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Recent decisions have signaled a subtle shift away from the Supreme Court's categorical approach to the issue of federal preemption of state law, and toward a preemption continuum in which the implied preemption theories may inform an express preemption analysis. Yet, the Court as a whole has avoided addressing the issues arising from the integration of the doctrines.

In this Article, Professor Jordan explores some of these difficult issues. The conceptual issues concern when and how the implied theories should be used in an analysis involving an express preemption clause. She analyzes the Court's recent use of the implied theories in a case involving an express preemption provision, and notes that the opinion is ground-breaking from a conceptual perspective: The Court's opinion suggests that, even when Congress has spoken through an express preemption clause, a federal statutory scheme may impliedly preempt state laws beyond the scope of the express clause—and beyond what would be superseded by the Supremacy Clause due to a direct conflict. Professor Jordan thus concludes that the Court's failure to grapple with the issues has opened the door to integration of the doctrines unnecessarily wide. The interpretive issue arises because the implied preemption analysis represents a more "purposive" approach to statutory interpretation, while the express preemption analysis reflects a classic "textual" approach. The issue is which approach should be used in an analysis that integrates the doctrines.

Professor Jordan's analysis reveals that the Court's recent use of textualism while applying the "stands as an obstacle" theory of implied preemption unduly circumscribes the preemption analysis. She concludes that, although textualism may be acceptable in some contexts, it is incompatible with the fundamental tenets underlying the preemption doctrines.

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The Shifting Preemption Paradigm: Conceptual and Interpretive Issues

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I. INTRODUCTION

Recent cases have signaled a fundamental change in the Supreme Court's approach to the preemption doctrines. Traditionally, the Court has taken a categorical approach. That is, the Court has reiterated that federal law can preempt state law either expressly or impliedly. Congress expressly preempts state law when it attempts to define the extent to which a particular federal law will preempt state law.[1] Congress impliedly preempts state law through federal

1. *See, e.g.*, New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 649 (1995) (holding express preemption provision in the Employee

legislation that occupies a field or conflicts with state law.[2] Within both the express and implied preemption categories, a distinct method of analysis has emerged. In implied preemption analysis, the Court has inferred congressional intent to occupy a field when the federal legislation involves a dominant federal interest or is sufficiently pervasive.[3] The conflict preemption analysis has focused on whether it is impossible for a party to comply with both federal and state requirements, or whether a state law would sufficiently frustrate the objectives underlying federal law.[4] In contrast, the express preemption analysis has focused on finding the meaning of the terms used by Congress in the preemption clause.[5]

When confronted with the question of preemption, the Court has traditionally analyzed the issue in a categorical manner.[6] If the federal law at issue contains an express preemption provision, the Court has analyzed the language of the preemption clause and has not purported to consider field or conflict preemption theories.[7] Recent preemption cases, however, have suggested a shift away from

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Retirement Income Security Act of 1974 does not apply to New York statutes imposing surcharges on hospital rates); American Airlines, Inc. v. Wolens, 513 U.S. 219, 222 (1995) (holding express preemption provision in the Airline Deregulation Act of 1978 bars state imposed regulation of air carriers, but allows for court enforcement of contract terms set by parties); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 519-20 (1992) (holding express preemption provision in the federal law regulating cigarette labeling only preempts state and federal legislatures from mandating particular cautionary statements and does not preempt state-law damages actions).

2. *See, e.g.*, Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n., 461 U.S. 190, 222-23 (1983) (finding state law impliedly preempted by the Atomic Energy Act); Jones v. Rath Packing Co., 430 U.S. 519, 543 (1977) (holding state laws regulating labeling impliedly preempted by federal laws regulating net weight labeling); Hines v. Davidowitz, 312 U.S. 52, 74 (1941) (finding state law regulating the registration of aliens impliedly preempted by the federal Alien Registration Act).

3. *See infra* notes 78-95 and accompanying text.

4. *See infra* notes 96-129 and accompanying text.

5. *See infra* notes 130-143 and accompanying text.

6. *See, e.g.*, English v. General Elec. Co., 496 U.S. 72, 83 (1990) (analyzing text and congressional intent of Energy Reorganization Act of 1974 to find that disputed claim was not clearly and manifestly preempted by Act); Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947) (holding that the United States Warehouseman Act preempted state laws regulating grain warehouses).

7. *See, e.g.*, New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 661 (1995) (deciding that the text alone did not provide sufficient evidence of congressional intont regarding the express preemption clause at issue, but declining to explicitly consider the implied preemption doctrines); American Airlines, Inc. v. Wolens, 513 U.S. 219, 221, 235, 238 (1995) (spawning three opinions by tbe Supreme Court due to different interpretations of the express preemption provision at issue, without one Justice considering the implied doctrines); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992) (stating expressly that the implied theories were irrelevant to the analysis of the express preemption provision at issue).

the categorical approach.[8] Specifically, the cases suggest that the Court as a whole agrees that an express preemption provision does not foreclose consideration of the implied preemption doctrines.[9] Beyond that, however, the cases reveal a tension among the Justices regarding the extent to which implied preemption principles should inform the interpretation of an express preemption provision. It is not clear that the Justices would readily engage in a wholesale incorporation of the principles into a traditional express preemption analysis. The reasons for the hesitancy may stem from the theoretical and ideological differences between the express and implied preemption doctrines. Because of these differences, difficult conceptual and interpretive issues must be confronted as the preemption paradigm shifts away from a categorical approach.[10]

Yet, the Court has demonstrated a reluctance to grapple with these difficult issues. For example, in *Boggs v. Boggs*, in which a five Justice majority held that the Employee Retirement Income Security Act of 1974 ("ERISA") preempted Louisiana's community property law to the extent that it permitted the spouse of an ERISA plan participant to make a testamentary transfer of her interest in the participant's pension plan benefits, the Court avoided addressing issues crucial to the integration of the preemption doctrines.[11] The Court used an implied preemption analysis to resolve the question of preemption under ERISA, which contains an express preemption provision.[12] The Court has resolved numerous ERISA preemption cases, but has never before explicitly looked to the implied preemption doctrines to inform its analysis. Thus, the *Boggs* decision confirms the shift away from the categorical approach to preemption and to-

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8. *See, e.g.*, Boggs v. Boggs, 520 U.S. –, 117 S. Ct. 1754, 1762 (1997) (using the implied "stands as an obstacle" theory of preemption in a case involving a federal law with an express preemption provision); California Div. of Labor Standards Enforcement v. Dillingham Constr., 117 S. Ct. 832, 843 (1997) (Scalia, J., concurring) (advocating an abandonment of the Court's traditional approach to the preemption analysis of federal law with an express preemption provision and for the use of the implied theories of preemption); Medtronic, Inc. v. Lohr, 518 U.S. 470, 502-03, 509-10 (1996) (O'Connor, J., concurring) (Breyer, J., concurring) (both noting that it makes sense to look to the implied theories of preemption when an express preemption provision is ambiguous).

9. *See* Freightliner Corp. v. Myrick, 514 U.S. 280, 289 (1995) (holding no express or implied preemption because it is possible to comply with both federal and state requirements); *see also infra* notes 39-73 and accompanying text.

10. *See infra* Part II.B.

11. 117 S. Ct. at 1761 ("We need not inquire whether the statutery phrase 'relate to' provides further and additional support for the pre-emption claim. Nor need we consider the applicability of field pre-emption.").

12. *See infra* Part III.B-C and Part IV.A.

ward a preemption continuum in which implied theories of preemption may inform an express preemption analysis.

However, the *Boggs* decision also reflects the tension between the Justices as the Court avoided addressing issues crucial to the integration of the preemption doctrines. First, the conceptual questions: If the implied theories may be relevant in an express analysis, when are they relevant and how should they be used? Should the implied theories be viewed as merely another means of defining the scope of the terms in the express preemption clause? Or, should the theories be used as a supplemental means of finding state laws preempted—beyond the scope of the express preemption clause, and perhaps beyond the direct operation of the Supremacy Clause? Second, the implied theories evolved during a period when the Court used a more purposive approach to statutory interpretation.[13] Yet, both the majority and dissent in *Boggs* used a textual approach to resolve the preemption question.[14] This approach yielded an unsatisfactery analysis of the preemption question: The Court's holding that ERISA preempts state community property law has significant federalism implications and is inadequately supported by reasoned analysis. Thus, *Boggs* also reveals an interpretive issue presented by the shifting preemption paradigm: namely, in using the implied theories, which approach to statutory interpretation, textual or purposive, will more likely lead to sound outcomes given the important policies implicated by preemption?

This Article explores the difficult conceptual and interpretive issues presented by the integration of implied theories of preemption inte express preemption analysis. The Article first explains the development of the conceptual and interpretive issues. Part II reveals the Court's mixed signals regarding the shift away from a categorical approach to preemption and explores why the Justices may be reluctant to integrate the implied and express preemption doctrines. The

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13. This Article uses the term "purposive" broadly to encompass those approaches to statutory interpretation that look beyond the text and structure of the statute. A purposive approach encourages courts, when intorpreting statutory provisions, te consider the context and background of the statute, including relevant legislative history. While the "intent" of the legislature is always the touchstone of statutery interpretation, a purposive approach recognizes that it may be impossible to attribute a particular intent te a collective group of legislators and therefore, instead, tries to ensure that the "purpose" underlying the law is effectuated and that the law's intorpretation and application is reasonable. *See infra* notes 238-257 and accompanying text.

14. The term "textual" is also used broadly in this article to encompass those statutory interpretation theories that focus predominantly on the text and structure of the statute at issue. A textual approach to interpretation emphasizes the plain meaning or dictionary definition of statutory terms. *See infra* notes 285-309 and accompanying text.

analysis concludes that, from a doctrinal perspective, the Court's hesitancy is unwarranted because the distinctions between the doctrines are largely due to the use of different approaches to statutory interpretation. Part III explores the conceptual issues and the ramifications of the *Boggs* majority's failure to address these issues. The majority opinion would permit the use of the implied preemption doctrines in any case involving an express preemption provision; and the theories could be used to justify preemption beyond the scope of the express preemption clause. Thus, the Article concludes that the *Boggs* majority has opened the door to integration of the doctrines unnecessarily wide.

Lastly, Part IV of the Article explores the interpretive issue: whether a textual approach to interpretation is appropriate when applying the implied preemption doctrines. The Article points out the fundamental weakness in the *Boggs* analysis caused by the Court's reliance on a textual approach to statutory interpretation. Both the majority and the dissenting opinions failed to conduct a sufficient search for the purpose underlying the federal provisions at issue, the key inquiry in the implied conflict preemption analysis. The result is a holding with serious federalism implications unsupported by well-reasoned analysis. The Article demonstrates that the implied theories evolved during, and reflect, a more purposive approach to statutory interpretation. Accordingly, rather than a textual approach, which results in a "purported" search for purposes, the implied conflict preemption theories require an honestly purposive approach to interpreting congressional intent. The Article supports this conclusion by showing why a purposive approach better serves important policies implicated by the preemption doctrines.

II. THE DEVELOPMENT OF THE CONCEPTUAL AND INTERPRETIVE ISSUES

The Court's traditionally categorical approach to preemption caused discrete methods of analysis to evolve for each category of preemption. That is, within each category, courts engaged in distinct inquiries. This complicates integration of the theories—both from a doctrinal and an interpretive perspective. Further, although the Court has noted from time to time that the categories are not rigidly distinct,[15] the Court has actually reinforced their distinctiveness by

15. *See, e.g.*, English v. General Elec. Co., 496 U.S. 72, 79-80 n.5 (1990).

sending mixed signals as to the appropriateness of looking to the implied theories to inform the express preemption analysis. This Part explains the Court's hesitant shift away from the categorical approach and, after analyzing the distinct inquiries associated with each category, explores whether the judicial reluctance to integrate the doctrines is justified.

A. The Hesitant Shift Away From a Categorical Paradigm

1. Preemption Generally—The Establishment of a Categorical Approach

The preemption doctrines have a long history in American jurisprudence. Nonetheless, the doctrines have not always been well understood.[16] Congress's capacity to preempt state laws flows from both the powers delegated to Congress through the Constitution and the Supremacy Clause.[17] The Supremacy Clause of the Constitution provides that the Constitution and all laws made under its authority shall be the "supreme Law of the Land."[18] The supremacy of federal law means that valid federal law overrides otherwise valid state law in cases of conflict. However, the concept of preemption is broader and goes beyond the constitutional question.[19] Congress has the complete authority to define the allocation of federal and state regulatory power over those matters within the domain of its delegated powers. Thus, when Congress has used its delegated powers and enacted legislation, state laws can be preempted—even in the absence of a real conflict—without reference to the Supremacy Clause. The preemption question then becomes one of statutory

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16. Scholarly attention te the nature of preemption has been limited. *But see* David E. Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685 (1991); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69 (1988).

17. Professor Gardbaum has explained that the widely held assumption that Congress's power of preemption derives from the Supremacy Clause is not entirely accurate because the Supremacy Clause does not grant powers but, rather, operates as a dispute resolution mechanism. *See* Gardbaum, *supra* note 16, at 773-77. *See generally* Stephen A. Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996).

18. U.S. CONST. art. VI, cl. 2.

19. Laurence Tribe has explained that the validity of state regulation is assessed in constitutional terms only when Congress has chosen not to act—for example, when state regulation is challenged as being in violation of the dormant commerce clause. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 479 (2d ed. 1988) [hereinafter TRIBE, CONSTITUTIONAL LAW].

interpretation.[20] That is, preemption turns on an assessment of the state and federal law and whether Congress intended the federal law to invalidate a challenged state law.[21] Supremacy, then, is a subset of preemption; and preemption does not necessarily depend on a conflict between federal and state law.[22]

Modern preemption doctrine has evolved significantly from its original conception as a manifestation of the division of power between federal and state governments. Early cases show that the Supreme Court viewed preemption as an automatic consequence of congressional action in a field such as interstate commerce.[23] The 1930s saw a radical restructuring of American federalism in which the Commerce Clause was interpreted as granting to Congress greatly enlarged powers.[24] Accordingly, the concept of preemption had to evolve to avoid the preemption of vast areas of state regulation. The modified view of preemption recognized a presumption that state laws would survive unless Congress clearly manifested its intent that a federal statute would preempt state law.[25]

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20. *See id.* Arguably, if the state law is in direct conflict with federal law the matter is constitutional. The state law is superseded as a matter of the Supremacy Clause. Even in that case, however, the relevant statutory provisions must be interpreted to determine whether there is a direct conflict.

21. However, Professor Gardbaum's research has shown that the Supreme Court did not conceptualize preemption as depending on congressional intent until the 1930s. Prior to the 1930s, preemption was conceived as an automatic divestiture of state power te enact legislation when Congress exerted its "paramount and all embracing authority" over subjects within its delegated powers. *See* Gardbaum, *supra* note 16, at 801-07.

22. However, even the Supreme Court uses preemption and supremacy terminology loosely. The Court often notes that "state law is pre-empted under the Supremacy Clause . . . in three circumstances;" thereby suggesting that all preemption of state law derives from the Supremacy Clause. *See, e.g.*, English v. General Elec. Co., 496 U.S. 72, 78-79 (1990).

23. For example, in *Southern Railyard Co. v. Reid*, 222 U.S. 424, 442 (1912), the Court overturned a state law requiring railroad companies to transport tendered freight on the grounds that, through the Interstate Commerce Act, Congress had taken possession of the field of railroad rato regulation; and consequently, the state no longer had concurrent power to regulate this practice. The Court in *Reid* explained that "[i]t is well settled that if the state and Congress have a concurrent power, that of the state is superseded when the power of Congress is exercised." *Id.* at 436; *see also* Gardbaum, *supra* note 16, at 801-06 (describing early cases involving preemption).

24. In the early 1930s, under the influence of the New Deal politics, expanded powers were accorded to Congress. *See* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 510-15 (1989). The scope of Congress's power has been described as follows: "Henceforth, no area of intrastate commerce would be open to the states to regulate which at the same time is constitutionally closed to Congress; no such area remained fully protected from the threat of congressional intervention." *See* Gardbaum, *supra* note 16, at 806.

25. *See, e.g.*, Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 237 (1947) (reaffirming the presumption against preemption in fields in which states have traditionally occupied absent clear congressional intent); Mintz v. Baldwin, 289 U.S. 346, 352 (1933) (upholding a state law designed to prevent infectious cattle diseases despite the federal Cattle Contagious Diseases Acts because congressional intent te preempt was not definite and clear).

During this period of evolution, the Court emphasized a categorical preemption paradigm. Specifically, a three category framework for preemption emerged from Supreme Court case law.[26] First, Congress can expressly define the extent to which its enactments preempt state law—express preemption.[27] Second, in the absence of explicit statutory language, federal law will preempt law that regulates conduct in a field that Congress intended the federal government to occupy exclusively—field preemption.[28] And third, state law will be preempted to the extent that it actually conflicts with federal law—conflict preemption.[29] Field and conflict preemption doctrines constitute the implied preemption doctrines because they address the question of the division of state and federal authority when Congress has not explicitly spoken. Of course, if the federal and state laws actually conflict, the Supremacy Clause operates to supersede state law and there is arguably no need to infer congressional intent to preempt the state law.[30] Nonetheless, modern preemption doctrine clings to the view that finding a conflict provides the necessary evidence for implying congressional intent to preempt state law.[31]

Further, the Court has often suggested that the categories of preemption are exclusive—especially as between the categories of express and implied preemption. The Court has often explained the categories in a manner that suggests that the implied preemption doctrines are not relevant where Congress has spoken through an express preemption clause. For example, the Supreme Court commonly explains the preemption principles as follows: "*In the absence of an express congressional command*, state law is pre-empted if that law actually conflicts with federal law . . . or if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference

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26. *See, e.g.*, *English*, 496 U.S. at 78-79; *Rice*, 331 U.S. at 229; *see also* Robert B. Leflar & Robert S. Adler, *The Preemption Pentad: Federal Preemption of Products Liability Claims After* Medtronic, 64 TENN. L. REV. 691, 694 (1997) (noting that courts addressing a preemption issue recite, "like a mantra, a formulaic incantation of black-letter law.").

27. *See English*, 496 U.S. at 78 (citing Shaw v. Delta Air Lines, Inc. 463 U.S. 85, 95-98 (1983)).

28. *See id.* at 79 (citing *Rice*, 331 U.S. at 230).

29. *See id.*

30. *See* Gardbaum, *supra* note 16, at 809 (explaining that the concept of implied conflict preemption is a contradiction in terms because, "[o]nce the inquiry moves from jurisdiction to the content of a particular piece of legislation, we are in the realm of supremacy").

31. Professor Gardbaum has noted the implausibility of this premise. Gardbaum, *supra* note 17, at 809 (explaining that existence of an actual conflict should rarely provide a "sufficient basis for inferring congressional intent to preempt state law").

that Congress left no room for the States to supplement it.' "[32] This phraseology suggests that the implied doctrines only come into play in the absence of an explicit congressional directive regarding preemption. Recently, however, the Court has suggested a shift from the categorical approach to one which recognizes the use of implied preemption doctrines in cases involving express preemption clauses. Indeed, the Court has expressly acknowledged that the three categories of preemption are not "rigidly distinct."[33] However, the Court's signals have been mixed, creating confusion as to when it is appropriate for the categorical walls to yield.

2. The Court's Mixed Signals as to a New Paradigm

In several cases the Court has suggested that resort to the implied doctrines is not appropriate when an express preemption provision exists. The Court's starkest statement to this effect is found in *Cipollone v. Liggett Group, Inc.*[34] In a 1992 opinion drafted by Justice Stevens, the Court in *Cipollone* addressed the preemptive scope of the federal laws regulating cigarette labeling.[35] The federal law at issue contained an express preemption provision. The Court in *Cippollone* explained that the preemptive scope of the federal laws was governed entirely by the express language of those provisions. According to the plurality opinion,

> [w]hen Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing the 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 pre-empt state laws from the substantive provisions" of the legislation.[36]

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32. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (emphasis added) (citing Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 204 (1983); Fidelity Fed. Sav. & Loan Ass'n. v. De la Cuesta, 458 U.S. 141, 153 (1982)).

33. English v. General Elec. Co., 496 U.S. 72, 79 n.5 (1990).

34. 505 U.S. 504 (1992).

35. *Id.* at 515. Specifically, the Court addressed the preemption provision which, as modified by the Public Health Cigarette Smoking Act of 1969, prescribes that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." *Id.*

36. *Id.* at 517 (citing California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 282 (1987); Malone v. White Motor Corp., 435 U.S. 497, 505 (1978)). The Court explained that this proposition was merely a "variant of the familiar principle of *expressio unius est exclusio alterius*: Congress's enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Id.*

In a concurring opinion, Justice Blackmun, joined by Justices Kennedy and Souter, more directly stated that resort to principles of implied preemption is appropriate only when Congress has been silent with respect to preemption.[37] Thus, *Cipollone* was interpreted by some as establishing the rule that implied preemption analysis is not appropriate when Congress has spoken through an express preemption clause.[38]

Three years later, the Court in *Freightliner Corp. v. Myrick*[39] clarified that *Cipollone* did not categorically preclude the co-existence of express and implied preemption analyses.[40] Rather, the Court explained that *Cipollone* merely "supports a reasonable inference . . . that the express clause entirely forecloses any possibility of implied pre-emption."[41] It does not establish a rule.[42] The Court considered the defendants' implied preemption argument, but did not clarify when or in what instances the *Cipollone* inference could be successfully rebutted. Significantly, none of the judges issued a dissenting view, although Scalia concurred only in the judgment.[43]

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37. *Id.* at 531-32 (Blackmun, J., concurring).

38. *See, e.g.*, Mary Pat Benz & Derek J. Meyer, *Express Federal Preemption: Where Is It After* Cipollone?, 59 DEF. COUNS. J. 491, 493 (1992); John A. Chatowski, Cipollone *and the Clear Statement Rule: Doctrinal Anomaly or New Development in Federal Preemption*, 44 SYRACUSE L. REV. 769, 794 (1993); Marc Z. Edell & Harriet Dinegar Milks, *The* Cipollone *Decision: Providing Guidelines for Federal Preemption of Product Liability Claims*, 150 N.J. LAW 37, 37 (1993). The dissenting Justices in *Cipollone* contributed to this construction of the plurality opinion. Justices Scalia and Thomas characterized the Stevens opinion as establishing the rule that, "[o]nce there is an express pre-emption provision, . . . all doctrines of implied pre-emption are eliminated." *Cipollone*, 504 U.S. at 547 (Scalia, J., dissenting). Scalia and Thomas opined that implied preemption principles can apply; but they also reinforced their primary position that the language of a preemption clause should be given its ordinary meaning. *See id.* at 545-49. Indeed, Scalia and Thomas are strong proponents of the textual approach to statutory interpretation which gives virtually sole weight to the words Congress used. *See infra* notes 285-308 and accompanying text.

