovereignty than an expansive interpretation of the scope of the agency's own regulatory authority. The exercise of an enumerated federal regulatory power such as the Commerce Clause to adopt affirmative legislation does not necessarily result in exclusion of the state from the regulatory field. Concurrent exercise of federal and state environmental regulation, for example, is the norm,<sup>132</sup> unless state regulation actually conflicts with federal law.<sup>133</sup> At the very least, federalism concerns ought to impel the courts to consistently apply a presumption against the conclusion that Congress delegated to a federal agency the power to preempt state law.<sup>134</sup>

Even though the courts have not clearly enunciated a rule forbidding deference in the absence of an express delegation of authority to preempt, the result urged here is consistent with the approach courts have taken in inaction preemption cases. The Supreme Court stated in one case involving alleged preemption by federal inaction that “[t]he relevant inquiry is not whether Congress authorized or expected [state] regulation, but whether it indicated by its own actions to *forbid* it.”<sup>135</sup> Similarly, to prove that Congress intended that agency inaction have preclusive impact, some lower courts have required Congress or the agency to declare “at a high level of specificity, its intention that its *inaction* preempt state law.”<sup>136</sup> A requirement that Congress explicitly delegate to the agency the power to preempt is consistent with that means of avoiding preemption in the absence of clear congressional intent, as well as with the desirability of avoiding unwarranted infringements on state sovereignty and the protective exercise of traditional regulatory authority.

Even if Congress has explicitly delegated to an agency the power to preempt state law in order to avoid frustration of federal purposes, however, the courts should not find preemption unless the agency has clearly exercised that power. As one lower court put it, preemption by inaction “requires *an actual, concrete assertion of regulatory authority* as

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<sup>132</sup> See, e.g., 33 U.S.C. § 1370 (Clean Water Act); 42 U.S.C. § 6929 (Resource Conservation and Recovery Act); 42 U.S.C. § 7416 (CAA).

<sup>133</sup> See, e.g., 7 U.S.C. § 136v(b) (FIFRA).

<sup>134</sup> See, e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981) (stating that, in assessing whether federal law preempts state common law, the Supreme Court “begins ‘with the assumption that the historic police powers of the states were not to be superseded by federal legislation unless that was the clear and manifest purpose of Congress’”).

<sup>135</sup> *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 387 n.11 (1983). See also *Baltimore & Ohio R.R. Co. v. Oberly*, 837 F.2d 108, 115 (3d Cir. 1988) (quoting *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 718 (1985)) (applying principle that federal agencies “will make their intentions clear if they intend for their regulations to be exclusive” in the context of an agency’s failure to regulate).

<sup>136</sup> *Baltimore & Ohio R.R. Co. v. Oberly*, 837 F.2d 108, 115 (3d Cir. 1988); *Elston v. Union Pac. R.R. Co.*, 74 P.3d 478, 488 (Colo. App. 2003) (requiring a “clear congressional directive”).



opposed to mere possession of authority.”<sup>137</sup> More specifically, the Supreme Court has indicated that an agency’s failure to regulate has preemptive effect only where that failure “takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute.”<sup>138</sup> Similarly, one lower court postulated that “there is a qualitative difference between a failure of a policymaker to act and a case where the policymaker evaluates a situation and then decides not to act ‘because [he or she has] determined it is appropriate to do nothing.’”<sup>139</sup> It is only in the latter situation that a finding of conflict preemption due to frustration of federal purposes should ensue.<sup>140</sup> Inaction alone thus represents only “the *absence* of a real regulatory decision,” which should be afforded no preemptive effect.<sup>141</sup>

An agency, just like Congress, may fail to regulate for myriad reasons, only one of which is its conclusion that unregulated activities best promote federal statutory policies. An agency may decide not to regulate, for example, because it is awaiting more information before doing so. Unless the agency that has been vested with the authority to preempt explicitly declares that its own decision not to regulate also bars states from doing so, the courts should not find conflict preemption based on interference with federal purposes.<sup>142</sup> Under presidential administrations more protective of state regulatory authority than the George W. Bush administration has been, the agencies themselves have recognized the propriety of that approach. NHTSA, for example, declared in 1995 that an agency’s decision not to regulate a particular activity will not “negatively” preempt state law unless the agency has “affirmatively manifested an intention to shut out State action.”<sup>143</sup>