39. 514 U.S. 280 (1995).

40. The defendants in *Myrick* argued that the express preemption provision in the National Traffic and Motor Vehicle Safety Act of 1966 precluded state common law negligence actions. *See id.* at 285-86. The preemption provision precludes states from establishing any safety standard which is not identical to a federal standard in effect. *See id.* at 286 (quoting 15 U.S.C. § 1392(d) (1994)). Because the federal standard by which the actions may have been preempted was suspended, and thus not "in effect," the Court found that the actions were not expressly preempted. *Id.* at 286-87. The defendants alteruatively argued that the actions were impliedly preempted; and the plaintiffs responded that *Cipollone* held that implied preemption cannot exist when Congress has included an express preemption clause in a statute. *See id.* at 287-89.

41. *Id.* at 288.

42. *See id.* at 289. The Court also cited *CSX Transportation, Inc. v. Easterwood*, 505 U.S. 658, 673 (1993), as support for its statement that subsequent Supreme Court cases have not read *Cipollone* as obviating the need for analysis of implied preemption given the existence of an express preemption provision.

43. *See Myrick*, 514 U.S. at 290.

However, in several cases involving express preemption provisions—even cases that the Court has admitted are ambiguous—the Court has continued to analyze the issue without any suggestion that the implied preemption doctrines should play a role. For example, in *American Airlines, Inc. v. Wolens*,[44] decided in 1995, the Justices struggled to define the scope of the preemption clause in the Airline Deregulation Act of 1978 ("ADA"), but did not look to the implied preemption doctrines. The airline argued that the ADA preempted the plaintiffs' state common law claims, based on the state consumer fraud act and breach of contract, and arising out of the airline's retroactive changes in the terms and conditions of its frequent flyer program.[45] The ADA preemption clause broadly prescribes that states shall not "enact or enforce any law, rule, regulation [or] standard . . . relating to rates, routes, or services of any air carrier . . . ."[46] The majority opinion in *Wolens* held that the claims "related to" rates and services, but that only the consumer fraud claim was preempted.[47] The Court attempted to base its holding on the preemption provision's language—specifically the words "enact or enforce any law." The Court explained that the state consumer fraud act serves as the means for policing the marketing practices of the airlines and, thus, the cause of action would constitute an enforcement of a law relating to rates and services.[48] In contrast, the contract claim would merely enforce the airline's self-imposed undertaking and thus would not amount to state enforcement.[49]

In a concurring and dissenting opinion, Justice Stevens agreed that the ADA would not preempt the breach of contracts claims, but disagreed that the ADA provision revealed sufficient evidence of Congress's intent to preempt general state laws prohibiting fraud.[50] In a separate opinion, Justice O'Connor, joined by Justice Thomas, could see no valid reason to find either claim outside the scope of the preemption clause.[51] Despite the apparent inadequacies of the express preemption analysis, none of the Justices advocated that the implied preemption doctrines should inform the analysis. Indeed, the

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44. 513 U.S. 219 (1995).

45. *See id.* at 224-26.

46. *Id.* at 222-23 (quoting 49 U.S.C. § 1305(a)(1) (1994)). In a prior opinion, the Court had looked to ERISA's similarly worded preemption provision and held that the ADA preempts any state law which has a "connection with or reference to 'airline ratos, routes, or services'." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992).

47. 513 U.S. at 226.

48. *See id.* at 227-28.

49. *See id.* at 228-33.

50. *See id.* at 235-37 (Stevens, J., concurring and dissenting).

51. *See id.* at 240 (O'Connor, J., concurring and dissenting).

dissenting opinion stated that the majority overstepped its role in the preemption analysis by "arriv[ing] at what might be a reasonable policy judgment as to when state law actions against airlines should be preempted if we were free to legislate it,"[52] thereby suggesting that the majority may have "impliedly" and erroneously engaged in an implied preemption analysis by looking to the purpose underlying deregulation and other regulatory provisions.

Similarly, in cases involving ERISA's express preemption provisions, the majority of the Court has never expressly suggested that the implied theories of preemption should inform the express preemption analysis. As explained in Part III.B, ERISA contains an express preemption provision which states that ERISA shall supersede any state laws that "relate to" employee benefit plans.[53] In the early 1980s, the Supreme Court, following a traditional express preemption analysis, looked to *Black's Law Dictionary* to determine that a law satisfied the "relates to" test if it had a "connection with or reference to" an employee benefit plan.[54] This remained the standard for ERISA preemption until 1995 when, in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, the Court acknowledged that the issue of preemption could not be resolved by looking to the words "relate to" or the "connection with" test.[55] The Court held that the objectives underlying ERISA must provide a guide as to the scope of state law that Congress expected to survive the Act's passage.[56]

However, the Court did not shift to an implied preemption analysis. Instead, the Court refined the express preemption analysis. That is, looking to prior preemption cases it had decided, the Court established a benchmark for when laws have a connection with ERISA plans such that ERISA's objectives are implicated.[57] The Court held that the state law at issue did not have a sufficient "connection with" ERISA plans because it did not either bind ERISA plan administrators to any particular choice or preclude uniform

52. *Id.* at 238 (O'Connor, J., concurring and dissenting).
53. *See* 29 U.S.C. § 1144(a) (1994).
54. *See infra* notes 167-74 and accompanying text.
55. *See* New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655-56 (1995).
56. *Id.* at 656-57.
57. *See id.* at 657 (finding that, in prior cases, ERISA preempted state laws that mandated employee benefit structures or their administration, or that provided an alternative enforcement mechanism).

administrative practices or the provision of uniform interstate benefit packages.[58]

Just one year later, however, some Justices began to state clearly that the analysis of express preemption provisions should be informed by the implied preemption doctrines. In *Barnett Bank v. Nelson*, the Court addressed whether a federal statute that permitted national banks to sell insurance in small towns preempted a state statute prohibiting banks from selling most kinds of insurance.[59] The federal law did not contain an express preemption provision, so the Court engaged in an implied preemption analysis. Yet Justice Breyer, writing for an unanimous Court, was careful to explain that, often, explicit preemption language does not directly answer the question and courts must then consider whether the "federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent."[60] Justice Breyer clearly indicated that he was referring to the implied preemption doctrines by further explaining that congressional intent could be inferred from a pervasive scheme of regulation, an irreconcilable conflict, or when the state law stands as an obstacle to the full purposes and objectives of Congress.[61]

Justice Breyer reiterated his view that implied preemption doctrines should play a role in the interpretation of express provisions a few months later in *Medtronic, Inc. v. Lohr*.[62] Justice Breyer expressed in a concurring opinion that, if the language of an express preemption clause is ambiguous, courts must look elsewhere for Congress's intent and "[i]t makes sense, in the absence of any indication of a contrary congressional . . . intent, to read the pre-emption

58. *Id.* at 661. At issue in *Travelers* was a New York in-patient, hospital rate-setting scheme. *See id.* at 648. The challenged provisions required hospitals to add specified surcharges onto bills paid by commercial insurers and HMOs, but not onto bills paid by Blue Cross. The law, therefore, affectod ERISA plans because the amount of the surcharges was passed on to health plan purchasers (employers), thereby influencing some employers to switch to Blue Cross plans. However, because the effect of the law was only to "influence shopping decisions," it did not satisfy the refined test for when a law has a sufficient connection with ERISA plans to warrant preemption. *See id.* at 660; *see also* DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. –, 117 S. Ct. 1747, 1749 (1997) (upholding the state law at issue as not preempted by ERISA without looking to the implied doctrines).

59. 517 U.S. 25, 27 (1996).

60. *Id.* at 31 (citing Fidelity Fed. Sav. & Loan Ass'n. v. De la Cuesta, 458 U.S. 141, 152-53 (1982); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

61. *See id.* at 1108 (citing Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 318, 230 (1947); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

62. 518 U.S. 470 (1996).

statute . . . in light of [the] basic [implied] preemption principles."[63] The plurality opinion, however, adhered to a traditional express preemption analysis with no reference to implied preemption doctrines.

The call to use implied preemption principles in cases involving express preemption provisions appeared most recently in a concurring opinion in *California Division of Labor Standards Enforcement v. Dillingham Construction, Inc.*[64] The *Dillingham* majority analyzed the issue by applying the conventional view of ERISA preemption: a state law is preempted if it has a connection with or reference to an ERISA plan. Following the *Travelers* decision, the *Dillingham* Court held that California's law was indistinguishable because the "apprenticeship portion of the prevailing wage statute does not bind ERISA plans to anything. No apprenticeship program is required by California law to meet California's standards."[65] The majority also articulated a new test for when a "reference to" ERISA plans will result in preemption, namely, if the state law "acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation . . . ."[66] As in *Travelers*, the majority in *Dillingham* did not look to implied preemption principles, but instead refined the express preemption analysis.

However, the concurring opinion in *Dillingham* expressed the view that, rather than adhering to a traditional express preemption analysis, the Court should interpret ERISA's preemption provision as indicating that Congress intended the principles of ordinary field and conflict preemption to apply.[67] Interestingly, the concurring Justices suggested that the Court had already set forth this "new" approach to ERISA preemption four years earlier in *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*.[68] However, *John Hancock* was not a traditional preemption case. Rather, the Court

63. *Id.* at 508 (Breyer, J., concurring).

64. 519 U.S. –, 117 S. Ct. 832 (1997). *Dillingham* involved an ERISA preemption challenge to a California law which, although generally requiring the prevailing wage in a locale, permits contractors on public works projects to pay a lower wage to workers participating in apprenticeship programs that meet certain state sanctioned standards. The state standards, in turn, are substantially similar to those promulgated under the National Apprenticeship Act. *See id.* at 835-36.

65. *Id.* at 841.

66. *Id.* at 838 (citations omitted).

67. *Id.* at 843 (Scalia, J., concurring).

68. 510 U.S. 86 (1993).

was asked to decide whether ERISA's fiduciary duties applied to an insurance company's conduct in relation to certain annuities.[69]

The preemption issue arose in *John Hancock* because the defendant argued that ERISA's fiduciary standards could not govern an insurer's administration of annuity contracts because, under ERISA's savings clause, federal law must yield to state regulation of insurance.[70] The Court agreed that state regulation of an insurer's management of general account assets, although "relating to" employee benefit plans, would be saved from preemption. Nonetheless, the Court recognized that Congress could regulate insurers through ERISA[71] and held that ERISA's fiduciary duties could apply even if they conflicted with state insurance regulation—because ERISA calls for federal supremacy if state and federal laws "cannot be harmonized."[72] It was in this context that the Court opined that

> we discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis. State law governing insurance generally is not displaced, but "where [that] law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," federal preemption occurs.[73]

Thus, it is difficult to interpret *John Hancock* as pronouncing that implied preemption doctrines generally should inform the interpretation of ERISA's express preemption provision. Rather, the context of the Court's statement suggests that it was describing preemption of a law which, although saved from ERISA preemption as a regulation of insurance, is in conflict with a federal law.

In sum, the Court's recent cases have sent a mixed message as to the extent to which the implied preemption doctrines should play a role in construing express preemption provisions. The cases suggest that the Court as a whole agrees that an express preemption provision does not foreclose consideration of the implied preemption doctrines. However, not all of the Justices are ready for a wholesale

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69. *See id.* at 99. Resolution of the issue required the Court to interpret the scope of the exclusion from "plan assets" for "guaranteed benefit policies." Thus, the primary focus of the opinion was on the interpretation of guaranteed benefit policies. *See id.* at 101-10.

70. *See id.* at 97-98. ERISA's savings clause expressly exempts from preemption any state law "which regulates insurance, banking, or securities." *See* 29 U.S.C. § 1144(b)(2)(A) (1994).

71. *See John Hancock*, 510 U.S. at 98.

72. *Id.* at 98. That is, subsection (a) of the McCarran-Ferguson Act, 15 U.S.C. § 1012 (1994), reaffirms that states may regulate the business of insurance. However, subsection (b) clarifies that, although federal law will not generally supersede state insurance regulation, federal laws will invalidate state insurance laws if the federal law "specifically relates to" the business of insurance. *Id.*

73. *Id.* at 99 (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984)).

incorporation of the doctrines into a traditional express preemption analysis. This is understandable because to do so would constitute a dramatic shift from the traditional categorical approach to preemption. The Justices' hesitancy may stem from uncertainty as to how an incorporation of the principles of implied preemption might alter the Court's conception of the express preemption analysis. Indeed, the majority opinion in *Boggs* expressly declined to venture into this conceptual quagmire. The obvious question is why. Is there really a conceptual distinction between the doctrines of express and implied preemption?

B. Is Judicial Resistance to a New Preemption Paradigm Justified?

To determine whether there is a sufficient conceptual distinction between the express and implied preemption theories to justify the Court's hesitant approach to their integration, it is necessary to analyze the discrete inquiries associated with each category of preemption. This Part analyzes the essence of the inquiry in each category and whether there is any real conceptual distinction between the implied and express doctrines.

1. Implied Preemption Inquiries

The touchstone of the implied preemption analysis is congressional intent to preempt state law. Traditionally, the Court has recognized that congressional intent to preempt state laws may be inferred where the state law regulates conduct in a field that Congress intended the federal government to occupy exclusively—field preemption;[74] or when state law actually conflicts with federal law—conflict preemption.[75] As noted, the Court has developed discrete inquiries associated with each category of preemption. These inquiries help to determine when congressional intent to preempt should be inferred. The Court has inferred a congressional intent to occupy a field from a " 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it', or where an act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' "[76] The

74. *See* English v. General Elec. Co., 496 U.S. 72, 79 (1990) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
75. *See id.*
76. *Id.*

requisite intent for conflict preemption has been inferred when the Court finds that it is "impossible for a private party to comply with both state and federal requirements,"[77] or "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[78] However, if the federal legislation is in a field that the states have traditionally occupied, the Court has held that it will infer neither field nor conflict preemption absent clear and manifest evidence of congressional intent.[79]

Field preemption based on a dominant federal interest requires more than an important federal interest. The Court has explained that, because every subject that merits federal legislation is a subject of national concern, the analysis requires a finding of some "special features" warranting preemption.[80] For example, in *Hines v. Davidowitz*, the Court held that the Federal Alien Registration Act preempted a state law regulating the registration of aliens because of "the supremacy of the national power in the general field of foreign affairs,"[81] including immigration, naturalization and deportation. The Court explained that, because this field affected international relations and demanded broad national authority, any concurrent state power that existed was limited to the narrowest of ranges.[82] Similarly, in *Pennsylvania v. Nelson*, the Court found that the special dangers of Communist seditious activities to the United States as well as to freedom throughout the world created a field in which the federal interest was dominant.[83]

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77. *Id.* (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).

78. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). However, the Court has cautioned that, although it often invokes the three-category framework, the categories of implied preemption are not rigidly distinct. *See id.* at 79-80 n.5.

79. *See* Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 206 (1983) (citing CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664-65 (1993); *Rice*, 331 U.S. at 230) (applying the limitation to conflict preemption).

80. Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 719 (1985).

81. 312 U.S. 52, 62 (1941).

82. *See id.* at 66-67.

83. *See* 350 U.S. 497, 504 (1956). In contrast, the Court has held that, although Congress enacted a scheme which resulted in federally approved standards for gauging the maturity of avocados, the maturity of avocados was not a subject "by its very nature admitting only of national supervision." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143-44 (1963). The Court has also suggested that the degree of prior state regulation in a field is relevant to the inquiry. In *Pacific Gas*, 461 U.S. at 194-95, the Court was asked to determine whether Congress, through the Atomic Energy Act, had revealed an intent te preempt the field of nuclear regulation. The state law allegedly preempted was a moraterium on new nuclear plants in California until a method of disposal for high-level nuclear waste was developed and approved by the Federal Energy Commission. *See id.* at 198. The Court found that the moratorium was designed to address an economic issue; namely, that, without a permanent means of disposal, the nuclear waste problem could become critical and lead to unpredictably high costs. *See id.* at 216. Further, the Court found that the "[n]eed for new power facilities,

Case law suggests, however, that field preemption on the basis of a dominant federal interest is difficult to prove. This is because, if a court identifies a field that Congress has intended to preserve for federal regulation based solely on the federal interest, the states would be deemed powerless to act—even if Congress has not regulated either in the field or specifically regarding the issue addressed by the challenged state law. Field preemption creates a regulatory vacuum that courts must honor because, in theory, Congress deliberately created the vacuum. Accordingly, case law also shows that the Court will seek to narrow the scope of the preemptive field to mitigate against the impact of field preemption. For example, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, the utility argued that a state provision which imposed a moratorium on the certification required to build a new nuclear plant[84] was preempted by the Atomic Energy Act ("AEA") because Congress intended the Act to "preserve the Federal Government as the sole regulator of all matters nuclear."[85] The Court adopted the narrower view that the federal government had occupied only the field of nuclear safety concerns.[86] Thus, although the weight

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[and] their economic feasibility"—i.e., the economic aspects of electrical generation—had been traditionally regulated "for many years and in great detail" by the states. *Id.* at 205. A consideration of the extent of prior state regulation would suggest that the inquiry may, in some cases, involve a balancing of the federal and state interests.

84. The moraterium was imposed until such time as the state energy commission determined that technology or the means for the disposal of high-level nuclear waste had been developed and existed, and had been approved by the appropriate federal agency. *See Pacific Gas*, 461 U.S. at 197-98 (citing section 25524.2 of the 1976 amendments to the Warren-Alquist Act). Another provision of the amendments was similarly challenged, but the Court found that this challenge was not yet ripe. *See id.* at 200-03.

85. *Id.* at 205.

86. *See id.* at 212. In reaching this conclusion, the Court relied on several factors. First, the Court found that the need for new power facilities and their economic feasibility are areas which have been traditionally regulated by the states. *See id.* at 206. Second, the Court considered the histery of federal regulation of nuclear matters, namely, that when Congress decided te encourage private sector involvement in 1954, the legislation left no role for the states. *See id.* at 207. The Atomic Energy Act of 1954 sought to encourage private sector involvement subject te federal regulation and licensing of construction, ownership and operation of commercial nuclear power plants. *See id.* However, the federal agency then repealed a regulation concerning the financial qualifications of a utility proposing to construct a plant, stating that financial qualifications are only of concern if related to the public health and safety. *See id.* Further, a statutery provision in the Act expressly provided that the Act shall not affect the authority or regulations of any state or local agency "with respect to the generation, sale or transmission of electric power produced through the use of nuclear facilities" licensed by the federal agency. *Id.* at 208. Amendments in 1959 then heightened the states' role by permitting state programs to take over some of the federal regulatory oversight, but expressly preserved the federal authority over regulation of construction, and operation of nuclear facilities and the disposal of hazardous nuclear materials. *See id.* at 209. According to the Court, these factors clearly indicated that Congress intended "dual regulation" of nuclear powered electricity

of the federal interest is the key inquiry in field preemption analysis grounded in dominant federal interest, the Court will balance the federal interest against the state interest by considering the history of state and federal regulation and the entire regulatory scheme.

Field preemption can also be found if the federal law provides a sufficiently pervasive or comprehensive scheme of regulation. The Court has emphasized that there is no exact measure for when a scheme's comprehensiveness gives rise to the inference that Congress intended to preclude all state regulation in a field, but case law provides some benchmarks. In *Warren Trading Post Co. v. Arizona State Tax Commission*, the Court held that the congressional statutes and regulations governing trade with American Indians evinced Congress's intent that the federal government should have exclusive jurisdiction over the business of Indian trading.[87] In addition to granting the Commissioner of Indian Affairs the exclusive power to appoint traders and to specify the kind, quantity and prices of goods sold to Indians, there were detailed regulations prescribing "in the most minute fashion" who may qualify as a trader and how he shall be licensed, as well as, *inter alia*, what business records must be kept and how Indians are to be paid. The regulations also provided for inspections and penalties for violations. The Court characterized the regulations as "all inclusive" and held that a state tax on gross sales of a company that did business with Indians on the Arizona part of the Navajo reservation was preempted.[88]

While *Warren Trading Post* involved a subject which arguably could support a finding of field preemption based on the strong federal interest, the Court has found field preemption based on pervasive regulation even where the federal interest was minimal. In *Cloverleaf Butter Co. v. Patterson*, the Court addressed the preemptive scope of

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generation, and that the field of exclusive federal control was limited to the regulation of the safety and nuclear aspects of energy generation. *Id.* at 211-12.

87. 380 U.S. 685, 688-89 (1965).

88. *See id.* at 690. In *Commonwealth v. Nelson*, 350 U.S. 497, 498-504 (1956), the Court relied on the aggregate effect of numerous Congressional activities te support its finding that Congress intended to occupy the field of sedition. In 1940, Congress enacted the Smith Act which proscribed advocacy of the overthrow of federal, state, or local government and was enforceable through general criminal conspiracy provisions. *See id.* at 498-99. In 1950, Congress enacted the Internal Security Act, which required communist organizations to register and file annual reports detailing officers and funds, imposed sanctions on the organizations and members, and was enforceable through fines. *See id.* at 502-03. In 1954, the Communist Control Act characterized the Communist political party as a conspiracy to overthrow the government and within the scope of the Internal Security Act. *See id.* at 503. The Court held a state sedition statute preempted because these acts, taken as a whole, evinced a plan which made "it reasonable to determine that no room ha[d] been left for the States to supplement it." *Id.* at 504.

extensive federal regulations governing the manufacture of butter.[89] Notably, while the process of manufacturing a product such as butter is important to consumers and workers, the federal interest in the subject does not rise to the level of the federal interest in foreign affairs, national security, nuclear safety or dealing with American Indians. Nonetheless, the Court held that the federal regulations precluded further state regulation in the field. The Court noted that the Department of Agriculture had been given authority to protect consumers' interests "throughout the process of manufacture and distribution" and that the Department had regulated "such minutiae as the clean hands of the employees and the elimination of objectionable odors."[90] Thus, the pervasive nature of the regulatory scheme alone justified a finding of preemption.

If a court finds that Congress intended to preempt a particular field, the second step in the field preemption analysis is whether the state law impermissibly intrudes on that field. In *Pacific Gas*, the Court stated that, "[w]hen the Federal Government completely occupies a given field or an identifiable portion of it . . . the test of preemption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.' "[91] In *English v. General Electric Co.*, which also involved an analysis of preemption under the Atomic Energy Act, the Court framed the issue as whether the state law is "so related to" the safety aspects involved in the construction and operation of a nuclear facility that it falls within the field occupied by Congress.[92] However, the Court limited the scope of laws that could be preempted by noting that "not every state law that in some remote way may affect the nuclear safety decisions made by

89. 315 U.S. 148, 151 (1942).

90. *Id.* at 168.

91. 461 U.S. at 212-13 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947)). Despite the test's focus on the subject matter of the regulation, in applying the test the Court suggested that the motivation underlying the state law was central to the analysis. The Court opined that a state moratorium on nuclear construction grounded in safety concerns would fall squarely within the identified field of nuclear safety concerns. *See id.* at 213. Because the Court accepted the lower court's finding that California's moratorium was motivated by economic concerns, the Court held that the provision fell outside of the occupied field of nuclear safety. Yet, the real basis for the Court's conclusion is unclear. In concluding its field preemption analysis, the Court noted that an inquiry into legislative motives was "unsatisfactory" and reitorated that it was clear that the states had been allowed to retain sufficient authority over the need for electrical generating facilities to permit the provision at issue. *See id.* at 216. In *English v. General Electric Co.*, 496 U.S. 72, 84 (1990), the Court clarified that *Pacific Gas* should not be read for the proposition that a finding of safety motivation was necessary to place a law within the field preempted by the AEA. Thus, although a moraterium grounded in safety concerns would fall within the preemptod field, state laws enacted for reasons other than safety may also be preempted.

92. 496 U.S. at 84-85.

those who build and run nuclear facilities can be said to fall within the preempted field."[93] Rather, the test was whether the state law had "some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels."[94] The focus of this prong of the field preemption analysis therefore devolves to whether the state law has a sufficient impact on the federal interest to warrant preemption.[95]

The other theory of implied preemption hinges on conflict with federal law. The Supreme Court has recognized that federal laws that do not exclude all state laws in the same field nonetheless override state laws when there is an impermissible conflict.[96] The Court will infer the requisite intent for conflict preemption when it is "impossible for a private party to comply with both state and federal requirements"[97] or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

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93. *Id.*

94. *Id.* at 85. The state law at issue in *English* was a state tort claim for wrongful discharge and intentional infliction of emotional distress. The plaintiff was a laboratory technician at a nuclear facility operated by the defendant and was allegedly discharged in retaliation for complaints to General Electric's management and the federal government about perceived violations of nuclear safety standards. The Court recognized that allowing the claim to proceed would have some effect on the decisions made by those who build or operate nuclear facilities because liability for such claims "will attach additional consequences to retaliatory conduct by employees. As employers find retaliation more costly, they will be forced te deal with complaints by whistle-blowers by other means, including altering radiological safety policies." *Id.*

Nonetheless, the Court held that such an effect was not sufficiently direct or substantial enough te fall within the scope of the preempted field. The Court bolstered its finding by analogizing to *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984), in which the Court held that a state tort claim for punitive damages arising out of an escape of plutonium from a federally licensed nuclear facility did not fall within the field preempted by the AEA. The Court explained that the state tort claim in *Silkwood* would attach additional consequences to safety violations themselves and, therefore, allowing it to proceed would have a more direct effect on safety decisions. *See English*, 496 U.S. at 86. Logically, then, a state tort claim imposing a less direct effect would not fall within the preempted field. *See id.*

95. The cases also show that the Court has, in some instances, used a balancing approach when determining whether certain state laws fall within an identified field subject to exclusive federal regulation. Despite its early broad findings that federal statutes and regulations evince a congressional intent that no room remains for state regulation of the business of Indian trading on reservations, the Court has upheld some state laws that affect the business of Indian trading. *See, e.g.*, Washington v. Colville, 447 U.S. 134, 151 (1979); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 471-72 (1976). In *Department of Taxation & Finance v. Milhelm Attea & Brothers., Inc.*, the Court explained that the preemption issue depends on a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." 512 U.S. 61, 73 (1994) (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142, 145 (1980)).

96. *See, e.g.*, Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982); Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977).

97. *English*, 496 U.S. at 79 (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).

Congress."[98] Cases where it is impossible to comply with both federal and state laws are the easy preemption cases which generate no real controversy.[99]

In contrast, preemption merely because a state law may frustrate congressional goals involves a more complex analysis and has generated more controversy. Whether a state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . requires [an analysis of] the relationship between the state and federal law as they are interpreted and applied."[100] In *Jones v. Rath Packing Co.*, the Court addressed whether a California law that prohibited the average weight of packages at the time of sale from being less than the net weight stated on the package was preempted by federal laws regulating net weight labeling.[101] The Court found that the federal law impliedly preempted the state law because, although the flour millers could physically comply with both laws, they could not do so without hindering what the Court found to be an important purpose underlying the federal labeling laws.[102]

Specifically, the federal laws in *Jones* required accurate labeling of the quantity of contents in a package, but permitted reasonable weight variations caused by loss or gain of moisture during the course of reasonable distribution methods.[103] The Court explained that a major purpose of the federal law was to facilitate value comparisons among similar products, which requires that packages bearing the same weight on the label in fact contain the same quantity of the product.[104] Under the federal law, although a change in moisture might impact the weight of the packages, the packages would contain the same amount of flour solids when they reach the consumer as when they were packed, thereby facilitating product comparisons.[105]

In contrast, the state law's prohibition on weight variations would have a different effect. Flour millers would have to make ac-

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98. *Id.* (quoting Maryland v. Louisiana, 451 U.S. 725, 747 (1981); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

99. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 9.1 (1995) (explaining that, if a federal statute forbids an act that state legislation requires, the federal law preempts the state law).

100. *Jones*, 430 U.S. at 526 (quoting *Hines*, 312 U.S. at 67).

101. *Id.*

102. *See id.* at 540-41.

103. *Id.* at 533-34 (citing 21 C.F.R. § 1.8b(q) (1976)).

104. *See id.* at 540-41.

105. A change in moisture might impact the weight because after milling and packaging the moisture content of flour does not remain constant: flour will absorb moisture if stored where the relative humidity is greater than sixty percent, and will lose moisture if the humidity is less than sixty percent. *See id.* at 541 & n.36.

commodations for possible weight changes that may occur before sale. While local millers could possibly adjust their packaging to the specific humidity conditions of a region, a national miller would have to prepare for any potential weight loss and would have to over-pack to ensure that the actual weight was not less than the label weight.[106] This could lead to some packages having a different amount of flour solids than others despite identical weight labels. Because consumers' product value comparisons would be hindered, the Court held that the state law was preempted.[107] *Jones* represents a traditional approach to the implied theories because preemption was premised on a finding of actual hindrance of the key federal purpose underlying the federal legislation.

In some cases, however, the Court has gone further and invalidated state laws even though compliance with the laws would seemingly further the federal goals. For example, in *Gade v. National Solid Wastes Management Ass'n*, the Court held that the Occupational Safety and Health Act of 1970 ("OSHA") preempted Illinois' legislative provisions for the licensure of certain hazardous waste equipment operators and laborers.[108] The state law required an applicant to undergo rigorous training.[109] The federal agency charged with the responsibility for establishing federal safety and health standards under OSHA also promulgated detailed regulations on training requirements for those working with hazardous materials. Generally, a worker had to receive a minimum of forty hours of instruction and three days actual field experience under a supervisor.[110] A trade association of businesses that transport, dispose, and handle hazardous waste materials challenged the state laws because some members of the association had to ensure that their workers received not only the three days of field experience required by OSHA, but also the 500 days required by Illinois.[111] *Gade* is thus distinguishable from *Jones* because the affected entities could physically comply with both laws and because compliance with the state law would not hinder the underlying federal objective of promoting worker health and safety.

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106. *See id.* at 542-43.

107. *See id.* at 543.

108. 505 U.S. 88, 108-09 (1992).

109. For example, the applicant was required to provide a record of at least forty hours of approved training, to pass an examination, and to complete an annual refresher course. Further, a hazardous waste crane operator's license required a record showing operation of equipment for a minimum of 4,000 hours (500 days). *See id.* at 93 (citing 225 ILL. COMP. STAT. 22015(c)-(e), 22016(c)-(d), 22017(b), 22115(c), 22116 (West 1998)).

110. *See id.* at 92-93 (citing 29 CFR § 1910.120(e)(3)(i) (1997)).

111. *See id.* at 93-94.

Indeed, the state provisions would enhance safety because those satisfying the Illinois requirements would be better skilled and thus would be likely to have fewer accidents.[112]

Nonetheless, a plurality of the Court in *Gade* held that the state laws were impliedly preempted. In part, the decision hinged on an express provision in OSHA which, although not a preemption clause, strongly suggested that Congress intended for state laws to be preempted if the state law established an occupational standard on an issue for which the federal agency had established a standard, unless the state obtained the agency's approval.[113] The Court was also influenced by the Act's savings clause, which exempts from preemption any state laws regulating an occupational health and safety issue if no federal standard is in effect.[114] The Court found that these provisions evidenced Congress's intent to preempt state laws regulating the same issues as federal laws, even if they merely supplemented, and thus promoted, the policy underlying the federal standard.[115]

However, preemption hinged in large part on a secondary purpose underlying the Act identified by the Court: a congressional intent to avoid subjecting workers and employers to duplicative regulation.[116] Although the state had emphasized that the laws were designed to promote worker safety, the Court held that:

> In determining whether state law 'stands as an obstacle' to the full implementation of a federal law, 'it is not enough to say that the ultimate goal of both federal and state law' is the same . . . 'A state law also is pre-empted if it

112. *See id.* at 94-95 (explaining the district court's findings).

113. Section 18(b) of OSHA provides:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated . . . shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667(b) (1994). Although not a "preemption clause," Justice Kennedy would have characterized the case as one of express preemption. *See Gade*, 505 U.S. at 109 (Kennedy, J., concurring).

114. Section 4(b)(4) of OSHA states that the Act does not "supersede or in any manner affect any workmen's compensation law or . . . enlarge or diminish or affect in any other manner the common law or statutery rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4) (1994).

115. *See Gade*, 505 U.S. at 100.

116. *See id.*

> interferes with the methods by which the federal statute was designed to reach th[at] goal.'[117]

Thus, preemption was deemed appropriate because allowing states to selectively " 'supplement' certain federal regulations with ostensibly nonconflicting standards would be inconsistent with th[e] federal scheme of establishing uniform federal standards."[118] A state law can therefore be preempted as frustrating federal law if the effect of the state law hinders either the primary substantive purpose underlying the federal law or the secondary purpose of avoiding duplicative regulation.[119]

Notably, identification of a federal purpose of "uniform" regulation in essence converts the situation from one of conflict preemption to one of field preemption. The Supreme Court has recognized this relationship between the frustration prong of conflict preemption and field preemption. Despite its "stands as an obstacle" analysis, the Court in *Gade* shifted to a field preemption analysis when addressing the state's argument that the law was not preempted because, although the law concerned an occupational standard, the law also addressed a public safety concern.[120] The Court rejected this argument and noted that the preemption analysis must focus on both the law's purpose and effect.[121] The key issue is "at what point the state regulation sufficiently interferes with federal regulation that it should be deemed preempted under the Act."[122] Relying on the "direct and substantial effect" test from *English*—developed in the field preemption context—the Court agreed that, notwithstanding the

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117. *Id.* at 103 (quoting International Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

118. *Id.*

119. In a concurring opinion, Justice Kennedy characterized OSHA's primary objectives as the protection of worker safety and health; thus, Congress's desire to " 'subject employers and employees to only one set of regulations' " would be a secondary objective. *Id.* at 110 (Kennedy, J., concurring) (citations omitted). Kennedy then disagreed that primary and secondary purposes should have the same preemptive implications. Justice Kennedy opined that implied conflict preemption should be "limited to state laws which impose prohibitions or obligations which are in direct contradiction to Congress's primary objectives, as conveyed with clarity in the federal legislation." *Id.* Kennedy viewed the protection of worker health and safety to be the Act's primary purpose, but did not believe that Congress's purpose to subject employers and employees to only one set of regulations rose to that level. *See id.* Kennedy agreed with the outcome, but viewed the case as one of express preemption rather than implied preemption because the implication was largely derived from specific provisions in the Act. *Id.*

120. According to the Stato, because the state legislature articulated a purpose other than workplace health and safety, the Act had lost its preemptive force. The Court framed the issue as whether a "dual impact law can be an 'occupational safety and health standard' subject to pre-emption." *Id.* at 104-05.

121. *See id.* at 105.

122. *Id.* at 107.

motivation for the state law, the Act preempted state law that "constitutes, in a direct, clear and substantial way, regulation of worker health and safety."[123] The slippery path between the frustration prong of conflict preemption and field preemption reinforces the view that the three categories of implied preemption are not "rigidly distinct."[124]

Perhaps more importantly for purposes of this Article, the *Gade* opinion suggests that the line between express and implied preemption may be equally blurry. As explained, a plurality of the Justices found the state training requirements to be impliedly pre-empted. The plurality analysis, however, focused predominantly on OSHA's text. Accordingly, Justice Kennedy would have characterized the case as one of express preemption.[125] The plurality acknowledged the validity of Kennedy's observation, but concluded that the text's strong indication of Congress's intent that federal standards would preempt non-approved state standards on the same issues did not rise to the level of express preemption.[126] "We cannot agree that the negative implications of the text, although ultimately dispositive . . . expressly address the issue of federal pre-emption of state law."[127] Interestingly, the Court then stated:

> Frequently the pre-emptive 'label' we choose will carry with it substantive implications for the scope of pre-emption. In this case, however, it does not. Our disagreement with Justice Kennedy as to whether [OSHA's] pre-emptive effect is labeled 'express' or 'implied' is less important than our agreement that the implications of the text of the statute evince a congressional intent to pre-empt nonapproved state regulations when a federal standard is in effect.[128]

Thus, after reinforcing that there was in fact a distinction between implied and express preemption, the Court nonetheless noted that the

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123. *Id.* Similarly, the dissenting Justices in *Gade* equated the frustration prong of conflict analysis to field preemption where one congressional purpose is to avoid duplicative regulations. Justices Souter, Blackmun, Stevens, and Thomas notod that:

> under the plurality's reading, any regulation on an issue as to which a federal standard has heen promulgated has heen pre-empted. As one commentator has observed, this kind of purpose-conflict pre-emption, which occurs when state law is held to 'undermin[e] a congressional decision in favor of national uniformity of standards,' presents 'a situation similar in practical effect to that of federal occupation of the field.'

Id. at 115-16 (Souter, J., dissenting) (quoting TRIBE, CONSTITUTIONAL LAW, *supra* note 19, at 486).

124. *See* English v. General Elec. Co., 496 U.S. 72, 79 n.5 (1990).

125. *See id.* at 109 (Kennedy, J., concurring).

126. *See id.* at 104 n.2.

127. *Id.*

128. *Id.*

label of express or implied preemption was unimportant to its decision.[129]

2. The Express Preemption Analysis

As with implied preemption, the Court has emphasized in express preemption cases that whether federal law supersedes state law is fundamentally a question of congressional intent. As to express preemption, the Court has often stated that, because Congress has revealed its intent through explicit statutory language, "the court's task is an easy one."[130] Given the number of cases addressed by the Supreme Court involving express preemption provisions, and the number of plurality opinions spawned,[131] it is clear that express preemption provisions have failed to make the task an easy one.

As noted earlier in Part II, in *Cipollone v. Liggett Group, Inc.*, the Court reinforced the notion that express and implied preemption analyses are distinct.[132] In *Cipollone*, the Court addressed whether the express preemption provisions in the federal laws regulating cigarette labeling preempted state common law claims for breach of warranty, failure to warn, and misrepresentation. The Court explained that the preemptive scope of the federal laws was governed entirely by the express language of those provisions. The preemption provision prescribed that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."[133] The cigarette manufacturers argued that the claims were not preempted because common law claims do not impose "requirements or prohibitions." The Court disagreed, noting that the argument was at odds with the plain words of the 1969 provision: "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law . . . ."[134] The pre-

129. *Id.*

130. *Id.* at 79.

131. *See. e.g.*, Medtronic, Inc. v. Lohr, 518 U. S. 470, 474, 503, 509 (1996); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 519-20 (1992); *cf.* American Airlines, Inc. v. Wolens, 513 U.S. 219, 234-50 (1995) (although not a plurality opinion, revealing a serious disagreement among the Justices as to the scope of an express preemption provision).

132. 505 U.S. 504, 514 (1992).

133. *Id.* at 515 (quoting 15 U.S.C. § 1334(b) (1994 & Supp. 1996)).

134. *Id.* at 521. Although the Court agreed that the legislative history suggested that Congress was primarily concerned with positive enactments by states, "the language of the Act plainly reaches beyond such enactments" because "it is difficult to say that such actions do not impose 'requirements or prohibitions.' " *Id.* at 521-22.

emption analysis of the plaintiff's claims therefore hinged on whether each was "based on smoking and health," and imposed with respect to "advertising or promotion." Thus, the Court focused on the precise words of the preemption clause when analyzing the scope of an express preemption provision.

However, in some cases, the language of an express preemption provision has not been the sole consideration in express preemption analysis. In *Medtronic, Inc. v. Lohr*, the Court addressed whether the Medical Devices Act ("MDA") preempted common law negligence and strict liability claims against manufacturers of medical devices.[135] The MDA's preemption provision provides that states may not establish any "requirement" which differs from or adds to any requirement applicable under the MDA, and which relates to the "safety or effectiveness of the device."[136] Following *Cipollone*, the Court in *Medtronic* explained that it was unnecessary to go beyond the text of the provision to determine whether Congress intended to preempt "at least some state law."[137] However, the Court clarified that it must "nonetheless 'identify the domain expressly pre-empted' by that language."[138] The Court explained that this analysis, while beginning with the text and the presumption against preemption, must ultimately strive to ascertain Congress's purpose.[139] The Court also stated that a fair understanding of congressional purpose is discerned not only from the language of the preemption provisions, but also from the statutory framework surrounding it, and the structure and purpose of the entire statute as revealed "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."[140]

The defendant in *Medtronic* argued that the plaintiff's claims were preempted because any common law cause of action constitutes a "requirement" which alters incentives or imposes duties different from or in addition to the standards promulgated pursuant to the MDA. Although the Court in *Cipollone* adopted a similar argument, a plurality of the Court in *Medtronic* deemed the argument implausible. The Court found it " 'difficult to believe that Congress would, without comment, remove all means of judicial recourse' for those injured"

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135. 518 U.S. 470, 474 (1996).
136. *Id.* at 484 (quoting 21 U.S.C. § 360k(a) (1994 & Supp. 1996)).
137. *Id.* at 484.
138. *Id.* (quoting *Cipollone*, 505 U.S. at 517).
139. *See id.*
140. *Id.* at 486.

from defective medical devices.[141] According to the Court, this would have the "perverse effect" of granting immunity from design defect liability to an industry that Congress thought needed more stringent safety regulation. The plurality distinguished *Cipollone* as involving a more specific preemption provision targeted at a limited set of state requirements based on smoking and health. Thus, "giving the term 'requirement' its widest reasonable meaning did not have nearly the pre-emptive scope nor the effect on potential remedies that Medtronic's broad reading of the term would have in this suit."[142] Therefore, although conducting an express preemption analysis, the Court tempered the plain meaning of the terms in the preemption clause.[143]

These cases suggest that in express preemption analysis, the key underlying inquiry is whether the state law constitutes the type of law described in the preemption provision. In making this determination, the language of the preemption provision carries substantial weight. But the Court may look beyond that language, to the purpose of the federal law as revealed through the statutory framework, to ensure that its interpretation is a fair assessment of Congress's intent regarding the scope of preemption. The inquiry then becomes whether, given the purpose of the federal scheme, it makes sense to construe the language of the preemption clause as encompassing the particular state law at issue.

Once the Court moves beyond the langnage of the provision, the analysis takes on some of the characteristics of implied preemption analysis. Yet, the majority or plurality opinions in express preemption cases do not suggest that the Court is conducting an implied preemption analysis despite recent suggestions in concurring opinions that it makes sense to use the implied preemption doctrines to aid in the interpretation of express preemption clauses. The question, then, becomes whether the express preemption analysis really differs from

141. *Id.* at 487 (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 238 (1984)).

142. *Id.* at 488.

143. Yet, *Medtronic* reflects a textual approach to the analysis. The plurality relied on the structure and purpose of the statute as a whole. The Court pointed out that, in the MDA, the term "requirement" appears several times, each time suggesting that its focus is specific enactments of positive law. *See id.* at 487-88. Additionally, the Court found that the MDA was primarily enacted to "provide for the safety and effectiveness of medical devices intended for human use." *Id.* at 489-90. Therefore, the Court found that, although Congress may have had some intent to protect innovations in device technology, Congress's primary concerns about regulatory burdens were related to the risk of additional federal and state regulation rather than the danger of preexisting duties under the common law. Indeed, the Court opined that any concern that product liability actions would hamper the development of devices was manifested through fewer substantive requirements under the MDA. *See id.* at 491.

an implied preemption analysis. A careful analysis supports the conclusion that there is no substantive difference between implied and express preemption analysis.

3. A Metaphysical and Illusory Distinction

The foregoing descriptions illustrate that, when Congress has used its delegated powers and enacted legislation, the question of preemption becomes one of statutory interpretation. The cases involving an express preemption clause readily reveal the interpretative nature of the preemption analysis. The Court has focused on the precise language of the preemption clause, and whether the state law constitutes the type of law described in the preemption provision. In making this determination, the language of the preemption provision is assigned substantial and sometimes determinative weight. However, in some cases, the Court may look beyond that langnage to the purpose of the federal law as revealed through the statutory framework. The inquiry in these cases then becomes whether, given the structure and purpose of the federal scheme, it makes sense to construe the language as encompassing the particular state law at issue.

Although implied preemption cases are also matters of statutory interpretation, no specific preemption language guides the analysis. Rather, the analysis focuses on more abstract concepts such as the weight of the federal interest, the pervasiveness of the regulatory scheme, or the purposes underlying the federal legislative action. The analysis in both field preemption and conflict preemption cases depends on the effect of the state law on the federal scheme. Namely, does the law have a direct and substantial effect on the subject matter preserved for federal regulation and thus constitute a law which impermissibly intrudes on the preemptive field? Or, does the effect of the law frustrate congressional purposes by rendering it impossible to comply with both or by being sufficiently in tension with the federal purposes? Without specific preemption language, identification of a field preserved for exclusive federal regulation and the federal purposes underlying federal law must be inferred.

But what, if any, is the difference between looking to the language, structure and purpose of the federal law in express preemption analysis to ensure a fair assessment of congressional intent and inferring intent to preempt from the weight of the federal interest, the pervasiveness of the regulatory scheme, or the purposes underlying the federal law? In the *Gade* decision, Justice Kennedy alluded to a

distinction when he objected to an inquiry that permitted a court to infer an intent to preempt by assessing whether the state law was in tension with the objectives of the federal law. According to Kennedy, "[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that preempts state law."[144] Yet, Kennedy endorsed the express preemption analysis which purports to divine Congress's intent from the language, structure, and purposes of the statute as a whole.[145] Thus, although both express and implied analyses look to the purpose of the federal law, Justice Kennedy noticed a critical difference between them.[146] In the express preemption analysis, a court determines the purpose of the statute and asks, given this purpose, as divined from the text, is it reasonable to infer that Congress intended the preemption clause to encompass this state law? But, in the implied "stands as an obstacle" analysis, a court asks a very different question: Is the state law sufficiently in tension with the federal interests or objectives that it should be preempted?