Finally, the existence and exercise of an agency’s delegated authority to declare its own failure to act to be preemptive of state regulation should not end the preemption inquiry. The agency’s exercise of its authority to preempt state law based on its own refusal to regulate is subject to judicial review. Although an authorized agency’s determination that preemption is needed to prevent frustration of federal objectives is entitled to judicial deference, the degree of deference depends on the manner in which the agency has exercised its authority. The Supreme Court in *Sprietsma* stated that a federal

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<sup>137</sup> *Manes v. Metro-North Commuter R.R.*, 801 F. Supp. 2d 954, 964 (D. Conn. 1992), *aff’d*, 990 F.2d 622 (2d Cir. 1993) (Table) (quoting *Donovan v. Red Star Marine Serv., Inc.*, 739 F.2d 774, 778 (2d Cir. 1984)) (interpreting preemption provision in the Occupational Safety and Health Act, 29 U.S.C. § 653(b)(1)).

<sup>138</sup> *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (quoting *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)).

<sup>139</sup> *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1555-56 (11<sup>th</sup> Cir. 1991) (quoting *Missouri Pac. R.R. Co. v. Railroad Comm’n of Texas*, 833 F.2d 570, 576 (9<sup>th</sup> Cir. 1987), *rehearing denied*, 845 F.2d 1022 (5<sup>th</sup> Cir. 1988)). *See also* *Walker v. St. Louis-Sw. Ry. Co.*, 835 S.W. 2d 469, 473 (Mo. App. 1992).

<sup>140</sup> *See also* *Union Pac. R.R. Co. v. California Pub. Util. Comm’n*, 346 F.3d 851, 868 (9<sup>th</sup> Cir. 2003) (finding that agency deferral of regulation was insufficient to preempt state law because it did not represent a determination that no regulation was necessary).

<sup>141</sup> *Baltimore & Ohio R.R. Co. v. Oberly*, 837 F.2d 108, 116 (3d Cir. 1988) (holding that EPA’s decision not to regulate noise from railroad refrigerator cars did not preempt state noise control standards).

<sup>142</sup> *See, e.g., Norfolk S. Ry. Co. v. Box*, 2007 WL 1030320, at \*9 (N.D. Ill. Mar. 30, 2007).

<sup>143</sup> Department of Transp., National Highway Traffic Safety Admin., Consumer Information Regulations; Vehicle Stopping Distance, 60 Fed. Reg. 32,918 (June 26, 1995). *See also* Department of Transp., National Highway Traffic Safety Admin., Low-Speed Vehicles, 65 Fed. Reg. 53,219 (Sept. 1, 2000).

agency's enunciation of its position on the preemptive effect of federal inaction must be "authoritative" before inaction may be given preemptive effect.<sup>144</sup> The Court has indicated more generally that agency determinations concerning the meaning or effect of the federal statutes they administer are entitled to *Chevron*-type deference<sup>145</sup> from the courts if Congress has delegated to the agency the authority "to make rules carrying the force of law" and the agency's determination represents the exercise of that authority.<sup>146</sup> If either of those conditions is not met, a more muted form of deference will apply.<sup>147</sup> Accordingly, the courts should lend greater credence to an agency's determination that its inaction preempts state law if that determination is made in the course of a rulemaking proceeding in which the agency has invited and considered public comments before making its decision than if it took the position that its inaction preempted state law for the first time in the course of litigation or in issuing an internally distributed policy statement.<sup>148</sup>

b. Does State Regulation of Activities that Contribute to Climate Change Conflict with Federal Purposes?

The approach to resolving claims of conflict preemption based on agency inaction described above leaves relatively little room for EPA to preempt state regulation of GHG emissions. The CAA does not generally delegate to EPA the power to preempt state

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<sup>144</sup> *Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002) (quoting *Arkansas Elec. Cooperative Corp.*, 461 U.S. at 384). See generally *Ausness*, *supra* note 58, at 969 (urging the Supreme Court to "refuse to allow administrative agencies to preempt state tort law unless they explicitly consider the preemption issue when formulating orders and regulations").

<sup>145</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the Court first enunciated its familiar two-part test for determining whether agency statutory interpretations are entitled to judicial deference:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Id.* at 842-43.

<sup>146</sup> *United States v. Mead Corp.*, 535 U.S. 218, 226-27 (2001).