It could be argued, then, that the implied preemption doctrines simply sidestep the key premise underlying both express and implied approaches, namely, that the touchstone of the analysis is congressional intent to preempt state law. Weighing the strength of the federal interest or the pervasiveness of the federal law, or assessing whether the effect of the state law is in tension with congressional purposes, may provide insight into whether the federal law should preempt the state law to ensure an effective regulatory scheme, but it does not provide insight into congressional intent. As one commentator has noted, the implied preemption doctrines may cause courts to "avoid the central question, whether Congress intended to oust state law, and rather examine what general purposes Congress intended its legislation to have in the subject area and consider whether the state law interferes with these purposes in any way."[147] In contrast, even when the Court has looked beyond the language of

144. Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 111 (1992). Many scholars agree with this view. *See, e.g.*, Philip H. Corby & Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 AMER. J. TRIAL ADVOC. 435, 444-50 (1992).

145. Kennedy agreed with the outcome, but viewed the case as one of express preemption rather than implied preemption because the implication was largely derived from specific provisions in the Act. *See Gade*, 505 U.S. at 111 (Kennedy, J., concurring).

146. *See id.* at 109-10.

147. Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS L.Q. 69, 96 (1988).

the provision and considered the federal law's structure and purpose, the express preemption approach appears to remain truer to preemption's premise.[148] When the Court analyzes the structure of the federal law, the Court is attempting to ascertain congressional intent from the terms of the statute as a whole. When the Court considers the statute's purpose, the focus remains on whether, given the effect of the state law on the federal purpose, it is reasonable to infer that Congress intended for this type of state law to fall within the scope of the preemptive language.

This distinction, however, is metaphysical if not illusory. In both instances the Court engages in statutory construction. The difference is that the implied theories represent a more purposive, or contextual, approach to statutory interpretation. As explained in greater detail in Part IV, a court using a purposive approach will consider numerous sources and factors to ensure that its interpretation gives effect to the spirit of the law, fits the law into the legal landscape, and remains consistent with overarching policies. In contrast, the express preemption analysis reflects a classic textual approach to statutory interpretation. A court using a textual approach will avoid looking beyond the text of the statute at issue, and will interpret the law in accord with the meaning attributable to the words used by Congress—even if a review of other material would show that the legislature could not have intended what the meaning suggests.[149] Both approaches, however, represent a search for congressional intent.[150]

If the distinction stems predominantly from different approaches to statutory interpretation, the Justices' hesitancy to integrate the implied theories into cases involving express preemption clauses is unwarranted—at least from a doctrinal perspective. The hesitancy is perhaps understandable, however, given the growing debate as to the proper approach to statutory interpretation. Nonetheless, rather than avoiding the issues, the Court should confront the complex conceptual and interpretive issues which arise as the preemption paradigm shifts away from the traditional categorical

148. The discussion in Part IV demonstrates the fallacy of this statement.

149. *See infra* notes 285-309 and accompanying text.

150. Notably, Justice Scalia, an avid proponent of textualism, would qualify the statement that statutory interpretation represents a search for congressional intent. Scalia has explained that, although the Court frequently states that the objective in interpreting a statute is te give effect to "the intent of the legislature," judges are not looking for subjective intent, but for an "objectified intent." Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 16-17 (1997).

approach. The remainder of this Article explores these difficult issues.

III. THE CONCEPTUAL ISSUES

As the Court shifts away from the categorical approach to preemption and toward a preemption continuum in which the implied theories inform an express preemption analysis, key issues which arise are when the implied theories are relevant and how they should be used. These questions delve into the conceptual difficulty associated with integrating the doctrines. For example, should the implied theories be viewed as merely another means of defining the scope of the terms in the express preemption clause? Or, should the theories be used as a supplemental means of finding state laws preempted—beyond the scope of the express preemption clause, and perhaps beyond the direct operation of the Supremacy Clause? As noted in Part I, the majority in *Boggs* expressly declined to address the conceptual issue.[151] This Part analyzes the ramifications of the Court's avoidance of the issues and finds that the majority opinion represents a doctrinal "leap" to the use of the implied preemption theories. However, in order to facilitate the discussion of both the conceptual and interpretive issues, this Part first provides relevant background information about *Boggs*.

A. *The* Boggs *Case—Background*

Boggs is a complex case both factually and legally. Isaac Boggs worked for South Central Bell ("SCB") and participated in SCB's retirement plan from 1949 until his retirement in 1985.[152] When Isaac began employment with SCB he was married to Dorothy. They remained married until Dorothy's death in 1979. Thus, Isaac and Dorothy were married for approximately thirty of the thirty-six years in which Isaac participated in SCB's retirement plan. They had three sons. Dorothy's will bequeathed to Isaac one-third of her estate; the remaining two-thirds was bequeathed to Isaac as a lifetime usufruct, with naked ownership interest being held by her sons.[153] For purposes

151. Boggs v. Boggs, 520 U.S. --, 117 S. Ct. 1754, 1761 (1997).

152. *See id.* The basic facts of the case, as explained in this subpart, are found in section I of the majority opinion. *See id.* at 1758-59.

153. Under Louisiana law, a "lifetime usufruct" is the equivalent of a common law life estate. *See id.* at 1758 (citing LA. CIV. CODE ANN., art. 535 (West 1980)). The "naked owner-

of the litigation, the parties agreed that, under Louisiana's community property laws, Dorothy could dispose of her community property interest in Isaac's undistributed pension plan.[154]

Within a year of Dorothy's death, Isaac married Sandra and they remained married until Isaac's death in 1989. When Isaac retired from SCB in 1985, he received numerous benefits: a lump sum distribution from SCB's savings plan which he rolled into an IRA;[155] ninety-six shares of AT&T stock; and a monthly annuity payment in the amount of $1,777.67. Isaac bequeathed to Sandra certain real property including the family home, and a lifetime usufruct in the remainder of his estate with naked ownership interest being held by his sons.[156]

The dispute arose when Dorothy and Isaac's sons filed an action in state court asking that the court appoint an expert to compute the percentage of the retirement benefits they were entitled to as a result of Dorothy's testamentary transfer.[157] From the sons' perspective, Dorothy's testamentary transfer of her community property interest in Isaac's retirement plan impacted Isaac's ability to bequeath the retirement benefits to Sandra at the time of his death. One part of the retirement benefits represented Isaac's community interest in the retirement benefits which Isaac could leave to Sandra. A second part represented the one-third of the benefits which constituted Dorothy's community interest, which she unconditionally left to Isaac and which Isaac could thus leave to Sandra. However, a third part represented the remaining two-thirds of the benefits which constituted Dorothy's community interest which she left to Isaac as a lifetime usufruct. Thus, if Dorothy's testamentary transfer was valid, the sons—as owners of the naked interest in this portion of the benefits—were entitled to some portion of the benefits at the time of Isaac's death. The sons sought a judgment awarding them their portion of the benefits, including a portion of the IRA, the AT&T stock,

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ship" held by the sons is the equivalent of a common law remainder interest. *See id.* at 1767 (Breyer, J., dissenting).

154. Shortly after Dorothy's death, a Louisiana state court ascribed to Dorothy's estate a community property interest in Isaac's savings plan retirement account in the amount of $21,194.29. *See id.* at 1758.

155. The lump sum distribution was in the amount of $151,628.94. Because Isaac made no withdrawals, the IRA acount was valued at $180,778.05 when he died. *See* Boggs v. Boggs, 89 F.3d 1169, 1172 (5th Cir. 1996).

156. *See Boggs*, 117 S. Ct. at 1758.

157. *See id.* at 1759.

the monthly annuity payments received by Isaac during his retirement, and Sandra's survivor annuity payments.[158]

Sandra challenged the sons' claim to any portion of the retirement benefits by raising the sword of ERISA preemption.[159] It was undisputed that Isaac's retirement benefits were provided by SCB as part of an employee benefit plan within the scope of ERISA. Thus, Sandra filed a complaint in federal court seeking a declaratory judgment that ERISA preempted the application of Louisiana's community property and succession laws to the extent that the laws would validate the sons' claim to an interest in Isaac's retirement benefits.[160] The district court held that ERISA did not preempt the state laws and a divided panel of the Fifth Circuit affirmed.[161]

The *Boggs* majority in the Supreme Court found that Louisiana's community property law was preempted to the extent it recognized Dorothy's sons' claims because of a conflict with two ERISA provisions. One ERISA provision mandates that annuity benefits payable upon retirement must be in the form of a joint and survivor annuity that includes an annuity payable to a nonparticipant surviving spouse.[162] The other provision is an exception to the general prohibition on alienation of ERISA benefits that permits a court to issue a decree creating or recognizing a nonparticipant spouse's rights to benefits when resolving marital property rights upon divorce or separation.[163] As to both provisions, the majority found that permitting the sons' action to proceed would frustrate Congress's purpose. The Court grounded its conclusion on a "stands as an

158. The dissenting opinion clarified that, in Sandra's words, the sons asked for " 'an undivided interest in, and/or the value of an undivided interest in, the assets and/or benefits that were paid out of the pension plans.' " *Id.* at 1768 (Breyer, J., dissenting). This distinction became relevant in the dissent's analysis of the survivor's annuity provision. *See id.* at 1774-75.

159. *See id.* at 1759. ERISA contains an express preemption clause which broadly provides that "the provisions of this subchapter . . . shall supersede any and all State laws insofar as they . . . relate te any employee benefit plan." 29 U.S.C. § 1144(a) (1994).

160. *See Boggs*, 117 S. Ct. at 1759.

161. *See id.* The lower courts held that ERISA did not preempt Dorothy's transfer because Congress did not intend to affect traditional family law. Further, ERISA provisions were not implicated because Dorothy's rights in the benefits were acquired by operation of community property law and not by a transfer, and because " '[ERISA] does not display any particular interest in preserving maximum benefits to any particular beneficiary.' " *Id.* at 1759 (citations omitted). The Supreme Court granted certiorari because the Fifth Circuit opinion created a split in the Circuit Court of Appeals, and because the decision affected the community property states of Arizona, California, Idaho, Nevada, and Washington. *See id.*

162. *See id.* at 1761-62; *see also* 29 U.S.C. § 1055(a) (1994). *See also infra* note 204 for a more detailed discussion of section 1055(a).

163. *See Boggs*, 117 S. Ct. at 1762-63. The anti-alienation provision is codified at 29 U.S.C. § 1056(d) (1994 & Supp. 1995). The provision expressly permitting qualified domestic relations orders is codified at 29 U.S.C. § 1056(d)(3) (1994 & Supp. 1995).

obstacle" theory of implied preemption.[164] The dissenting Justices in *Boggs* disagreed with the outcome, but agreed that the "stands as an obstacle" theory of preemption was relevant to the analysis.[165] The Court's reliance on the implied "stands as an obstacle" theory in a case involving ERISA, which contains an express preemption provision, is significant because it confirms the evolving view that the implied theories of preemption may inform an express preemption analysis. However, the majority declined to explain, from a conceptual perspective, how the implied "stands as an obstacle" theory related to ERISA's express preemption clause.[166]

B. ERISA Preemption—Traditionally an Express Preemption Analysis

Congress enacted ERISA in 1974 and included in it a preemption provision infamous for its breadth.[167] Section 514(a) of ERISA broadly proclaims that "the provisions of this subchapter . . . shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan."[168] Employee benefit plans are defined to include both pension and welfare plans.[169] The Supreme Court has historically construed section 514(a) as broadly encompassing all state laws that have a "connection with or reference to" ERISA plans; but as not reaching state laws with only a "tenuous, remote, or peripheral" effect on plans.[170] These parameters of ERISA preemption were established through the approach to express preemption analysis explained in Part II. Indeed, the early ERISA cases were among the first cases decided by the Supreme Court involving an express preemption provision.

The Court first articulated the "connection with or reference to" standard in *Shaw v. Delta Air Lines, Inc.*[171] Citing to *Black's Law Dictionary*, the Court held that a law " 'relates to' an employee benefit

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164. *See Boggs*, 117 S. Ct. at 1763-64; *see also infra* Part IV.A.1.

165. *See id.* at 1776 (Breyer, J., dissenting); *see also infra* Part IV.A.2.

166. *See id.* at 1760-61.

167. For an in-depth analysis of ERISA's preemption clause, see Karen A. Jordan, Travelers Insurance*: New Support for Arguments to Restrain the Scope of ERISA Preemption*, 13 YALE J. ON REG. 255 (1996).

168. 29 U.S.C. § 1144(a) (1994).

169. *See* 29 U.S.C. § 1002(3) (1994).

170. *See, e.g.*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983).

171. *Id. Shaw* involved a challenge to two New York laws: a law prohibiting employers from structuring their benefit plans such that pregnancy was treated differently from other non-occupational disabilities; and a law requiring employers to pay disability benefits to employees unable to work because of pregnancy.

plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."[172] The Court noted that it must give effect to the "plain meaning" of the phrase "unless there is good reason to believe Congress intended the language to have some more restrictive meaning."[173] The Court looked briefly to the structure of ERISA's preemption provisions and to the legislative history to confirm that Congress used the phrase "relate to" in its broad sense; and it then reinforced the breadth of its interpretation by relegating to a footnote the possibility of any limitation on the scope of the phrase.[174] *Shaw*, therefore, set the stage for express preemption analysis in ERISA preemption cases.

Following *Shaw*, the inquiry into whether ERISA preempts state law has traditionally begun with the Court's dictionary definition of the phrase "relate to," "connection with," or "reference to," and then proceeded to an analysis of whether the challenged state law falls within the scope of this phrase.[175] As noted in Part II, the Court recently has suggested that the scope of ERISA preemption cannot be determined solely by reference to the phrase "relate to," but must turn in part on the congressional purposes underlying ERISA.[176] Importantly, however, the Court in these recent cases did not explicitly employ the implied preemption doctrines. Rather, the Court retained the "connection with or reference to" benchmark, thereby suggesting that the Court was still, in essence, engaging in an express preemption analysis, albeit one which required further refinement of what those terms meant.[177]

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172. *Id.* at 96-97 & n.16 (quoting BLACK'S LAW DICTIONARY 1288 (6th ed. 1990): "Relate. To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with").

173. *Id.* at 97 (citing Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

174. *See id.* at 98-100 & n.21.

175. *See, e.g.*, Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990); Mackey v. Lanier Collection Agency & Serv., Inc., 468 U.S. 825 (1988); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987); Pilot Life Ins. v. DeDeaux, 481 U.S. 41 (1987); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

176. *See, e.g.*, DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. --, 117 S. Ct. 1747 (1997); California Div. of Labor Standards Enforcement v. Dillingham Constr. Inc., 519 U.S. --, 117 S. Ct. 832 (1997); New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995).

177. For example, the Court in *Travelers* found that the state law at issue did not involve an impermissible "reference to" ERISA plans, and held that the state law had an insufficient "connection with" ERISA plans because it did not bind ERISA plan administrators to any particular choice nor preclude uniform administrative practices or the provision of uniform interstate benefit packages. *Travelers*, 514 U.S. at 61. In *Dillingham*, the Court held that a state law has an impermissible "reference to" ERISA plans when the law "acts immediately and exclusively upon ERISA plans, as in *Mackey*, or where the existence of ERISA plans is essential to the law's operation . . . ." *Dillingham*, 117 S. Ct. at 838.

Thus, even in the recent cases, the Court appeared to follow the approach to express preemption described in Part II. Although looking beyond the text of the preemption provision, the inquiry was still whether, given the structure and purpose of ERISA, it made sense to construe the phrase "relate to" as encompassing the particular state law at issue. The majority's use of an implied analysis in *Boggs* therefore presented a significant analytical shift. However, the majority failed to address squarely the conceptual issue of when and how the implied doctrines should be used in cases involving express preemption provisions. Unfortunately, avoiding the conceptual quagmire has arguably created a doctrinal leap rather than a mere analytical shift.

C. The Majority's Doctrinal "Leap" to the Use of Implied Theories

Despite the Court's previous adherence to an express preemption analysis in the ERISA context, the majority in *Boggs* resolved the case using an implied preemption analysis. This shift in analysis is neither remarkable nor unexpected given the Court's recent dialogue about the providence of looking to the implied doctrines to inform the analysis in cases involving express preemption provisions, as well as the concurring Justices' statements in *Dillingham*.[178] Further, unlike most ERISA preemption cases reaching the Supreme Court, Sandra Boggs argued that permitting Dorothy's sons' claims to go forward conflicted with certain express ERISA directives,[179] thereby readily setting the stage for the integration of the implied theories into the ERISA preemption analysis.[180]

It is remarkable, however, that the majority explicitly declined to address the conceptual issues underlying the preemption paradigm shift. The majority in *Boggs* understood that questions had arisen as to when and how to incorporate the implied theories into an analysis involving an express provision. Nonetheless, Justice Kennedy simply began the preemption analysis by quoting ERISA's express preemption provision, and stating:

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178. *See supra* notes 64-68 and accompanying text.

179 *See* Boggs v. Boggs, 520 U.S. --, 117 S. Ct. 1754, 1759 (1997).

180. In most other ERISA preemption cases, the parties had not argued that the state laws at issue conflicted with any particular ERISA provision. Rather, the parties generally argued that the state laws had an impermissible effect on ERISA plans. *See, e.g.*, *Travelers*, 514 U.S. at 648-49 (involving a state law imposing surcharges on hospital bills which, in turn, arguably affected ERISA plans by increasing the costs associated with providing benefits); *Pilot Life*, 481 U.S. at 54 (involving state contract and tort claims which, if allowed to proceed, would arguably affect ERISA plans by increasing the costs associated with providing benefits).

> We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve the case. We need not inquire whether the statutory phrase 'relate to' provides further and additional support for the pre-emption claim. Nor need we consider the applicability of field pre-emption.[181]

The majority then found that Dorothy's sons' claim to any portion of Sandra's survivor's annuity, as well as to Isaac's other retirement benefits, was preempted because recognizing their interest would frustrate a congressional purpose underlying specific ERISA provisions.[182]

By failing to explain why this case could be resolved on the basis of the implied theories alone, and by resting its holding on the "stands as an obstacle" theory, the *Boggs* majority opinion is groundbreaking. The opinion can be construed as suggesting that, even when Congress has spoken through an express preemption provision, a federal statutory scheme may impliedly preempt state laws beyond the scope of the express preemption language—and beyond laws that would be superseded by the Supremacy Clause due to a direct conflict. This is the opposite of what Justice Kennedy explicitly suggested, namely, that an express clause may preempt laws in addition to those impliedly preempted.[183] But, without an explanation, the language is open to this broader and more groundbreaking construction. It is more groundbreaking because recent express preemption cases such as *Cipollone* and *Medtronic* suggest that, when Congress has spoken on the issue of preemption, the express preemption provision delimits the bounds of preemption beyond the operation of the Supremacy Clause.[184] Thus, while it is traditionally accepted that Congress may expressly preempt laws beyond those which could be found impliedly preempted, it is another matter to suggest that laws beyond the scope of Congress's expression nonetheless may be impliedly preempted under a "stands as an obstacle" analysis.

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181. *Boggs*, 117 S. Ct. at 1760-61.

182. *See infra* Part IV.A.1.

183. *See Boggs*, 117 S. Ct. at 1760-61.

184. That is, as explained in Part II.B.2, the express preemption analysis posits that, when Congress speaks through a preemption clause, the scope of preemption is determined by the precise terms Congress chose to use in the clause. At the same time, it is traditionally recognized that, through operation of the Supremacy Clause, a direct and actual conflict between a provision in a federal legislative scheme and a state law results in the state law being superseded by the federal provision.

From this perspective, the majority's approach in *Boggs* could be characterized as a doctrinal leap instead of a doctrinal shift. Specifically, the opinion does not necessarily flow from the recent ERISA cases suggesting that the implied doctrines might be relevant to the analysis. Rather, the Court in *Travelers* unanimously held only that its prior literal approach to the "relates to" language in ERISA's preemption provision was unworkable; and that courts should look to ERISA's objectives when determining whether a state law has a sufficient "connection with" ERISA plans.[185] The Court in both *Travelers* and *Dillingham* did not explicitly recognize the use of the implied theories.[186] Further, even if the recent cases could be construed as reflecting an "implicit" use of the implied preemption analysis, the implied doctrines would have been used as a means of identifying the scope of the phrase "reference to or connection with."[187] Accordingly, the Court's use of the implied doctrines would have been in accord with the prevailing view that an express provision delimits the bounds of preemption even if the implied doctrines are used to help understand those bounds. The approach of the majority in *Boggs* leaped beyond this use of the implied theories.[188]

This doctrinal leap was both unnecessary and overly broad. In notable contrast to the majority opinion, the dissenting Justices in *Boggs* confronted the conceptual issue and attempted to explore how

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185. The Court in *Travelers* found that the state law at issue did not involve an impermissible "reference to" ERISA plans, and held that the state law had an insufficient "connection with" ERISA plans because it did not bind ERISA plan administrators to any particular choice nor preclude uniform administrative practices or the provision of uniform interstate benefit packages. *Travelers*, 514 U.S. at 661.

186. *See supra* notos 55-68 and accompanying text.

187. *See supra* noto 177.

188. The majority's approach, however, is arguably not unprecedented. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524-26 (1981), the first ERISA preemption case to reach the Supreme Court, the Court held that a state law was preempted—not on the basis of an analysis of the language of section 514(a)—but due to a conflict with specific ERISA provisions. At issue in *Alessi* was a state law which prohibitod the set-off of workers' compensation awards against employees' retirement benefits. *Id.* at 507-08 (citing N.J. STAT. ANN. § 34:15-29 (West Supp. 1980-81)). The Court found that Congress, in enacting ERISA, expressly preserved the option of integrating pension funds with other income streams available to the retired employee, although Congress imposed a restriction on intogration of pension benefits with benefits available under the Social Security Act and the Railway Retirement Act. *See id.* at 514-15. Further, although ERISA does not expressly mention integration with workers' compensation, the Court found that Congress had embraced an Internal Revenue Service regulation and Revenue ruling which approved of reduction in pension benefits corresponding to workers' compensation awards. The Court held that the state law was preempted because it eliminated a method for calculating benefits that was permitted by federal law and thus constituted an impermissible intrusion on the federal regulatory scheme. *See id.* at 524-25. Thus, *Alessi* arguably supports an approach which views the implied doctrines—including the "stands as an obstacle" theory—as coexisting with an express preemption provision.

the implied preemption doctrines should be used in a case involving an express preemption provision.[189] Specifically, Justice Breyer integrated the implied doctrines into the doctrinal framework developed in prior ERISA preemption cases. Justice Breyer explained that Louisiana's community property law "relates to" an ERISA plan if it " 'refers' to such a plan, or if it has an impermissible 'connection with' a plan."[190] Breyer first found that the law did not involve an impermissible reference by applying the test articulated in *Dillingham*.[191]

Justice Breyer then incorporated the implied doctrines into the "connection with" prong of the ERISA preemption analysis. Breyer opined that the phrase "connection with" might "encompass the question whether state law intrudes into an area Congress (given ERISA's basic objectives) would have wanted to reserve exclusively for federal legislation. In my view, this latter problem (sometimes called 'field preemption') is not present here."[192] Justice Breyer considered some possible "fields" which could be implied from ERISA, but found none that might be implicated by the state law at issue.[193] Justice Breyer also noted that the "connection with" prong could refer to a conflict with an ERISA purpose.[194] The heart of the dissenting opinion is thus devoted to a conflict analysis, as is detailed in the following section. The key point is that the dissenting opinion in *Boggs* confronted the task avoided by the majority.

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189. *See* Boggs v. Boggs, 520 U.S. --, 117 S. Ct. 1754, 1769-71 (1997) (Breyer, J., dissenting).

190. *Id.* at 1769 (Breyer, J., dissenting).

191. Breyer found that the community property law neither acts exclusively on nor relies on the existence of ERISA plans. *See id.* at 1771 (Breyer, J., dissenting).

192. *Id.* at 1769-70 (Breyer, J., dissenting).

193. *See id.* at 1770 (Breyer, J., dissenting). Justice Breyer's finding flowed from the fact that the state law in question "involve[d] family, property and probate—all areas of traditional, and important, state concern." *Id.* Justice Breyer explained:

> Obviously, Congress did not intend to pre-empt all state laws that govern property ownership. After all, someone must own an interest in ERISA plan benefits. Nor, for similar reasons, can one believe that Congress intended to pre-empt state laws concerning testamentary bequests. This is not an area like, say, labor relations, where Congress intended to leave private parties to work out certain matters on their own.
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> . . .
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> Nor can I find some appropriately defined forbidden category by looking to the congressional purpose of establishing uniform laws to regulate the administration of pension funds . . . . *This case does not involve a lawsuit against a fund.*
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> . . .
>
> Of course, one could look for a still more narrowly defined category. . . . [b]ut to [do so] is to change the question from one about occupying the field, to one about whether, or the extent to which, Louisiana law frustrates or interferes with an important federal purpose.

Id. at 1770-71 (Breyer, J., dissenting) (citations omitted).

194. *See id.* at 1771 (Breyer, J., dissenting).

Moreover, by addressing the conceptual issues the dissenting Justices avoided the doctrinal leap made by the majority. Although at first blush there may appear to be little practical distinction between the majority and dissenting approaches, a real difference exists. Under the majority opinion, a law could be preempted under an implied "stands as an obstacle" analysis regardless of the meaning attributed to the phrase "counection with." By divorcing the implied analysis from the meaning of the phrase "connection with," the majority has opened up the possibility of using the implied doctrines in any case involving an express preemption provision; and, as noted above, the theories can be used to justify preemption beyond the scope of the express preemption clause. In contrast, Justice Breyer viewed the implied doctrines as alternative tests for determining whether a state law has a sufficient "connection with" ERISA plans to warrant preemption. Under Justice Breyer's approach, then, use of the implied doctrines to inform the analysis is limited to cases where the express provision is ambiguous and the theories would be used to help identify the scope of the language of the preemption clause.

Thus, by failing to discuss how the implied doctrines should be integrated into the ERISA preemption analysis, the majority in *Boggs* has left unanswered the conceptual questions as to when and how the doctrines should be used, while at the same time opening the door to integration unnecessarily wide. When viewed in its entirety, it becomes apparent that the majority opinion has signaled the use of the implied theories in cases involving a federal law with an express preemption provision—with no limitations. Use of the implied theories to inform the express preemption analysis is a positive step in the evolution of the preemption paradigm, but the parameters of their use should be established. In future cases, the Court should follow the approach initiated by the dissenting Justices in *Boggs* and more appropriately delimit use of the implied theories by integrating them into the existing doctrinal framework.

IV. THE INTERPRETIVE ISSUES

As explained, the distinctions between the implied and express preemption doctrines reflect, at their core, different approaches to statutory interpretation.[195] This implied preemption analysis represents a more "purposive" approach, while the express

195. *See supra* Part II.B.3.

preemption analysis reflects a classic "textual" approach. Thus, as the paradigm shifts away from a categorical approach to preemption, the issue becomes which approach to statutory interpretation should be used. This Article advocates that, although a textual approach to statutory interpretation may be sound in many contexts, the approach is unsatisfactory in the context of preemption.[196] Instead, the use of a more traditional "purposive" approach to statutory interpretation leads to better outcomes.[197] The Article reaches this conclusion after analyzing the *Boggs* decision and the differences between textual and purposive theories of statutory interpretation. Analysis of the *Boggs* case shows that a textual approach to statutory interpretation short-circuits the identification of the federal law's purpose, a key issue in deciding whether a federal law impliedly preempts state law under the "stands as an obstacle" analysis,[198] and undermines important policy considerations relevant in the preemption context. In contrast, a purposive approach permits courts to assess more accurately congressional purpose, and promotes policies implicated in the preemption context, such as the appropriate accommodation of federal and state authority to regulate.

A. The Boggs *Analysis—A Purportedly Purposive Approach*

The majority in *Boggs* held that ERISA preempted Louisiana's community property laws to the extent the laws would recognize Dorothy's sons' claims to Isaac's retirement benefits.[199] Specifically, the majority found that permitting the claims to proceed would frustrate congressional intent reflected through two ERISA provisions. One ERISA provision mandates that annuity benefits payable upon retirement must be in the form of a joint and survivor annuity, which

196. The term "textual" is also used broadly in this Article to encompass those statutory interpretation theories which focus predominantly on the text and structure of the statute at issue. A textual approach to interpretation emphasizes the plain meaning or dictionary definition of statutory terms. *See infra* notes 285-309 and accompanying text.

197. The Article uses the term "purposive" broadly to encompass those forms of statutory interpretation which look beyond the text and the structure of the statute. A purposive approach encourages courts, when interpreting statutory provisions, to consider the context and background of the statute, including relevant legislative history. While the "intent" of the legislature is always the touchstone of statutory interpretation, a purposive approach recognizes that it may be impossible to attribute a particular intent to a collective group of legislators and therefore, instead, tries to ensure that the "purpose" underlying the law is effectuated and that the law's interpretation and application is reasonable. *See infra* notes 238-57 and accompanying text.

198. *See supra* notes 100-19 and accompanying text.

199. *Boggs*, 117 S. Ct. at 1762; *see also supra* Part III.A for a description of the facts in the *Boggs* case.

includes an annuity payable to a nonparticipant surviving spouse.[200] The majority found that permitting Dorothy's testamentary transfer would diminish Sandra's right to the survivor's annuity and thus frustrate Congress's purpose.[201] The other ERISA provision is an exception to the general prohibition on alienation of ERISA benefits.[202] The exception permits a court to issue a decree creating or recognizing a nonparticipant spouse's rights to benefits when resolving marital property rights upon divorce or separation.[203] Thus, ERISA expressly authorizes a transfer of benefits pursuant to a community property claim only in the event of divorce or separation. Because Dorothy's testamentary transfer did not fit within this express authorization, the majority found that permitting the sons' action to proceed would frustrate Congress's purpose.

As to both provisions then, the majority grounded its conclusion on a "stands as an obstacle" theory of implied preemption. Application of this theory requires a court to identify the purpose underlying the federal law and to ascertain whether the state law frustrates that purpose. Identifying the purpose underlying the survivor's annuity was fairly clear-cut. Accordingly, the Court's holding regarding the sons' claim to any portion of the annuity is less troublesome and is omitted from this Article's discussion of the case.[204]

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200. *See id.* at 1761.

201. *See id.* at 1762.

202. *See id.* at 1763; *see also* 29 U.S.C. § 1056(d)(3)(A) (1994 & Supp. 1995).

203. *Boggs*, 117 S. Ct. at 1763.

204. Section 1055(a) of ERISA specifically requires plans to use qualified joint and survivor annuities, payable to a nonparticipant surviving spouse. *See* 29 U.S.C. § 1055(a) (1994). Further, unless waived, the survivor must be a surviving spouse, and ERISA ensures that an equitable proportion of the annuity benefit continues to flow to the nonparticipant surviving spouse after the participant's death. The majority opined that "[i]t would undermine the purpose of ERISA's mandated survivor's annuity to allow Dorotby the predeceasing spouse by her testamentary transfer to defeat in part Sandra's entitlement to the annuity § 1055 guarantees her as the surviving spouse." *Boggs*, 117 S. Ct. at 1762. The majority found that the purpose underlying the annuity provisions was "to ensure a stream of income to surviving spouses." *Id.* at 1761. The dissenting Justices agreed that Louisiana could not give Dorothy's sons a share of the pension annuity without frustrating the purpose of ERISA's survivor annuity provisions. However, the dissenting Justices disagreed that the sons' request for an accounting should be preempted on this basis alone. The dissenting Justices pointed out that a Louisiana state court might provide an accounting which would allow Dorothy's sons, as heirs, to recover Dorothy's community property interest in such a manner that Sandra's right to the survivor's annuity would be fully protected. *See id.* at 1775 (Breyer, J., dissenting). Further, the dissenting Justices found nothing in ERISA that suggested a congressional concern with the assets beyond the survivor's annuity. *Id.* Nonetheless, there was no real dispute as to the purpose to be attributed to the ERISA annuity provision. Accordingly, the heart of the case—and the crux of this author's view of the case—revolves around the analysis of the sons' claims as to other aspects of Isaac's retirement benefits.

In contrast, the Justices' analysis of the purpose underlying the anti-alienation provisions at issue has proven to be quite troublesome. Rather than conducting a traditional "stands as an obstacle" analysis, Justice Kennedy accorded considerable weight to the implications of Congress's failure to expressly recognize the right of a nonparticipant spouse to control benefits through testamentary transfer. The dissenting Justices pointed out the deficiencies in the majority opinion, but similarly failed to conduct a satisfactory preemption analysis. The analysis in both the majority and the dissenting opinions relied on the text and structure of the statutory provisions only and, thus, both opinions can be characterized as using a "purportedly purposive" approach to the issue of implied preemption. The following subsections explain more fully the analysis of the *Boggs* majority and dissenting Justices and why a purported search for the purpose underlying the federal law yields an unsatisfactory analysis of the preemption question.

1. The Majority's Analysis of the Anti-Alienation Provisions

In addition to the annuity benefit, Isaac received other retirement benefits from SCB, including a lump sum distribution which he rolled into an IRA and ninety-six shares of AT&T stock.[205] Dorothy's sons also sought their share of these benefits.[206] The preemption analysis as to the sons' claim to these benefits turned on ERISA's spendthrift provision, § 1056(d), which prescribes that "benefits provided under the [retirement plan] may not be assigned or alienated."[207] An assignment has been defined by regulation as "any direct or indirect arrangement whereby a party acquires from a participant or beneficiary" an interest enforceable against a plan to "all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary."[208] The majority found that Dorothy's testamentary transfer fell within the scope of this provision.[209] If the majority could have rested its decision on this provision alone, its conclusion would not have been as suspect because the transfer would

205. *See Boggs*, 117 S. Ct. at 1758.

206. *See id.* at 1759. In addition to these benefits, Dorothy's sons sought their share of the monthly annuity paid to Isaac during his retirement but before his death. *See id.*

207. 29 U.S.C. § 1056(d) (1994 & Supp. 1995).

208. *Boggs*, 117 S. Ct. at 1765; *see also* 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (1997).

209. *See Boggs*, 117 S. Ct. at 1761. Even though the sons were enforcing their interest against Sandra, and not the plan, the majority noted that Louisiana law would permit community property laws to be enforced against the plan. *See id.* at 1762.

arguably be in actual conflict with an ERISA provision and, therefore, preempted on the basis of the Supremacy Clause.[210]

However, Dorothy's testamentary transfer arguably fell within the scope of an express exception to section 1056(d) enacted by Congress through 1984 amendments to ERISA. Section 1056(d)(3) provides that the anti-alienation provisions shall not apply to qualified domestic relations orders ("QDRO").[211] A QDRO is an order that "creates or recognizes . . . an alternate payee's right to . . . receive all or a portion of the benefits payable with respect to a participant under a plan,"[212] where the order is a judgment or decree that "relates to the provision of child support, alimony payments, or marital property rights of a spouse, former spouse, child, or other dependent of a participant, and is made pursuant to a State domestic relations law (including a community property law)."[213]

The QDRO provision would arguably support the right of Dorothy's sons to seek an accounting of Isaac's benefits because their interest arose from an analogous judicial order. A Louisiana probate court had ascribed to Dorothy's estate a community property interest in Isaac's retirement plan. The sons, therefore, could argue that the judicial order recognized an alternate payee's right (the sons') to receive all or a portion of the benefits payable with respect to a plan participant (Isaac); and that the judicial order related to the marital property rights of a former spouse (Dorothy), and was made pursuant to a community property law. Because the order was analogous, the sons had a strong argument that recognizing their claim would not be in conflict with ERISA.

However, the majority viewed the matter quite differently. The Court had previously held that ERISA's anti-alienation provision reflected Congress's "decision to safeguard a stream of income for pensioners (and their dependents . . .), even if that decision prevents others from securing relief for the wrongs done them."[214] As with the annuity provision, the majority found that Congress enacted the QDRO provisions to protect the nonparticipant spouse and dependent children in the event of divorce or separation.[215] The majority then held that, because the annuity and QDRO provisions protect specific

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210. The dissent, however, questioned whether a testamentary transfer fell within the scope of the statutory language. *See id.* at 1772 (Breyer, J., dissenting).

211. 29 U.S.C. § 1056(d)(3).

212. 29 U.S.C. § 1056(d)(3)(B)(i)(I) (West Supp. 1998).

213. 29 U.S.C. § 1056(d)(3)(B)(ii)(I)-(II).

214. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 376 (1990).

215. *See Boggs*, 117 S. Ct. at 1763.

pension plan community property interests, their enactment "gives rise to the strong implication that other community property claims are not consistent with the statutory scheme. ERISA's silence with respect to the right of a nonparticipant spouse to control pension plan benefits by testamentary transfer provides powerful support for the conclusion that the right does not exist."[216]

Thus, although the majority was purportedly engaging in a "stands as an obstacle" analysis, its conclusion did not rest on a finding that the effect of the state law would hinder the purpose underlying the federal law. The majority identified a purpose, but then short-circuited the analysis by concluding that the "silent implication" was that Congress could have intended no further protection of a nonparticipant spouse's legal interests in the benefits.

The majority supported its conclusion that Louisiana's community property law was preempted to the extent it permitted Dorothy to bequeath her interest in Isaac's benefits through a number of arguments. From a preemption analysis perspective, however, the majority's arguments are unsatisfactory. First, the majority justified the distinction between the community property interests of separated and divorced spouses and those of a predeceased spouse by noting that the whole subject of domestic relations "belongs to the laws of the states."[217] However, the majority did not explain why the subject of community property rights as determined by probate courts is not wholly within the domain of the states.

The majority then simply recycled its "silent implication" argument in numerous ways. An amicus, the Estate Planning, Trust and Probate Law Section of the State Bar of California, argued that the law through which the QDRO amendments were enacted, the Retirement Equity Act of 1984 ("REA"), was enacted in response to a plethora of litigation over issues of property division and support rights in the divorce and separation context.[218] Thus, the amicus argued, Congress did not consider the community property rights of a nonparticipant spouse in the testamentary context. The majority responded by looking at the interplay of ERISA's provisions according certain rights to "beneficiaries." ERISA confers "beneficiary" status on a nonparticipant spouse only in relation to the survivor's annuity and the QDRO.[219] The Justices viewed the amicus as "ask[ing] us to ignore [ERISA's] definition of 'beneficiary' and, through case law,

216. *Id.* at 1763-64.
217. *Id.* at 1764.
218. *See id.* (quoting *In re* Burrus, 136 U.S. 586, 593-94 (1890)).
219. *See id.* at 1764-65.

create a new class of persons for whom plan assets are to be held and administered. The statute is not amenable to this sweeping extratextual extension."[220] Thus, the majority reasoned that Congress intended to limit a nonparticipant's rights grounded in marital status to those situations expressly articulated, thereby, in essence, recycling the "silent implication" theory to support its prior "silent implication" theory. Similarly, the majority recycled the argument by noting that its conclusion that Congress intended to preempt the sons' interests "is given specific and powerful reinforcement by the pension plan anti-alienation provisions."[221] The majority noted that ERISA's pension plan anti-alienation provision is "mandatory and contains ouly two explicit exceptions . . . which are not subject to judicial expansion. The anti-alienation provision can 'be seen to bespeak a pension law protective policy of special intensity: Retirement funds shall remain inviolate until retirement.' "[222]

Finally, when Justice Keunedy eventually tied the majority opinion's conclusion to a purpose underlying the anti-alienation provisions, his reasoning also hinged on the perceived "silent implication." The majority identified the federal purpose underlying ERISA generally as that of protecting plan participants and beneficiaries, and the purpose underlying the specific anti-alienation provision as that of keeping pension funds intact until retirement so that pensioners and dependents will have a secure stream of income.[223] According to the majority, permitting Dorothy's sons to pursue their interests under Louisiana's community property laws could undermine this purpose: "retirees could find their retirement benefits reduced by substantial sums because they have been diverted to testamentary recipients. Retirement benefits and the income stream provided for by ERISA-regulated plans would be disrupted in the name of protecting a nonparticipant spouses' [sic] successors over plan participants and beneficiaries."[224]

Of course, the QDROs could similarly disrupt the stream of income flowing to the retirees, thereby suggesting that the identified federal purpose was not inflexible. Thus, the majority justified its

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220. *Id.* at 1765.

221. *Id.*

222. *Id.* (quoting JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 547 (2d ed. 1995)) (citations omitted). In addition to the QDRO exception, section 1056(d) exempts voluntary and revocable assignments that do not exceed ten percent of any benefit payment, or any irrevocable assignment or alienation of benefits executed before the enactment of ERISA. *See* 29 U.S.C. § 1056(d)(2) (1994 & Supp. 1995).

223. *See* Boggs, 117 S. Ct. at 1766.

224. *Id.*

preemption conclusion by explaining that the ERISA provisions reflect a careful balancing of interests and that the QDRO is a limited exception designed to ensure that, in the event of divorce or separation, a living nonparticipant spouse would receive her community property interest in the benefits and thus receive the stream of income that would otherwise be available.[225] Viewed from this perspective, QDRO advances ERISA's underlying purposes.[226] In contrast, the majority emphasized that recognizing the community property interests of a predeceased nonparticipating spouse would not advance this purpose.[227] Notably, however, discerning a purpose of protecting living nonparticipants but not predeceased nonparticipants, simply from the existence of the QDRO and survivor's annuity provisions, is tantamount to divining the purpose from Congress's "silent implication." Thus, although Justice Kennedy purportedly engaged in an analysis grounded in the purpose of the ERISA provisions, scrutiny reveals that the majority never fully justified its view of the underlying purpose of ERISA's anti-alienation and QDRO provisions.

2. The Dissenting Justices' Analysis of the Anti-Alienation Provisions

The dissenting Justices strongly disagreed that Congress's silence as to testamentary transfers of a nonparticipant's community property interest evinced an intent to preempt state laws permitting such transfers. Justice Breyer, writing for the dissent, acknowledged that one purpose of the anti-alienation provision may have been to "safegnard a stream of income for pensioners (and their dependents . . .)."[228] However, the dissent noted a point ignored by the majority: ERISA does not generally evince any purpose of restricting what a plan participant (such as Isaac) can do with the pension funds, either upon the participant's death or otherwise.[229] Specifically, the dissent explained that ERISA would not restrict

225. *See id.* at 1766-67.

226. *See id.* at 1767.

227. *See id.*

228. *Id.* at 1771 (Breyer, J., dissenting) (quoting Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 376 (1990)).

229. *See id.* at 1772. Specifically, the dissent pointed out that ERISA does not restrict what a participant does with benefits after the participant's death. Thus, in discerning the purpose underlying the anti-alienation provision, the question becomes what purpose could be served by restricting a testamentary transfer of a nonparticipant spouse if testamentary transfers of participants are not restricted. The most obvious answer is that a testamentary transfer by a nonparticipant spouse before the death of the participant would deplete funds otherwise available to the participant. But, as the dissent noted, this purpose was not hindered in this case because the sons' claims merely sought their share of benefits after both the participant (Isaac) and the nonparticipant (Dorothy) bad died. *See id.*

Isaac from using his retirement benefits "to pay for a vacation, to buy a house, [or] to bet at the races . . ." or from bequeathing his community property interest in the retirement benefits.[230] Thus, as the dissent noted, the majority's argument hinged on a doubtful assumption about Congress's purposes. From the dissent's perspective, the anti-alienation provision at most serves to safeguard the funds until the point of retirement. Recognizing Dorothy's testamentary transfer, which did not affect Isaac's benefits either before retirement or before his death, would not interfere with this purpose.[231]

Justice Breyer also disagreed with the majority's view of the implications which could be drawn from the QDRO provisions. The dissent focused on the structure of the QDRO amendments and found, as a threshold matter, that the QDRO provisions do not answer the question whether the anti-alienation provision itself reaches probate court orders. That is, the structure of the QDRO amendments suggests that Congress sought to clarify that the anti-alienation provision applies to domestic relations order, and to exempt "qualified" orders.[232] Further, the use of language such as "domestic relations orders" suggests that Congress enacted the QDRO provisions due to a concern with orders arising in the divorce and separation context.[233] According to the dissent, then, the provisions evince only an intent to regulate transfers between living spouses and not an intent to affect testamentary transfers: "[I]t would be anomalous to find a congressional purpose in ERISA—despite the absence of express statutory language and any indication that Congress even considered the question—that would in effect deprive Dorothy of her interest because, instead of divorcing Isaac, she 'stayed with him till her last breath.' "[234] The dissent concluded by noting that finding a conflict justifying preemption in this case would require a departure "from what Congress actually said in ERISA and [an inference of] some more abstract general purpose . . . ."[235]

Thus, the dissenting Justices strongly disagreed with the majority's view that Congress's express provisions created a "silent impli-

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230. *Id.* at 1772.

231. *See id.*

232. *See id.* at 1773.