<sup>147</sup> *Id.* at 228 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)) (stating that deference will depend on the "persuasiveness of the agency's position"). Professor Mendelson has argued "that *Chevron* deference to agency interpretations of the preemptive effect of statutes is . . . inappropriate" because other institutions are more competent to assess the appropriate distribution of governmental authority and the value of preserving state regulatory authority, because "granting *Chevron* deference to agency preemption decisions may result in inadequately constrained decisionmaking processes," and because "granting deference also might increase the risk that agencies would inappropriately expand their own authority at the expense of the states." Mendelson, *supra* note 15, at 742. She also contends that the presumption against preemption should apply in cases involving agency preemptive judgments, but that *Skidmore*-type deference is appropriate if the agency's preemptive determination has "the power to persuade." *Id.*

<sup>148</sup> See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (finding that "[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate").

law.<sup>149</sup> As a result, EPA should not be able to declare any decision it makes not to regulate GHG emissions from stationary sources to be preemptive of state regulation.

The statute does not exactly delegate to EPA the authority to preempt state regulation of motor vehicles either. The statute itself preempts state law.<sup>150</sup> The provision authorizing EPA to waive the prohibition on state regulation for California might reasonably be interpreted, however, as a delegation to EPA of the power to determine the preemptive scope of the CAA's motor vehicle emission control provisions in limited contexts.<sup>151</sup> If so, EPA has the authority to determine that California (and other states seeking to adopt California's controls)<sup>152</sup> may not regulate GHG emissions from motor vehicles, even though EPA has chosen not to do so. Because the exercise of delegated authority to preempt state law is subject to judicial review, however, EPA would have to provide a convincing explanation that a decision to deny California's waiver petition reflects a determination that state regulation is inappropriate because it would interfere with the CAA's objectives. EPA would have to convince a court, for example, that California's regulation of GHG emissions would be more disruptive of federal purposes than that state's regulation of other pollutants under the statute, which EPA has allowed. One common reason for judicial reversal of agency decisions is a finding that the decisions are inconsistent with previous agency determinations and that the agency has failed adequately to explain the inconsistency.<sup>153</sup>

#### 4. *The Impact of the Lack of Federal Regulatory Authority*

In the litigation between the auto industry and California concerning the preemptive impact of the CAA on the state's efforts to regulate GHG emissions from motor vehicles, the industry argued that California's controls on CO<sub>2</sub> emissions were preempted by the CAA, even though at the time the industry made that argument, EPA professed to have no authority to regulate CO<sub>2</sub> under the CAA. The Supreme Court has since held that EPA does indeed have the authority to regulate CO<sub>2</sub> and other GHG emissions from motor vehicles under the CAA.<sup>154</sup>

But industry's argument made no sense at the time it was made. The statute preempts states from adopting or enforcing standards relating to the control of motor vehicle emissions "subject to" the CAA.<sup>155</sup> The motor vehicle emissions "subject to" the CAA's emissions control provisions are those covered by EPA-issued "standards

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<sup>149</sup> The CAA's boilerplate delegation of authority to EPA to issue such regulations as are necessary to carry out its functions under the statute makes no reference to preemption. 42 U.S.C. § 7601(a)(1). The provision regarding retention of state authority also makes no reference to agency preemptive judgments. *Id.* § 7416. Nor does the Energy Policy and Conservation Act, 49 U.S.C. § 32919, the statute that authorizes the Department of Transportation to issue corporate fuel economy standards, delegate to that agency the power to preempt state law.

<sup>150</sup> 42 U.S.C. § 7543(a).

<sup>151</sup> 42 U.S.C. § 7543(b).

<sup>152</sup> 42 U.S.C. § 7507.

<sup>153</sup> *See, e.g.,* Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 446-47 n.30 (1987).

<sup>154</sup> Massachusetts v. EPA, 127 S. Ct. 1438 (2007).

<sup>155</sup> 42 U.S.C. § 7543(a).

applicable to the emission of any air pollutant” from motor vehicles which may cause or contribute to threats to the public health or welfare.<sup>156</sup> If CO<sub>2</sub> were not an air pollutant, as EPA and industry had claimed, EPA could not adopt a standard that controls CO<sub>2</sub> emissions, and those emissions therefore would not be “subject to” the CAA. In other words, the CAA’s preemption provision simply would not apply to state controls on CO<sub>2</sub> emissions. It is likely that state regulation of other activities over which federal agencies lack jurisdiction would be similarly exempt from express statutory preemption provisions.

This section considers more generally the impact of a federal agency’s lack of authority to regulate on a claim that state regulation is implicitly preempted by federal law. Supreme Court decisions support the conclusion that a court should never interpret a federal law that fails to vest in an agency the authority to regulate activities being regulated by a state as implicitly preemptive of state regulation. Even if the courts are not willing to adopt such an absolute rule, they should not afford any deference to an agency’s conclusion that a statute that fails to provide a federal agency with the authority to regulate activities subject to state regulation nevertheless preempts state regulation.

a. Preemption by Inaction in the Absence of Federal Regulatory Authority

The courts should refuse to find implied preemption in cases in which the federal agency lacks jurisdiction over the activities being regulated by a state. The Supreme Court has repeatedly recognized the inappropriateness of implied preemption based on the inaction of federal agencies that lack the power to regulate in areas subject to state regulation. It has done so both in contexts in which Congress has never authorized federal regulation in the first place and in instances in which existing federal regulatory authority has been repealed.

In the *Bethlehem Steel* case,<sup>157</sup> decided in the 1940s, the Court reasoned that if Congress enacts a statute that deals only partially with a particular subject, and leaves outside the scope of its delegation to a federal agency closely related matters, “it implies that in such matters federal policy is indifferent and . . . we can only assume it to be equally indifferent” to whether the state decides to regulate the activity excluded from federal regulation.<sup>158</sup> The Court also stated that when Congress enacts statutes which initiate regulation of certain activities, “but where effective regulation must wait upon the [administrative] issuance of [federal] rules, . . . this Court has usually held that the police power of the state may be exercised” in the interval between adoption of the statute and issuance of federal regulations.<sup>159</sup>

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<sup>156</sup> 42 U.S.C. § 7521(a)(1).

<sup>157</sup> *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947)

<sup>158</sup> *Id.* at 773.

<sup>159</sup> *Id.* at 774. The Court indicated that the validity of state regulation may depend on the comprehensiveness of a federal regulatory scheme as well as whether the state regulation covers a “separable or distinct segment of the matter covered by the federal statute.” *Id.* In the latter situation, if the federal agency has not acted on that segment, the states will be allowed to regulate. *Id.* See also *H.P. Welch Co. v. New Hampshire*, 306 U.S. 79, 85 (1939) (concluding that, “[p]lainly Congress by mere grant

The Court reached a similar result in a case involving federal and state regulation of rural electric rates in which the Federal Power Commission (FPC) decided that it lacked jurisdiction to regulate the wholesale rates charged by rural cooperatives.<sup>160</sup> In *Arkansas Electric Cooperative*, the Court found that the FPC's refusal to assert jurisdiction did not support preemption of state law because that refusal merely reflected the agency's view that, "purely as a jurisdictional matter, the relevant statutes gave [the Rural Electrification Administration] exclusive authority among federal agencies to regulate rural power cooperatives. It did not determine that, as a matter of policy, rural power cooperatives that are engaged in sales for resale should be left unregulated."<sup>161</sup> Absent such a finding by Congress or the federal agency, the Court insisted, a court should not find preemption by inaction. Finally, in the *Puerto Rico Department* case discussed above, the Court refused to attribute to Congress an intention to preempt state regulation of the petroleum industry when it terminated its earlier delegation of authority to the federal government to regulate the industry. In the absence of textual evidence of Congress's desire to preclude state regulation, the Court deemed it "impossible to find that a free market was mandated by federal law."<sup>162</sup>

All of these decisions support the conclusion that a federal statute that does not create federal authority to regulate the activities subject to state regulation lacks implicit preemptive impact on state law, whether the basis for the alleged preemption is occupation of the field or conflict due to frustration of federal purposes.

b. Deference to the Preemptive Judgments of Agencies that Lack Regulatory Authority

Even if the courts refuse to adopt an approach that precludes implied preemption in the absence of federal regulatory authority, judicial deference to the views of an agency lacking jurisdiction over the regulated state activities is inappropriate. In particular, it is inappropriate when the issue is whether the federal government has occupied the field in which the state seeks to regulate as well as when the issue is whether state law would frustrate federal objectives. In both contexts, the courts should afford no deference to a federal agency's view that a statute vesting that agency with authority to regulate some activities, but not the ones subject to state regulation, was

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of [unexercised] power to the Interstate Commerce Commission did not intend to supersede state police regulations established for the protection of the public using state highways"); *Northwestern Bell Tel. Co. v. Nebraska State Ry. Comm'n*, 297 U.S. 471, 478-79, 480 (1936) (refusing to find that Congress intended "to preclude all regulation, state and national, of depreciation rates for telephone companies, for an indefinite time, until the Interstate Commerce Commission could act administratively to prescribe rates" and holding that, "[p]ending action by the . . . Commission establishing depreciation rates for telephone companies, state control over such rates remains unimpaired"); *Mintz v. Baldwin*, 289 U.S. 346, 351 (1933) (interpreting statutory preemption of state bovine inspection authority to extend "only to cases where federal inspection has been made and certificate issued").