233. *See id.* The dissent specifically found that a probate order awarding property to an estate or to children "cannot easily be squeezed into the definition of 'domestic relations orders.' " *Id.*

234. *Id.* (quoting Transcript of Oral Argument at 15).

235. *Id.* at 1776. An example would be "to help a second wife at the expense of a first wife's state law-created interest in her property." *Id.*

cation" justifying preemption, and recognized that Dorothy's testamentary transfer of her community property interest was not in conflict with anything that Congress actually said. The dissent also discounted the majority's view of the purpose underlying the anti-alienation provisions. However, like the majority opinion, Justice Breyer did not adequately justify the dissent's view of the purpose which should be attributed to the federal provisions for purposes of a "stands as an obstacle" implied preemption analysis.

3. Both the *Boggs* Majority and Dissent Failed to Adequately Analyze the Key Inquiry: What is the Purpose Underlying the Federal Law?

The majority's conclusion that Dorothy's sons' claims to any portion of Isaac's retirement benefits were preempted was grounded in the "stands as an obstacle" theory of implied preemption. Analysis of whether a state law frustrates the attainment of Congress's objectives involves several steps: an identification of congressional purposes; an assessment of the effect of the state law; and a determination of whether that effect "stands as an obstacle" to one of the purposes underlying the federal law. The most troublesome aspect of the *Boggs* decision is the Court's approach to the identification of the purpose underlying the federal provisions. Namely, the opinions reveal that both the majority and dissenting Justices used a "textual" approach to statutory interpretation which unduly limited the analysis of congressional purpose.

Justice Kennedy divined the purpose from the text and structure of the relevant statutory provisions: the anti-alienation provision, the QDRO exception, and the definitions of plan participant and beneficiary. In the majority's view, recognizing Dorothy's sons' interest would be tantamount to an "extratextual extension" of the statute because the express provisions, and their interplay with the statutory scheme as a whole, reflect the full extent to which Congress intended community property interests to be recognized.[236] Thus, the majority identified the key element in the "stands as an obstacle" analysis solely from the "silent implication" of the inclusion of two provisions expressly recognizing certain aspects of a nonparticipant spouse's interest in ERISA benefits. The majority did not consider legislative history, and discounted the litigious climate in which the QDRO provisions were enacted. Moreover, the majority appeared to give

236. *See id.* at 1765.

little weight to the presumption against preemption of state laws within the scope of a state's traditional police powers.

The dissenting opinion pointed out this weakness in the majority's opinion, but engaged in a similar textual analysis to discern the congressional purpose that should be attributed to the provisions for purposes of an implied preemption analysis. Justice Breyer looked to the language and structure of the anti-alienation provision and the QDRO provisions as a reason for rejecting the majority's "silent implication."[237]

Both opinions, therefore, reflect a classic textual approach to the identification of the purpose underlying the federal provisions. But other purposes could reasonably be attributed to ERISA's anti-alienation provision and other approaches to statutory interpretation would have required the Court to consider other factors in assessing congressional intent. Indeed, as discussed in the following Part, the "stands as an obstacle" theory of implied preemption evolved during a period when—and reflects—the Supreme Court's use of a more "purposive" approach to statutory interpretation which permits courts to engage more fully in an analysis of the purposes of the federal law and whether preemption is appropriate. The purportedly purposive approach of the *Boggs* Court thus presents a fundamental tension—Justices committed to a textual approach to statutory interpretation were applying a doctrine grounded in a purposive approach—thereby raising an interpretive issue, namely, whether a textual approach to statutory interpretation is appropriate in the preemption context. The following Part explores which approach to assessing congressional intent will more likely lead to sound preemption outcomes and concludes that the textual theory of statutory interpretation is incompatible with the underlying tenets of the implied preemption doctrines.

B. The Implied Preemption Doctrines Require an Honestly Purposeful Approach

Analyzing the interpretive issue of which approach to statutory interpretation should be used as the preemption paradigm shifts away from a categorical approach involves two inquiries: first, an analysis of the relevant differences between a textual and a purposive approach to statutory interpretation; second, a determination of which approach would result in sounder outcomes given the policies

237. *Id.* at 1772-74 (Breyer, J., dissenting).

underlying the doctrine of preemption. This Part concludes that a purposive approach permits courts to assess more accurately the key preemption issues, and promotes important policy considerations relevant in the preemption context, such as effectuation of an appropriate accommodation of federal and state authority to regulate.

1. The Implied Theories—Grounded in Purposivism

Like other common law theories, the preemption doctrines have evolved over time. As explained in Part II of this Article, the Supreme Court first viewed preemption as an automatic consequence of congressional action in fields such as interstate commerce.[238] The more modern view of preemption emerged in the 1930s, and was developed by the Court over a number of decades.[239] During this period, the broadly accepted approach to statutory interpretation was originalism—that is, the tradition of striving to discover original legislative intent or purpose. Originalist theories of interpretation are committed to the concept of the legislative supremacy of Congress.[240] Two common variants of originalism used in the mid-twentieth century were the theories of intentionalism and purposivism.[241]

Under intentionalism, a court would look for clues that signal the actual legislative intent regarding the statutory provision at issue. The sources used to inform the analysis include the statute's text, legislative history, and the circumstances surrounding its enactment.[242] Text is important to the analysis, but an intentionalist may view the text as insight to the legislative intent, rather than using

238. *See supra* notes 16-31 and accompanying text.

239. The case *Mintz v. Baldwin*, 289 U.S. 346, 351-52 (1933) (relying on the statutery language and the practical interpretation of the federal law), has been identified as one of the first cases in which the preemption issue turned on a finding of congressional intent. *See* Gardbaum, *supra* note 16, at 806-07. For other key discussions of preemption see *Malone v. White Motor Corp.*, 435 U.S. 497, 504-16 (1978); *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 413-23 (1973); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-52 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-35 (1947).

240. Because the legislature has greater authority than the judiciary in the realm of policy-making, the concept of legislative supremacy establishes an agency relationship between the two institutions; the legislature acts as the principle and the judiciary serves as the agent. *See* Martin H. Redish & Theordore T. Chung, *Democratic Theory & the Legislative Process: Mourning the Death of Originalism In Statutory Interpretation*, 68 TUL. L. REV. 803, 810-11 (1994).

241. The names attributed to various intorpretative approaches are not universally used. However, the names intentionalism and purposive have been used by several scholars. *See, e.g.*, T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23-27 (1988); Redish & Chung, *supra* note 240, at 812-17.

242. *See* Aleinikoff, *supra* note 241, at 23-24; Redish & Chung, *supra* noto 240, at 813.

evidence of intent to give meaning to the text,[243] because getting closer to what the enacting legislature intended better serves the end of legislative supremacy.[244] However, intentionalists recognize that discovery of the original legislative intent is at times unlikely because litigated statutory questions often involve issues never considered by the legislature. Accordingly, it is sufficient to discern a "manifest" or "imputed" intent, "something they are willing to call intent derived from the materials deemed appropriate to consult in the search for intent."[245] Thus, although intentionalism permits a fair amount of judicial discretion, it nonetheless exhibits a strong commitment to legislative supremacy.

Purposivism, however, emerged as the more dominant strain of originalism. Its success as a theory of statutory interpretation is attributable to its key proponents, Professors Henry Hart and Albert Sacks.[246] Teaching materials drafted by Hart and Sacks developed a theory of statutory interpretation premised on the purpose of the statute.[247] The Hart and Sacks purposive approach to interpretation has been described as a "weaker intentionalist model."[248] Rather than

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243. *See* Aleinikoff, *supra* note 241, at 23-24; Redish & Chung, *supra* note 240, at 813.

244. *See* Aleinikoff, *supra* note 241, at 23-24.

245. *Id.* at 25. In discussing the technique known as "imaginative reconstruction," Judge Posner has suggested that, in such situations, the "judge should try to think his way as best he can into the minds of the enacting legislatures and imagine how they would have wanted the statute applied te the case at bar." Richard A. Posner, *Statutory Interpretation-in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

246. Professors Hart and Sacks taught at Harvard Law School and together developed a comprehensive set of teaching materials which included an influential chapter on statutory interpretation. These materials have only been recently published. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) [hereinafter THE LEGAL PROCESS]. Hart initially collaborated with Abe Feller of Yale University and Walter Gellhorn at Columbia University and produced teaching materials for a course on legislation for the 1941-42 academic year. *See id.* at lxxiv. Hart continued to develop these matorials upon returning te Harvard after World War II in the 1947-47 academic year. *See id.* at lxxviii-lxxxv. Sacks, who had been a student in Hart's legislation seminar in the Spring 1948 term, joined the Harvard faculty in the 1952-53 academic year. *See id.* at lxxxv. The Hart and Sacks collaboration culminated with the 1958 "tentative edition" of the teaching materials entitled, "The Legal Process: Basic Problems in the Making and Application of Law." *See id.* at xci. Although not published until 1994, the "tentative edition" was widely distributed and has been heralded as "[t]he most influential and widely used toxt in American law schools during the 1950s . . . ." *Id.* at viii (quoting MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960—THE CRISIS OF LEGAL ORTHODOXY 254 (1992)).

247. Hart's theory of interpreting the statute in light of its "purpose" was in line with the approach advocated in the academic literature and Supreme Court opinions after 1938. *See* THE LEGAL PROCESS, *supra* note 246, at lxxx-lxxxi.

248. Alienikoff, *supra* note 241, at 24. Hart and Sacks' methodology for statutory interpretation is also often referred to as the "legal process" approach. *See, e.g.*, Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 434-35 (1989). It has also

attempting to discover what answer the enacting legislature would have given to a specific statutory question, a purposivist court would identify the broader purposes embodied in the legislation and construe the statute to carry out those purposes.[249] Hart and Sacks' purposivism rests on the assumptions that the legislature is comprised of "reasonable [persons] pursuing reasonable purposes reasonably"[250] and that statutes, therefore, represent a "purposive act."[251]

To identify a statute's purpose, Hart and Sacks advocated that courts should consider relevant sources of information in addition to the statute's text, such as the law's legislative history and the circumstances surrounding the law's enactment.[252] Further, Hart and Sacks advocated that courts should explore the legal landscape to determine how the statutory provision at issue could be made to fit into the whole fabric of the law.[253] In particular, their theory posits that, in construing a statute to carry out its purpose, courts should take into account relevant overarching principles and policies and should ensure that the interpretation is in accord with any relevant "policy of clear statement," such as the premise underlying preemption that state laws should not be found preempted absent "clear evidence" of congressional intent.[254]

Thus, purposivism does not purport to discern the enacting legislature's subjective intent, but, instead, assumes that the legisla-

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been associated with the public interest theory of legislation. *See* ROBERT A. KATZMANN, COURTS AND CONGRESS 50-51 (1997).

249. *See id.*; *see also* THE LEGAL PROCESS, *supra* note 246, at lxxx-lxxxi; Redish & Chung, *supra* note 240, at 815.

250. THE LEGAL PROCESS, *supra* note 246, at 1125; *see also* Redish & Chung, *supra* note 240, at 815.

251. *See* THE LEGAL PROCESS, *supra* note 246, at 1121; *see also* Redish & Chung, *supra* note 240, at 815.

252. Notably, Hart and Sacks recognized the problems associated with considering legislative history. The Hart and Sacks materials make the point that, "[s]purious use of legislative history must not swallow the legislation so as to give point to the quip that only when the legislative history is doubtful do you go the statute." THE LEGAL PROCESS, *supra* note 246, at 1232-33 (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947)). But, rather than suggesting a ban as do proponents of textualism, Hart and Sacks simply urged the prudent use of legislative history. *See id.* at 1379.

253. *See id.* at 1379.

254. Hart and Sacks advocated that statutes should be understood as having not only an immediate purpose, "but a larger and subtler purpose as to how the particular statute is to be fitted into the legal system as a whole." THE LEGAL PROCESS, *supra* note 246, at 1377. Further, when courts are uncertain as te the purpose to be attributed to a statute, they advocated that a court may resort to an appropriate presumption drawn from the overarching general policy. *See id.* at 1380; *see also id.* at lxxx-lxxxi ("Find out the purpose of your statute, and [c]onstrue it to carry out the purpose, if (1) [t]he language will bear that meaning[, and] (2) [t]he policy of clear statement will [not] be violated by giving it that meaning."). The presumption against preemption constitutes a "policy of clear statement." *Id.* at 1209-10, 1241.

ture intended a purposive interpretation. Like intentionalism, purposivism permits courts to temper the plain meaning of the text if it is at odds with the statute's purpose in order to give effect to the spirit of the law,[255] although words may not be given a meaning they cannot bear. As a result, some commentators argue that it permits greater judicial discretion than intentionalism.[256] Further, although Hart and Sacks recognized the lawmaking supremancy of the legislature, some critics note that their theory's assumptions marginalized it. Indeed, a corollary of the theory is that judges interpreting statutes have significant, and appropriate, policymaking discretion.[257]

Supreme Court decisions during the formative years of the modern conception of preemption reflect a "purposive" approach to interpretation. Analysis of key preemption decisions reveals that, although the text of the federal law has always been a key factor in the preemption analysis, the Court historically looked beyond the text in an effort to preserve the appropriate balance between federal and state authority to regulate. Further, the Court affirmatively sought to limit the scope of preemption to effectuate the presumption against preemption. A congressional purpose to preempt state law had to be "clear" and would be inferred only upon a finding of an "unmistakable" conflict.

For example, in *Rice v. Santa Fe Elevator Corp.*,[258] which has been described as the "locus classicus of modern preemption doctrine,"[259] the Court held that the United States Warehouseman Act ("the Federal Act") preempted a number of state provisions regulating the operation of grain warehouses, including prohibitions on charging

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255. Indeed, Hart is credited with subjecting "plain meaning" approaches to interpretation to an "especially negative review." *See* THE LEGAL PROCESS, *supra* note 246, at lxxx.

256. *See* Redish & Chung, *supra* note 240, at 817.

257. *See* William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 319 (1989).

258. 331 U.S. 218 (1947).

259. Gardbaum, *supra* note 16, at 807. In *Rice*, the Court succinctly articulated the implied theories which had emerged. The Court first explained that, since warehouses engaged in interstate commerce, Congress was empowered to allocate the regulatory authority over them as it deemed appropriate. *See Rice*, 331 U.S. at 229-30. However, because the United States Warehouse Act legislated in a field which states had traditionally occupied, the Court emphasized that it must start with the "assumption that the histeric police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 230 (citing Allen-Bradley Local v. Wisconsin Employ. Relations Bd., 315 U.S. 740, 749 (1941); Napier v. Atlantic Coast Line R.R., 272 U.S. 605, 611 (1926)). The Court then proceeded to articulate the parameters of the traditional categories of implied preemption: field preemption due to pervasive federal regulation or a dominant federal interest, and preemption due to a state policy that produces a result inconsistent with the objective of the federal statute. *See id.* at 230-31. The opinion can be credited with solidly establishing the "categorical" approach to preemption.

unreasonable rates, operating in the dual position of warehouseman and dealer, mixing grains of differing quality and maintaining unsafe warehouses.[260] The Court explained that, although an earlier version of the statute contained a clause providing that nothing in the Federal Act would limit the effect or operation of state laws relating to warehouses and warehousemen, a later amendment deleted that language and provided instead that the "power, jurisdiction, and authority conferred upon the Secretary of Agriculture . . . shall be exclusive with respect to all persons securing a license hereunder . . . ."[261] The Court then pointed to Committee Reports that noted the language was "designed to make 'the Federal Act independent of State laws' and to 'place the Federal Act on its own bottom.' "[262] The Court found that the term "exclusive" and the strong language in the legislative history rendered congressional purpose unambiguous.[263] Thus, the Court based its decision on the Federal Act's text, legislative history, and the context in which it was enacted.

Moreover, in accord with a purposeful approach to resolving the preemption issue, the Court carefully delimited the scope of the Federal Act's preemption. Although recognizing the Secretary's "exclusive" authority, the Court held that preemption depended on "whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act."[264] Much state regulation of warehouses and warehousemen was held to be preempted because the Federal Act similarly addressed matters such as rates, operating in the dual position of warehousemen and dealers, mixing grains of differing quality and maintaining unsafe warehouses. However, the Court found that several matters being enforced by the state were not preempted by the Federal Act.[265]

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260. *Rice*, 331 U.S. at 222-29 (detailing the relevant state and federal provisions).

261. *Id.* at 223-24.

262. *Id.* at 234.

263. *Id.* at 233.

264. *Id.* at 236 (noting further that, if the Secretary has regulated a matter, "the federal scheme prevails though it may be a more modest, less pervasive regulatory plan than that of the State").

265. *See id.* at 236-37. For example, there were no express federal provisions addressing the state's concern with unwarranted drains on utility funds or the creation of unsound financial structures which would affect the ability of warehousemen to render adequate service at reasonable rates. *See id.* Notably, the dissenting opinion in *Rice* urged the Court to use even greater scrutiny before finding state laws preempted. Justice Frankfurter strongly noted: "Suffice it to say that due regard for our federalism, in its practical operation, favors survival of the reserved authority of a State over matters that are the intimate concern of the State unless Congress has clearly swept the boards of all State authority, or the State's claim is in unmistakeable conflict with what Congress has ordered." *Id.* at 241 (Frankfurter, J., dissenting). The dissent noted that, through the federal Warehouse Act, Congress did not undertake a general,

Significant implied preemption cases following *Rice* reflect an even greater deference to state law as the Hart and Sacks approach to statutory interpretation became more deeply ingrained in the judiciary. In *Florida Lime & Avocado Growers, Inc. v. Paul*, the Court held that federal marketing orders approved by the Secretary of Agriculture which established a standard for avocado maturity did not supersede a California law which imposed a different and more difficult to satisfy standard.[266] The federal orders were adopted pursuant to the Agricultural Adjustment Act which Congress enacted to "ensure the stable and steady flow of commodities to consumers, and 'to establish and maintain such minimum standards of quality and maturity . . . as will effectuate such orderly marketing . . . as will be in the public interest.' "[267] Preemption hinged on whether the state law frustrated congressional purposes underlying the federal regulatory scheme.[268] The dissenting Justices believed that the state law clearly stood as an obstacle to Congress's purposes because fruit determined to be mature according to federally approved standards, and thus fit for sale in interstate markets, could be turned away from California markets.[269]

Nonetheless, following a purposive approach to statutory interpretation, a majority of the Court upheld the state law. The Court looked to the text of the Federal Act and its legislative history. The

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affirmative regulation of warehouses. Accordingly, the scheme did not persuasively indicate a purpose to free a federal licensee from state regulations which governed other warehousemen when those regulations were not in practical conflict with the requirements of federal law. *See id.* at 242-45.

266. 373 U.S. 132, 152 (1963). The federal order established a maturity test for South Florida avocados based on an annually drafted schedule of picking dates, sizes and weights. *See id.* at 139. The regulations also forbade picking before prescribed dates unless exempted, and required inspections for compliance with standards based on quality and physical characteristics of Florida avocados. *See id.* California based its maturity standard on the oil content in the avocados, prohibiting the transportation or sale in California of avocados which contained "less than 8 percent of oil, by weight . . . excluding the skin and seed." *Id.* at 133-34 (citing CAL. AGRIC. CODE § 792 (West 1962)).

267. *Id.* at 138 (quoting 7 U.S.C. § 602(3) (1994)).

268. *See id.* at 142. The Court found that the standards, though different, did not present an inevitable collision: the record demonstrated that growers could meet both standards. For example, the federal order would permit the picking and marketing of avocados meeting the California standard, and growers in Florida could attain the requisite oil content by leaving the fruit on the trees beyond the earliest picking date. *See id.* at 143. Further, the Court found no indication of field preemption. The Court noted that avocado maturity is not a subject "by its very nature admitting only of national supervision." *Id.* at 143-44. Further, the Court found that comprehensive federal regulation of minimum standards for picking, processing and transportation of agricultural commodities "does not of itself import displacement of state control over the distribution and retail sale of those commodities in the interests of the consumers . . . ." *Id.* at 145.

269. *See id.* at 166 (White, J., dissenting).

Court found that the text's reference to "minimum standards . . . as will effectuate . . . orderly marketing" did not unmistakably reveal a congressional scheme in which federal marketing orders should displace state standards.[270] The Court also noted that other provisions in the Act reinforced the view that the marketing orders would be regional in nature;[271] and, further, that the legislative history suggested that Congress intended to create a scheme by which growers could cooperate, through the Department of Agriculture, to work out local harvesting, packing, and processing programs.[272] The most telling signal of the Court's purposive approach, however, was the Court's consideration of the practical operation of the marketing orders. The Court found that the "pattern which emerges is one of maturity regulations drafted and administered locally . . . designed to do no more than promote orderly competition among the South Florida growers."[273] Use of the purposive approach, therefore, enabled the Court to preserve state regulation despite a comprehensive federal regulatory scheme as to avocado maturity and a state law which arguably interfered with the federal interest in interstate commerce.

In *Malone v. White Motor Corp.*, the Court similarly declined to displace state law despite possible conflict with an important federal policy.[274] At issue in *Malone* was a state law which established minimum standards for funding and vesting of pension plans.[275] White Motor Corp. raised a preemption challenge under the National Labor Relations Act ("NLRA") because the law's requirements were inconsistent with the obligations White Motor Corp. had undertaken in its collective bargaining agreement.[276] The Court first looked to the

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270. *Id.* at 147-48. In assessing the language of the Act, the Court compared it to a Federal Tobacco Inspection Act in which Congress had clearly declared the importance of uniformity. *See id.* at 149. The Court's assessment of the text reflects the high standard accorded to the presumption against preemption. As the dissent pointed out, it is "commonplace that when the appropriate federal regulatory agency adopts minimum standards which on balance satisfy the needs of the subject matter without disproportionate burden on the regulatees, the balance struck is not to be upset by the imposition of higher local standards." *Id.* at 171 (White, J., dissenting).

271. *See id.* at 148-49.

272. *See id.* at 149-50 (citing H.R. Rep. No. 24-1241, at 22-23 (1935); S. Rep. No. 74-1011, at 15 (1935)).

273. *Id.* at 150.

274. 435 U.S. 497, 513-14 (1978).

275. *Id.* at 499. The Minnesota law imposed on any employer who ceased to operate a place of business or pension plan a pension funding charge sufficient to ensure that employees with ten years of service would receive pensions accrued regardless of whether the benefits had vested. *See id.* at 501-02.