<sup>160</sup> *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983).

<sup>161</sup> *Id.* at 384.

<sup>162</sup> *Puerto Rico Dep't of Consumer Affairs v. ISA Petroleum Corp.*, 485 U.S. 495, 501 (1988).

meant to preempt state regulation in the area outside the realm of the agency's regulatory authority.

The justification the Supreme Court advanced in *Chevron* for judicial deference to an agency's interpretation of the statute it is charged with implementing is two-fold. First, Congress (implicitly) delegated to the agency the responsibility of interpreting gaps or ambiguities in the text. Second, the agency has greater expertise than the reviewing court is likely to have and is therefore better able to understand the policy implications of the adoption of competing interpretations of the statute.<sup>163</sup>

Neither of these justifications is likely to apply when an agency that lacks jurisdiction to regulate particular activities under a statute that does not contain an applicable express preemption provision concludes that Congress nevertheless intended to divest the states of the power to regulate those same activities. If the federal agency lacks the authority to regulate the activities in question, then Congress has not delegated to it the power to make *any* determinations concerning those activities, including whether the statute was intended to preclude state regulation so that the activities can be conducted free of regulation. Likewise, if the federal statute does not authorize the federal agency to regulate the activities the state seeks to regulate, the agency probably lacks the same kind of expertise concerning the policy implications of allowing state regulation that a federal agency with jurisdiction to control the activities being regulated by the state would normally have.

#### IV. CONCLUSION

This article argues that preemption of state regulation based on federal inaction is rarely appropriate. It provides recommendations to guide Congress in determining whether federal inaction should preempt state law and to guide the courts in addressing whether such inaction does result in either express or implied preemption of state regulation. In deference to state prerogatives in areas of traditional state concern such as protection of the public health and safety or the environment, Congress should not preempt state regulation in areas in which it has chosen not to regulate unless it determines that a state's effort to address market failure through regulation would inappropriately impose adverse impacts on other states unable to protect their own interests or that federal policies can best be achieved in the absence of positive regulation at any level of government. If Congress fails to enunciate in statutory text its desire to preempt state regulation in the absence of federal regulatory action, the courts should be very hesitant to find implied preemption, unless it is physically impossible to comply with both federal and state law. A situation in which federal inaction and state regulation make simultaneous compliance with both regulatory regimes impossible will occur rarely because, by definition, the federal government has not prescribed or proscribed any conduct.

The courts should confine the implied preemption doctrine in cases involving alleged preemption by inaction to the conflict branch of implied preemption. Implicit

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<sup>163</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

occupation of the field should never occur as a result of inaction. The courts should be willing to find implied conflict preemption in the absence of federal regulatory action (other than a conflict based on physical impossibility) only if Congress has explicitly delegated to a federal agency the power to preempt state law to prevent it from subverting federal goals and the agency has clearly, authoritatively, and persuasively exercised that authority. Finally, the courts should never find implied preemption of state regulation of activities that the relevant federal agency lacks the authority to regulate. Even if the courts refuse to impose an absolute prohibition on implied preemption based on inaction by an agency with no authority to regulate, they should afford no deference to such an agency's view that Congress intended to preempt state law.

These recommendations strike an appropriate balance between the interests of the federal government in pursuing policy objectives within the competence of federal power and the need to respect state sovereignty, especially in areas of traditional state regulation, to achieve the benefits of the dual system of government that the Framers built into the Constitution. They also increase the chances that one level of government's failure to take action to protect the public health and safety or the environment will not preclude another from doing so, while preserving the authority of the federal government to supersede the judgments of state policymakers in appropriate instances.<sup>164</sup>

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<sup>164</sup> Cf. *National Steel Corp. v. Mich. Pub. Serv. Comm'n*, 919 F.2d 38, 41 (6<sup>th</sup> Cir. 1990) (characterizing it as "imprudent" to find preemption based on inaction when to do so would leave an "enormous industry" unregulated).