276. The collective bargaining agreement, which gave to the employer the right to terminate the pension plan at any time, only obligated the employer to guarantee pensions for those

text of the federal law. The NLRA requires employers to bargain with employees regarding pension plans, but the Court found nothing in the NLRA that would expressly foreclose all state regulatory power over pension plans.[277] Following a purposive approach, the Court then looked beyond the text to another statutory scheme, the 1958 Disclosure Act ("the Act"), and its legislative history. The Court construed the Disclosure Act as reflecting Congress's intent, at that time, to leave regulation of pension plans to the states.[278] The Disclosure Act represented a limited step by Congress to remedy the widespread abuses in the unregulated pension field. The Act required plan administrators to file with the Labor Department a description of the plan and an annual report containing financial information, but imposed no substantive regulations on plans.[279] The Disclosure Act also provided that "nothing contained in this subsection shall be construed to prevent any State from obtaining such additional information . . . or from otherwise regulating such plan."[280] The Court found that these provisions, viewed in light of Congress's study of the problems in the pension field, showed that Congress intended for states to have the power to regulate in the pension field.[281]

A striking point about the *Malone* analysis is that the clause in the Disclosure Act that expressly preserved the state's power to regulate could have been construed in a more limited manner. NLRA case law had established that state laws would be preempted if they controlled key economic weapons used in collective bargaining.[282] Thus, as the Eighth Circuit found, the states logically could be precluded from directly controlling the substantive terms of the contract that results from collective bargaining.[283] The Disclosure Act, then,

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entitled to them; and employees were guaranteed to receive only about sixty percent of the amount specified in the plan. *See id.* at 501.

277. *See id.* at 504-05. Notably, although the NLRA does not contain an express preemption provision, courts have recoguized an extensive area of implied preemption under the labor laws. Section 301 of the Federal Management Relations Act preempts breach of contract claims involving collective bargaining agreements. *See, e.g.*, Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560 (1968). Similarly, the Garmon doctrine is a branch of preemption resulting from the primary jurisdiction of the National Labor Relations Board. *See, e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959).

278. *See Malone*, 435 U.S. at 505-06. The Court acknowledged that later a federal enactment shifted away from the perspective that states should regulate the field of pension benefits. *See id.* at 499 (citing ERISA, 29 U.S.C. § 1001 (1994)).

279. *See id.* at 506.

280. *Id.* at 505.

281. *See id.* at 507-12.

282. *See* Lodge 76 v. Wisconsin Employ. Relations Comm'n, 427 U.S. 132, 149 (1976) (holding that states cannot control the economic weapons of the parties at the bargaining table).

283. *See Malone*, 435 U.S. at 503 (explaining the procedural history of the case before the Court).

could have been read more narrowly as preserving state regulation of pension plans to the extent otherwise permitted under NLRA case law. This view would have preserved the strong federal role in the area of labor policy. The majority's approach to the preemption issue, therefore, reinforces the strength of the presumption against preemption accorded to state law under a purposeful approach. Preemption was not found because congressional intent regarding the preemption of state laws was not unmistakably clear.

In sum, the implied preemption doctrines were developed during a period when the Supreme Court adhered to a purposive approach to statutory interpretation. Landmark implied preemption cases during the formative years reflect the influence of Hart and Sacks, especially those cases based on the "stands as an obstacle" theory of preemption.[284] To determine the law's purpose, and thus how the law should be construed, the Court looked not only to the text of the federal law, but also to other provisions in the law, to the law's legislative history and to the circumstances surrounding its enactment. Further, the Court explored the legal landscape to ensure a harmonious interpretation of the law: the Court looked to other relevant federal laws and their legislative history and to the law's practical operation. Moreover, the Court ensured that its interpretation would not violate the relevant policy of clear statement, for example, that preemption would not be inferred absent clear evidence of congressional intent or an unmistakable conflict.

2. The Shift to a More Textual Approach to Interpretation

In more recent years, originalist theories of statutory interpretation have been seriously challenged and numerous theories have been proposed as better interpretive models.[285] At the most general

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284. Other scholars have noted the influence of Hart and Sacks on the interpretive approach used by the Court through the years. *See* THE LEGAL PROCESS, *supra* note 246, at cxv (Eskridge and Frickey noting that the Burger Court was more oriented to the legal process philosophy than the Warren Court because "the Court often massaged statutery text to be consistent with statutory purpose or general principles of law").

285. Since the mid-1980s, scholars have been very active in the area of statutory interpretation. As Professor Redish has aptly noted, "originalism has come under attack from critics who assert that it is based on false notions of ascertainable collective intent, that it exacerbates the problem of anachronistic statutes, and that it does little to combat the 'pathologies' endemic to the legislative process." *See* Redish & Chung, *supra* note 240, at 804-05. The literature is rich with proposed theories purporting to lead to more acceptable outcomes. *See generally* Aleinikoff, *supra* note 241; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Daniel A. Farber, *Statutory Interpretation and*

level, the emerging theories can be divided into two groups: those adhering to the concept of legislative supremacy, and those advocating a more dynamic role for the judiciary. Recent Supreme Court cases reveal that the Court as a whole has shifted away from originalist theories, but has still adhered to the concept of legislative supremacy.[286] In place of originalism, the Court has shifted to a more textual approach to statutory interpretation.[287]

In contrast to a purposive approach to interpretation, textualism relies primarily, and in some cases exclusively, on the statutory text itself.[288] Courts using a textual approach focus on finding the "meaning" of the language used by Congress as a means of ascertaining what Congress intended.[289] In fact, some textualists advocate that ascertaining congressional intent is not the objective of statutory interpretation because the "objective indication of a statute's words" is what constitutes the law.[290] To find a statute's meaning—the objective indication of the statute's words—the Court has used dictionaries, grammar books, the entirety of the statute, analogous provisions in other statutes, canons of construction, and common sense.[291] The Court's early interpretation of ERISA's preemption clause in *Shaw v. Delta Air Lines, Inc.*, is a prime example of the textualist approach.[292] As described in Part III, the Court's

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Legislative Supremacy, 78 GEO. L.J. 281 (1989); Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233 (1997); Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767 (1991); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988); Redish & Chung, *supra* note 240; W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992); Sunstein, *supra* note 248; George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321 (1995); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989).

286. As noted, the Court has moved away from a purposive approach toward a textual approach te interpretation. However, the textual approach shares with the purposive approach a commitment to legislative supremacy: both theories are grounded in the view that a judge's role is that of an agent of the legislature. *See* Sunstein, *supra* note 248, at 415, 424-25.

287. Professor Sunstein noticed the shift to textualism in a number of Supreme Court cases decided in the late 1980s. *See* Sunstein, *supra* note 248, at 415-16 n.29 (citing cases).

288. *See id.* at 415-19; Taylor, *supra* note 285, at 327 & 333-36.

289. *See* Taylor, *supra* note 285, at 334-36. "The meaning of text is said to be self-evident, a product of the language itself; such a situation requires of a judge no active role of interpretation but simply a grasping of the meaning ready at hand." *Id.* at 355.

290. Scalia, *supra* note 150, at 32 (noting that, with respect to 99.99 percent of the issues of construction reaching the courts, there is no legislative intent because the issues involve points of relative detail about which members of Congress and the President were likely "blissfully unaware.").

291. *See* Redish & Chung, *supra* note 240, at 819-20.

292. 463 U.S. 85, 100 (1983).

interpretation of the phrase "relate to," which governed the preemption analysis for over a decade, was derived solely from the Court's reference to *Black's Law Dictionary*.[293]

Textualists are opposed to recourse to legislative history or other sources that could arguably shed light on congressional intent.[294] Indeed, Justice Scalia, a strong advocate of the textualist approach, has suggested that, once a court has ascertained the statute's plain meaning, consideration of legislative history becomes irrelevant.[295] Legislative history is viewed as an inappropriate guide for interpretation in part because senators and representatives are frequently absent from debates and have insufficient time to read committee reports. Additionally, the primary purpose of legislative history has shifted from informing those who vote on bills to influencing judges who resort to legislative history as authoritative expressions of congrssional intent.[296]

Textualism, then, does not allow the interpreter to effectuate the spirit of the law over the letter of the law, even if review of other materials would convince a reasonable reader that the enacting legislature could not have intended what the plain meaning suggests.[297] Thus, lower courts following the Supreme Court's early sigual to use a strict textual approach when construing the scope of ERISA preemption felt compelled to find state law causes of action preempted despite the lack of an appropriate remedy provided in ERISA.[298] The courts often noted the inequity of the situation, as well as the fact

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293. *See id.* at 96-97, n.16; *see also supra* notes 171-73 and accompanying text.

294. *See* Aleinikoff, *supra* note 241, at 22; Redish & Chung, *supra* note 240, at 807-08.

295. *See* Scalia, *supra* note 150, at 29-37. "My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, te the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning." *Id.* at 29-30; *see also* Eskridge, *supra* note 285, at 623 (explaining Scalia's concurring opinion in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)).

296. *See* Scalia, *supra* note 150, at 29-37 (noting that one of the routine tasks of the Washington lawyer-lobbyist is to draft language that sympathetic legislatures can recite in a prewritten 'floor debate', or—even better—insert into a committee report).

297. *See* Aleinikoff, *supra* note 241, at 25. Justice Scalia has reinforced this aspect of textualism through a discussion of the case of *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), which he presents as a "prototypical" example of an analysis focusing on legislative intent. According to Scalia,

> It may well be that the statutory interpretation adopted by the Court in *Church of Holy Trinity* produced a desirable result; and it may even be (though I doubt it) that it produced the unexpressed result actually intended by Congress, rather than merely the one desired by the Court. Regardless, the decision was wrong because it failed to follow the text. The text is the law, and it is the text that must be observed.

Scalia, *supra* note 150, at 22.

298. *See, e.g.*, Corcoran v. United Healthcare, Inc., 965 F.2d 1321, 1338 (5th Cir. 1992) (finding preempted a wrongful death action brought against a utilization review entity, even though the plaintiffs were left without a remedy for the entity's alleged negligence).

that Congress likely did not intend such a result, but concluded that preemption was consistent with the intention "expressed" by Congress.[299]

Yet, proponents advocate that textualism is linked to legislative supremacy in two ways. Textualism posits that only the language actually adopted by the legislature meets the constitutionally prescribed procedures and thus constitutes "law."[300] Second, textualism arguably restricts the judicial lawmaking that may occur when a court considers the legislative history and context of the statute.[301] Thus, although plain meaning will not always identify the legislature's actual intent, it is deemed an acceptable approximation in light of its alleged ability to promote judicial restraint.[302] The commitment to legislative supremacy, however, is debatable. Professor Redish has noted that given the generality with which statutes are drafted and the complexity of statutory disputes, few interpretive problems can be resolved simply by reference to the express statutory text. Accordingly, instead of ensuring that Congress's meaning prevails over a judge's policy preference, textualism may "permit virtually unfettered judicial discretion in through the back door."[303]

It is therefore significant that the Supreme Court, as a whole, has not adopted a pure textualist approach. Although the Court has exhibited a tendency to focus foremost on the text of the statute and on ascertaining its plain meaning,[304] some Justices temper the textual analysis by recognizing that language does not occur in a contextual vacuum.[305] The Court in some cases has looked to the entirety of the

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299. *See, e.g., id.* at 1333-34.

300. *See* Scalia, *supra* note 150, at 23; *see also* Sunstein *supra* note 248, at 416.

301. *See* Scalia, *supra* note 150, at 23. In defense of textualism and in opposition to searching for unexpressed legislative intent, Justice Scalia has noted that "[t]he practical threat is that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field." *Id.* at 17-18.

302. *See id.* New textualists argue that, "to the extent originalist . . . models permit judges to stray from the text . . ., judges substitute their own policy preferences for those embodied in the statutory language." Redish & Chung, *supra* note 240, at 821-22. However, several scholars have noted that the textual approach actually encourages judicial discretion. *See, e.g.*, Taylor, *supra* note 285, at 367.

303. Redish & Chung, *supra* note 240, at 825; *cf.* Sunstein, *supra* note 248, at 418. As Professor Taylor has aptly explained: "Choice of a dictionary, choice of a particular definition, and choice of an interpretation over what that definition signifies are all choices that are made in light of contestable background assumptions that recourse te the dictionary does not eliminate." Taylor, *supra* note 285, at 376.

304. Eskridge has noted that the pre-Scalia Court had tightened up the plain meaning rule. *See* Eskridge, *supra* note 285, at 691 n.11 (citing Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982)).

305. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

statute, and to its object and policy.[306] Further, the Court has recently reinvigorated, in the express preemption analysis, the assumption that the historic police powers of the states are not to be superseded absent clear and manifest congressional intent.[307] However, there has been minimal reliance on sources beyond the statute itself. Instead, the Court is likely to require that the purpose, object and policy be ascertainable largely from the language of the provision, its surrounding statutory framework, and the structure of the statute as a whole.[308]

Thus, even in a more temperate form, textualism is a more restrictive approach to statutory interpretation than purposivism.[309] The predominant focus on the language and structure of the federal law to the exclusion of legislative history, the circumstances surrounding the law's enactment or other relevant considerations, may preclude any realistic attempt to ascertain Congress's purpose in enacting the law. Further, it prevents the judiciary from achieving a harmonious interpretation of the law and from taking into account important policies and principles. These deficiencies are particularly troublesome in the preemption context—and this is especially so when, as in the *Boggs* case, the Court is assessing whether a state law frustrates the objectives underlying the federal law. Because a court using a textual approach does not even purport to try to identify Congress's real purpose in enacting the federal law, the analysis becomes a sham. Rather than the "purportedly" purposeful analysis in the *Boggs* case, the implied theories of preemption, especially the "stands as an obstacle" theory, require an honestly purposeful approach to interpreting Congress's intent. The following subpart supports this conclusion by demonstrating that a purposive approach to interpretation is more appropriate in the preemption context because it permits courts to assess more accurately congressional pur-

306. *See, e.g.*, John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 94-95 (1993).

307. *See, e.g.*, New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995); *see also Medtronic*, 518 U.S. at 485. Further, the Court typically notes that, in the context of preemption, the purpose of Congress is the ultimate touchstone in every preemption case.

308. *See, e.g.*, *Medtronic*, 518 U.S. at 485; *see also* Taylor, *supra* note 285, at 351 (explaining that textualists restrict any recourse to notions of purpose because of that approach's reliance on legislative history, but accept scrutiny of purpose and design to the extent it is decipherable within the text). When the Court has looked to the legislative history, its role has largely been to disconfirm the apparent meaning of the statutory terms in especially egregious cases. *See* Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 237 (1997).

309. However, the degree of distinction between the approaches may hinge on the particular case before the Court as well as on which Justice writes the opinion.

pose, and promotes important policy considerations relevant in the preemption context.

3. The Purposive Approach Better Serves the Policies Underlying the Preemption Doctrine

In determining whether a textual approach to statutory interpretation is appropriate when conducting an implied preemption analysis, important polices implicated by the preemption doctrines should be considered. This Article focuses on policies arising from two key aspects of preemption. First, the preemption question implicates the relationship between the state and federal governments. Specifically, the doctrine implicates the core federalism question—which government, federal or state, has the authority to regulate in a particular area. Thus, one important policy goal of the doctrine of preemption is that the judicial analysis effectuates an appropriate accommodation of federal and state authority to regulate. Second, preemption raises questions about the proper role of the judiciary as a branch within the federal government.[310] As a constitutional matter, as long as Congress acts within an area delegated to it, Congress may enact laws that preempt state laws and, indeed, Congress may define the allocation of federal and state regulatory authority. However, to the extent that preemption turns on a question of statutory interpretation, the courts become involved in the process of allocation. A second policy goal underlying preemption, therefore, is that the analysis does not result in the judiciary overstepping the boundaries of its proper institutional role.

The following subsections show that a more purposive approach better serves these important policies and, therefore, is a more appropriate methodology for the preemption analysis.[311]

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310. *See* Kenneth L. Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L. F. 515, 533 (1972); Elaine M. Martin, *The Burger Court and Preemption Doctrine: Federalism in the Balance*, 60 NOTRE DAME L. REV. 1233, 1235 (1985).

311. Although the following analysis draws upon the Hart and Sacks approach te interpretation, the author is not necessarily advocating a return to a pure legal process theory. However, the author does believe that Hart and Sacks' theory is particularly useful in the preemption contoxt because of its directive to harmonize fundamental policies and te fit the provision into the existing legal landscape.

a. Ensuring the Appropriate Judicial Role in the Preemption Analysis

As noted, the preemption issue generally devolves to one of statutory interpretation. Thus, the judiciary's role in the legislative process is implicated. Analysis reveals that both the textual and the purposive approach safeguard against judicial overreaching; however, textualism may hamper the legislative process by preventing the judiciary from fulfilling a necessary institutional role.

Under the Federal Constitution, legislation and the policy judgments reflected therein are attained through the interaction between Congress and the President.[312] The Constitution provides no role for the judiciary in the process by which a bill becomes federal law. Rather, courts play a role only as a byproduct of the case or controversy requirement of Article III.[313] That is, when a litigant's right to relief in a judicial action turns on whether Congress intended certain federal legislation to preempt state law, a court has the authority to interpret the federal law at issue.[314] Nonetheless, the relationship between the legislative and judicial branches has vital ramifications for the lawmaking or policy-making process.[315] Policy-making can be viewed as a "continuum of institutional processes [judicial, legislative, and administrative], sometimes acting independently, but often interacting in subtle and perhaps not always conscious ways to influence the behavior of other processes."[316] When courts interpret federal laws in the context of a case, policy-making interaction between the legislative and judicial branches occurs. Accordingly, it becomes important to avoid a counterproductive interaction—one which interrupts the continuum of institutional processes.

There are divergent views regarding the judiciary's role in interpreting federal laws. For example, the judiciary's role has been described as that of an honest agent or a relational agent on the one

312. *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 9-10 (1975) (explaining the constitutional requirements for enacting statutes). According to the Constitution, the only appropriate law is that which both houses of Congress and the President have approved (or in some cases enacted over the President's vete). *See* INS v. Chadha, 462 U.S. 919, 944-51 (1983) (striking down legislative vetoes because they effectively legislated outside the bounds of the constitutionally approved process).

313. *See* Zeppos, *supra* noto 285, at 379.

314. *See* KATZMANN, *supra* note 248, at 46.

315. *See id.* at 47 (citing numerous articles exploring the interaction between courts and Congress).

316. *Id.* (quoting ROBERT A KATZMANN, INSTITUTIONAL DISABILITY: THE SAGA OF TRANSPORTATION POLICY FOR THE DISABLED 9 (1986)).

hand; and as an adjunct or a partner in the legislative process on the other.[317] The different views of the judiciary's role are given life through various theories of statutory interpretation. As explained, purposive theories of interpretation and textual theories are significantly different. However, both approaches are committed, in theory, to the notion of legislative supremacy; in other words, the notion that Congress is the branch of government primarily responsible for policymaking, and that the judiciary's role is limited to effectuating that policy by deciphering legislative commands and applying them to particular cases.[318] In practice, however, the theories are premised on differing means of realizing that commitment and, in fact, satisfy the commitment to differing degrees.

The textual approach views the judiciary's role as that of a very limited agent of the legislature. A court using a textual approach views its task narrowly as that of ascertaining the meaning of the statute, usually by examining the statutory provision's text and the statute's overall structure.[319] As explained in the previous Part, even if other materials would convince a reasonable person that the enacting legislature could not have intended what the plain meaning suggests, a focus on the plain meaning does not allow the judiciary to give effect to the spirit of the law over the letter of the law.[320] Proponents of textual interpretation have explained that this approach ensures that the judiciary does not overstep its institutional

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317. The view that judges are agents or servants of the legislature is the most prominent conception of the role of courts in statutory construction. Underlying this view is the rationale that, "[i]n a democratic system, with an electorally accountable legislature and separated powers, . . . the appropriate and indeed constitutionally prescribed role of the courts [is] to apply legislative commands. . . ." Sunstein, *supra* note 248, at 415. However, some scholars have advocated for an approach to interpretation which permits judges greater flexibility. "The static vision of statutory interpretation prescribed by traditional doctrine is strikingly outdated. In practice it imposes unrealistic burdens on judges, asking them to extract textual meaning that makes sense in the present from historical materials whose sense is often unpossible to recreate faithfully." William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1482 (1987). The dynamic approaches have, in turn, been criticized as permitting courts to go beyond their institutional roles:

> The judiciary that dynamic scholars envision for purposes of statutory interpretation bears little resemblance to the judiciary posited by either new textualists or originalist commentators. Instead of deciphering and implementing the decisions of a coordinate branch, the judiciary, from the dynamics perspective, acts as an adjunct in the legislative process or, more precisely, a superlegislature.

Redish & Chung, *supra* note 240, at 807.

318. However, the toxtual approach shares with the purposive approach a commitment to legislative supremacy: both theories are grounded in the view that a judge's role is that of an agent of the legislature. *See* Sunstein, *supra* note 248, at 415, 424-25; *cf.* Redish & Chung, *supra* note 240, at 805.

319. *See supra* notes 285-309 and accompanying text.

320. *See supra* note 297 and accompanying text.

role by requiring Congress to act affirmatively to overrule judicial interpretations which do not give effect to the spirit of the law.[321]

This argument, however, is especially weak in the preemption context.[322] First, although Congress has enacted a multitude of preemption provisions, Congress has failed to satisfactorily define the scope of the express preemption provisions. Indeed, Professor Fisk has opined that Congress simply cannot, *ex ante*, draft meaningful preemption provisions.[323] At the same time, Congress has demonstrated an inability to modify the language of preemption provisions even in light of judicial decisions pointing out textual inadequacies. ERISA preemption, again, is a prime example. When ERISA was first enacted, there was some initial attempt on the part of Congress to "manage" the federalism issues.[324] However, congressional willinguess or ability to manage federalism rapidly faded and as a result the state of ERISA preemption has been described as "diseased federalism."[325] Logically, Congress is even less likely to

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321. *See supra* notes 300-02.

322. This Article express no view as to whether the premise is more meritorious in contexts other than that of preemption. However, the popular appeal of textualism may be waning. *See* Solan, *supra* note 308, at 239.

323. *See* Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 96 (1996).

> It may be that when Congress passes a statute covering a relatively narrow subject, it can decide in advance all the preemption issues that are likely to arise and resolve them itself. But when it enacts a lengthy and complex statute that displaces state law and regulates across the scope of the employment relationship . . . Congress simply cannot anticipate all the preemption problems that are likely to arise.

Id.

324. A decade ago, ERISA preemption was heralded as a successful experiment in federalism because the scope of preemption was periodically recalibrated through case law construction and subsequent legislative amendments. *See* David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427, 429 (1987). As described by Professor Gregory, the enactment in 1974 of detailed preemption and saving clauses revealed Congress's desire to carefully address the allocation of authority over employee benefit plans between the federal and state governments. *See id.* at 450-53. Several amendments then followed. In 1982, Congress amended ERISA to permit states to regulate the reserve levels of fully insured multiple employer welfare arrangements; a 1983 amendment permitted Hawaii to operate a health insurance program aimed at lowering the rato of uninsurance; and a 1984 amendment exempted qualified domestic relations orders from the general prohibition on alienation. *See id.* at 472-77.

> These incidents of legislative recalibration . . . have provided a series of important lessons regarding the dynamism of the preemption doctrine in employment law. The virtually absolute original ERISA preemption language has been contoured to allow operation of innovative state legislation that does not threaten the pension plan protection objectives that are at the heart of ERISA.

Id. at 433-34.

325. *See, e.g.*, Mary A. Bobinski, *Unhealthy Federalism: Barriers to Increasing Health Care Acccss for the Uninsured*, 24 U.C. DAVIS L. REV. 255, 346-47 (1990); Jolee Ann Hancock, *Diseased Federalism: State Health Care Laws Fall Prey to ERISA Preemption*, 25 CUMB. L. REV. 383, 407 (1995). Professor Fisk has noted that the ERISA experience shows that "it is a

manage federalism in the implied preemption context. If Congress will not manage the federalism issue, judicial reliance on a textual approach in the preemption context is unwarranted.[326] Indeed, although not overstepping its judicial role, a court using a textual approach is not likely to fulfill the judicial role of effectuating policies established by the legislature. The result is a legislature and judiciary working at cross purposes.

In contrast, the purposive approach enables the judiciary to fulfill its institutional role as well as safeguard against judicial overreaching. The purposive approach to interpretation views the judiciary as a more active participant in the lawmaking process. Although also grounded in the notion of legislative supremacy, a fundamental tenet of a purposive theory of interpretation is that policy should evolve through the interaction of courts and the legislature.[327] A court using a purposive approach puts itself in the place of a reasonable legislature, strives to ascertain the underlying reason for the provision, and, when necessary, looks beyond the text of the statute to the context of its enactment.[328] Further, if doubt exists as to the purpose underlying the statute, a court following a traditional purposive approach will strive to interpret the provision in a way that best harmonizes fundamental policies and fits the provision into the general fabric of the law.[329]

A judiciary acting as a participant in the lawmaking process is not overstepping its institutional bounds. The Constitution gives the legislature the power to enact laws and establishes the fundamental

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great deal more difficult for Congress te correct flawed statutes than it is to enact them in the first place." Fisk, *supra* noto 323, at 99.

326. Professor Fisk has also noted:

> If one believes that courts should not correct statutory errors, one must believe that Congress will fix the problem or that the cost of its failing to do so is worth the gain in judicial legitimacy.... As for the latter idea, a great deal of unintentionally irrational law is not a fair price for a small flg leaf of judicial legitimacy.

Fisk, *supra* note 323, at 99.

327. *See* Eskridge, *supra* note 257, at 319; *see also* Sunstein, *supra* note 248, at 426 (noting that "resort te purpose was an effort to maintain the role of the courts as agents of the legislature while at the same time acknowledging the inadequacy of textualism.").

328. *See supra* notes 246-57 and accompanying text.

329. *See* Sunstein, *supra* note 248, at 426. A fundamental premise of the legal process approach is tbe notion of institutional settlement. According te Hart and Sacks, a court interpreting a statutory provision is determining what meaning ought to be given to it—within the judiciary's institutional role. Specifically, courts are bound to respect the constitutional pesition of the legislature and the constitutional procedures for the enactment of legislation. Thus, the discretion accorded to the courts te determine wbat purpose ought te be accorded to a statute is delimited by the principle tbat words may not be given a meaning that they will not bear.

principle of separation of powers.[330] Nonetheless, as noted, the governance in the United States is a process of interaction among the legislative, executive and judicial branches.[331] As envisioned by the Founders, although "[n]o branch was to encroach upon the prerogatives of the others . . . in some sense each was dependent upon the others for sustenance and vitality. And that interdependence would contribute to an informed and deliberative process."[332] Thus, the institutional role of the judiciary in the lawmaking process, although limited to the interpretation of statutes, includes some responsibility for the effectuation of the policy statements declared by the legislature.[333] Notably, the degree of responsibility may vary depending on the federal law at issue.

Preemption constitutes a distinct type of policy statement by the legislature and one which may more readily depend upon interdependence between Congress and the judiciary. As noted, Congress has had particular difficulty drafting, *ex ante*, preemption provisions. Even if legislators try to imagine circumstances where the language might produce an undesirable result, they simply cannot be expected to envision all possible state laws that might be affected by a preemption provision.[334] Additionally, a preemption clause has a more dramatic effect than a substantive provision of federal law. Rather than just regulating conduct, a preemption clause involves the allocation of authority to regulate between the federal and state governments and thus can invalidate substantive state laws.

Accordingly, it should be recognized that, in the preemption context, the judiciary has a heightened responsibility for effectuating policy; and the approach to statutory interpretation should not enhance the potential for results at cross-purposes with the work of the legislature.[335] A textual approach creates just this potential through

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330. The Constitution's system of checks and balances, of course, precludes complete separation of the three branches of federal government created by the framers of the Constitution. *See* JOHN E. NOWAK, ET AL., CONSTITUTIONAL LAW § 3.5 (3d ed. 1986).

331. *See* KATZMANN, *supra* note 248, at 1; *see also* NOWAK, *supra* note 330, at § 3.5 ("While people sometimes refer to the three branches of the federal government as a three-layer cake, it is more accurate te think of it as a marble cake.").

332. KATZMANN, *supra* note 248, at 1. *See supra* note 316 and accompanying text.

333. Notably, although the "interdependence" envisioned by the Founders between the legislature and the judiciary would permit courts to have an affirmative role in the legislative process, the judiciary would not rise to the level of a "superlegislature" as envisioned by proponents of dynamic theories of interpretation. *See supra* note 317.

334. *See* Fisk, *supra* note 323, at 54 (noting that the imagination of legislators is generally constrained by a shortage of time or experience).

335. *Cf.* Wolfson, *supra* note 147, at 96 (noting that, to serve the goals of federalism, preemption should "secure to both the federal government and the states the right to regulate in their proper fields of authority").

its fundamental premise that Congress will step in and correct legislative deficiencies revealed through judicial interpretations.[336] Further, because of the overarching importance of federalism in the preemption context, the judiciary's approach should enable a court to give effect to the policy of clear statement (that preemption will not be inferred absent clear evidence of congressional intent) and ensure that the law fits into the general fabric of the law.[337] A more purposive approach to interpretation, then, better ensures the appropriate judicial role in the process of allocating the authority to regulate between the federal and state governments—it does not result in judicial overreaching and, in fact, helps ensure that courts fulfill their institutional responsibility.[338] The following subpart similarly shows that a more purposive approach better serves the second, and related, policy consideration effectuating an appropriate accommodation of federal and state authority to regulate.

b. *Protecting Federalism Concerns Inherent to the Preemption Analysis*

As noted, the Court has historically recognized that preemption raises the core federalism question of which government, federal or state, has the authority to regulate a particular area. In light of this fundamentally important policy consideration, Justice Frankfurter once eloquently noted:

> Suffice it to say that due regard for our federalism, in its practical operation, favors survival of the reserved authority of a Stato over mattors that are the

336. It has been noted that ignoring legislative history is an "assault on the integrity of the legislative process" and that, "in doing so, . . . the judiciary comes 'perilously close to impugning the way a coordinate branch conducts its operations, and, in that sense, running the risk of violating the spirit if not the letter of separation of powers.' " KATZMANN, *supra* noto 248, at 64 (citations omitted).

337. Professor Fisk has made a similar argument in the ERISA context. *See* Fisk, *supra* note 323, at 90-92. She argues that, because ERISA's preemption clause does not definitively resolve the proper balance between state and federal law, courts should use a "pragmatic approach" and develop a theory of regulatery federalism. *Id.* at 91. "What the courts ought to ask themselves in deciding ERISA preemption cases, therefore, is a pragmatic question: to what extent will decentralization of regulatory authority over this area of law facilitate or hamper the sensible operation of the law?" *Id.* at 92. She, in essence, argues that courts should take a purposive approach and seek to harmonize the law with overarching policies and principles.

338. Viewing a purposeful approach to interpretation as a means of fulfilling the judiciary's institutional role has been recognized in the preemption context. Justice Frankfurter noted that the preemption issue involved "the duty of judicially adjusting the interests of both the Nation and the State, where Congress has not clearly asserted its power of preemption so as to leave no doubt that the separate interests of the States are left wholly to national protection." *See* Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 241 (1947) (Frankfurter, J., dissenting).

> intimate concern of the State unless Congress has clearly swept the boards of all State authority, or the State's claim is in unmistakable conflict with what Congress has ordered.[339]

This subpart shows that the Court's traditional approach to the implied theories of preemption safeguarded federalism concerns by balancing the relevant interests, and that textualism radically departs from the carefully crafted balance.

The development of the implied theories of preemption reflects a careful accommodation of state and federal authority through a number of judicially recognized presumptions and policies relevant in the preemption context. Foremost, the Court developed the presumption that laws enacted pursuant to the historic police powers of the states are not to be deemed superseded unless there is clear and manifest evidence of congressional intent to preempt. As explained in Part II, this presumption evolved in light of the restructuring of American federalism in the 1930s in order to avoid the preemption of vast areas of state law.[340] The evolution of the implied theories of preemption further reflects the Court's attempt to ensure an appropriate accommodation. Specifically, the "stands as an obstacle" theory of implied preemption historically permitted an inference of congressional intent to preempt only when the state law unmistakably frustrated the objectives of Congress.[341] Additionally, the Court recognized heightened standards for the preemption of certain types of state laws. For example, the Court pronounced that state "family-property laws must 'do major damage' to 'clear and substantial' federal interests" before such laws would be deemed preempted.[342] These developments suggest that a full inquiry into the

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339. *Id.*

340. *See supra* notes 23-25 and accompanying text. It has been noted that, to protect federalism concerns, "[t]he essential element of any constitutionally legitimate doctrine of preemption must be an affirmative act on the part of Congress which manifests a clear and unambiguous intent to set aside state law." Corby & Smith, *supra* note 144, at 443.

341. In *Gade v. National Solid Wastes Management Ass'n*, Justice Kennedy stressed the high threshold of conflict established in the Supreme Court's prior cases:

> Any conflict must be 'irreconcilable .... The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute'.... In my view, this type of pre-emption should be limited to state laws which impose prohibitions or obligations which are in direct contradiction to Congress's primary objectives, as conveyed with clarity in the federal legislation.

505 U.S. 88, 110 (1992) (Kennedy, J., concurring) (citations omitted).

342. *See* Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979). In *Hisquierdo*, the Court noted that, "[o]n the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted.... A mere conflict in words is not sufficient." *Id.*; *see also* Betsy J. Grey, *Make Congress Speak Clearly:*

congressional purposes underlying federal law, and a clear finding of conflict, are integral to the balance struck in the preemption context.

The textual approach used by the Court in *Boggs* upset the traditional balance struck by the Supreme Court in the implied preemption context. The majority in *Boggs* held that Louisiana's community property laws were superseded to the extent they recognized Dorothy's sons' claims to any portion of Isaac's retirement benefits. Preempting state laws so obviously within the domain of traditional state regulation clearly has serious federalism consequences. The Court was able to reach this result because it strayed from the presumptions and standards developed in earlier Supreme Court cases. The Court did not adhere to the principle that state family-property laws must do "major damage to clear and substantial" federal interests before such laws may be found impliedly preempted. Indeed, the Court did not even give any real weight to the traditional presumption against preemption. Moreover, rather than applying the high standard of "irreconcilable conflict," the Court in *Boggs* found that the "silent implications" of ERISA's anti-alienation provisions effectively preempted the state community property interests.[343] It is difficult to see how a "silent implication" could ever pass muster given the presumptions and policies developed in the preemption context to address the federalism concern. Thus, the *Boggs* decision readily shows that a textual approach to the preemption question vitiates the safeguards put in place to help maintain an appropriate accommodation of federal and state authority to regulate.[344]

A judiciary committed to a more purposive approach to the preemption issue will therefore better promote relevant policy considerations. A purposive approach will enable the courts to give real effect to the presumption against preemption. Further, a consideration of how the issue should be resolved from the perspective of

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Federal Preemption of State Tort Remedies, 77 B.U. L. REV. 559, 565 (1997) (advocating for use of the "clear statement rule" in the preemption context).

343. This is a particular paradox given that Justice Kennedy, who authored the *Boggs* majority opinion, emphasized the "high threshold" of "irreconcilable conflict" in his concurring opinion in *Gade*. *Gade*, 505 U.S. at 109-10 (Kennedy, J., concurring).

344. As Justice Frankfurter once noted:

> Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial inplications to achieve the super-session of State authority. To construe federal legislation so as not needlessly to forbid preexisting State authority is to respect our federal system. Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure the full federal authority, completely displacing the States.

Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 780 (1947) (Frankfurter, J., dissenting).

"weaving a harmonious fabric of the law" will prevent unnecessary encroachments on state authority to regulate areas within the states' traditional police power.[345] The following brief analysis, for example, readily shows that the outcome and analysis in *Boggs* would have been more satisfactory if the Court had used an "honestly purposive" approach rather than a textual and thus "purportedly purposive" approach. The analysis is brief because it is intended to be illustrative only. Further, although the analysis in this subpart follows the Hart and Sacks methodology, the author does not advocate a return to a pure legal process approach to interpretation. However, the author does believe that Hart and Sacks' theory is particularly useful in the preemption context because of its directive to harmonize fundamental policies and to fit the provision into the existing legal landscape.

c. *A More Reasoned and Reasonable Preemption Analysis*

As to the benefits beyond the survivor's annuity, Sandra's challenge to Dorothy's testamentary transfer of her interest in the SCB retirement plan presented the issue whether the anti-alienation and the QDRO provisions evinced a congressional intent to preempt any transfer of community property interests beyond those explicitly recognized by the QDRO provisions.[346] A purposive approach would have begun with an analysis of the text of the provisions, but would have prompted the Court to acknowledge that the text and the structure of the provisions were unhelpful.[347] As noted, the majority in *Boggs* readily viewed Dorothy's transfer as falling within the scope of the anti-alienation provision and viewed the QDRO provision as a narrow exception recognized by Congress. The majority believed that

345. *See also* Mary L. Lyndon, *Tort Law, Preemption and Risk Management*, 2 WIDENER L. SYMP. J. 69, 75 (1997) (noting that preemption law should more openly allow courts to make interpretations and craft arrangements that make jurisprudential, economic and administrative sense).

346. As explained, the majority in *Boggs* readily viewed Dorothy's transfer as falling within the scope of the anti-alienation provision and viewed the QDRO provision as a narrow exception recognized by Congress. Looking to the text of the provisions, the majority determined that the anti-alienation provision was intended te protect a stream of income for retirees and their dependents; and that the QDRO reflected a decision to protect living spouses and dependents, but not to protect other transfers of community property interests. The dissent noted that the majority's view of the provisions' purpose was implausible given that ERISA does not attempt to regulate what retirees do with their funds after distribution, but did not further explore what purpose should be accorded to the statutory provisions. *See supra* Part IV.A for a more detailed discussion of *Boggs*.

347. When the Justices of the Supreme Court cannot agree on the meaning of the text, surely it is appropriate to acknowledge that the text simply cannot be the primary focus of the analysis.

the "silent implication" of the text was that only court orders falling within the scope of the QDRO were exempt.

In contrast, the dissenting Justices believed that the text of the provisions revealed an intent to exempt "qualified" orders from the scope of the anti-alienation provision, but nothing more. The "language does not tell us what the word 'alienation' would cover in its absence. It does not tell us whether the amendment taken as a whole clarified that the anti-alienation provision covers court orders . . . or extended that coverage so that it included domestic relations orders."[348] The dissenting Justices also noted that the fact that the QDRO provisions concern divorce and separation evinces an intent to regulate transfers between living spouses, but does not evince any intent to affect testamentary transfers.[349] Thus, an analysis focused solely on the text of the provisions does not reveal with any degree of certainty the purpose which should be attributed to the provisions for purposes of a preemption analysis.

Under a purposive approach to the question, a court would then look beyond the statute's language and structure in order to determine what purpose or policy or underlying principle ought to be attributed to the provisions at issue.[350] While a court could not attribute to the statute a meaning that the words would not bear, the court would treat the statute as not only having an immediate purpose, but also a larger and subtler purpose in its relation to the legal system as a whole. Thus, a court would consider the context of the statute's enactment and inquire why, given the state of the law, a reasonable legislator would have enacted the provision.[351] In addition to the text of the ERISA provisions, then, the history of the amendments through which Congress created the QDRO provisions, the Retirement Equity Act of 1984 ("REA"),[352] would become relevant to the analysis.

Congress included the anti-alienation provision in ERISA as it was originally enacted in 1974. The provision simply prohibits the assignment or alienation of benefits provided under the plan.[353]

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348. Boggs v. Boggs, 520 U.S. --, 117 S. Ct. 1754, 1773 (1997) (Breyer, J., dissenting).

349. *See id.*

350. As Hart and Sacks noted, "[t]he criteria for deciding what purpose ought to be attributed to a statute, when the words admit of more than one purpose and more than one is rationally conceivable, touch at the core of the problem of interpretation." THE LEGAL PROCESS, *supra* noto 246, at 1125.

351. *See supra* notes 252-54 and accompanying text.

352. Pub. L. No. 98-397, 98 Stat. 1426 (1984) (codified at 26 U.S.C. § 417 (1994 & Supp. 1996)).

353. *See* 29 U.S.C. § 1056(d)(1) (Supp. 1998).

Viewed broadly, the general terms of the provision would arguably preempt state court orders directing transfer of pension benefits to the non-employee spouse and dependents incident to divorce or separation. But it was not clear that Congress intended such a result. Thus, the issue whether the anti-alienation provision applied to spouses was litigated in case after case.[354] Importantly, these cases were confined to the issues of property division and support rights in the context of divorce or separation.[355] The clear majority of cases held that Congress did not intend for the anti-alienation provision to apply so as to preclude the enforcement of property rights created in the divorce/separation context.[356]

Nonetheless, the legislative history suggests that Congress enacted the REA so that non-employee spouses would not be required to go to court to enforce their rights pursuant to property settlement orders.[357] Under this view, Congress enacted the QDRO provisions to affirm that the anti-alienation provision was never intended to encompass domestic relations orders. However, it could also be argued that, if courts were correctly holding that the anti-alienation provision did not bar enforcement of property rights created in the divorce/separation context, there was no real need for Congress to step in to affirm the law. Thus, the enactment could be construed as evidence that Congress wanted not only to clarify that the anti-alienation provision was intended to encompass domestic relations orders, but also to create a limited exception for certain domestic relations orders. As with analysis of the text, then, consideration of the legislative history and the context of the enactment also does not clearly point to the purpose which should be accorded to the provisions for purposes of the preemption analysis.

Under the purposive approach as conceived by Hart and Sacks, when doubt still remains as to the purpose which ought to be attributed to a statute, a court may resort to an appropriate presumption drawn from some general policy of law.[358] This enables a court to ensure that its interpretation fits the statute appropriately into the

354. *See* Ablamis v. Roper, 937 F.2d 1450, 1463 (9th Cir. 1991) (Fletcher, J., dissenting) (collecting cases).

355. *See id.* at 1463 n.1 (explaining that only one district court case raised the issue in the testamentary context and citing Employees Sav. Plan of Mobil Oil Corp. v. Geer, 535 F. Supp. 1052 (S.D.N.Y. 1982)).

356. *See id.* at 1463.

357. *See id.* at 1465. The legislative histery notes that the "bill clarifies that such [a qualified domestic relations] order does not result in a prohibited assignment or alienation." *Id.* (citations omitted).

358. *See* THE LEGAL PROCESS, *supra* note 246, at 1380.

"general fabric of the law."[359] According to Hart and Sacks, "reflection about these presumptions is the most important task in the development of a workable and working theory of statutory interpretation."[360] When interpreting a statute for the purpose of determining whether the statute preempts state law, the assumption against preemption of state law logically seems to be the relevant presumption.[361]

Following a more purposive approach, then, when analyzing whether the QDRO and anti-alienation provisions in ERISA reveal congressional intent to preempt state community property law, a court would approach the issue from a very different perspective than did the majority in *Boggs*. Effectuating a presumption against preemption means that the analysis must be approached from the perspective that the assumption must be overcome by clear evidence of congressional intent: a "silent implication" simply would not suffice. Rather, a court would approach the analysis from the perspective that, "[s]o long as full scope can be given to the amendatory legislation without undermining non-conflicting State laws, nothing but the clearest expression should persuade [the court] that the federal Act wiped out . . . State requirements deeply rooted in their laws."[362] The *Boggs* dissent pointed out that the anti-alienation provision and the QDRO amendment could be given full effect without the preemption of Louisiana's community property law:

> Congress has recognized that community property law, like any other kind of property law, can create various property interests for nonparticipant spouses. Community property law, like other property law, can provide an appropriate legal framework for resolving disputes about who owns what. The anti-alienation provision is designed to prevent plan beneficiaries from prematurely divesting themselves of the funds they will need for retirement, not to prevent application of the property laws that define the interest in those funds. One cannot find frustration of an 'anti-alienation' purpose simply in the state law's definition of property.[363]

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359. According to Hart and Sacks, "The purpose of a statute must always be treated as including not only an immediate purpose or group of related purposes but a larger and subtler purpose as to how the particular statute is to be fitted into the legal system as a whole." *Id.* at 1377.

360. *Id.* at 1380.

361. Indeed, Hart and Sacks recognized that, in some cases, controlling weight ought to be given to the "policy of clear statement" reflected in the "prevailing policy against incautious or casual extensions of federal power inte spheres occupied by the states." *Id.* at 1240-41.

362. Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 245 (1947) (Frankfurter, J., dissenting).

363. Boggs v. Boggs, 520 U.S. –, 117 S. Ct. 1754, 1772 (1997) (Breyer, J., dissenting) (citations omitted).

Thus, a purposive approach to statutory interpretation would have avoided the serious federalism implications caused by the finding of preemption in the *Boggs* case.

More important than the difference in outcome, however, is that a purposive approach would have resulted in both a more "reasoned" analysis of the preemption issue and an analysis more consistent with the implied doctrines of preemption. A purposive approach would have required the Court to engage in a meaningful analysis of the purpose underlying the anti-alienation and QDRO provisions and would have promoted the policy considerations relevant in the preemption context, as discussed in subparts IV.B.3(a)-(b). These considerations are key components of the traditional approach to implied preemption and the balance struck by the Court to ensure the appropriate accommodation between federal and state authority to regulate. The Court's textual approach in *Boggs* unduly limited these aspects of the analysis.

Accordingly, it is reasonable to conclude that a textual approach to statutory interpretation is incompatible with the implied preemption analysis. Thus, as the Court shifts away from the categorical preemption paradigm and begins integrating the implied doctrines into the express preemption analysis, the Court should also shift away from a textual approach to discerning congressional intent to preempt. The implied theories of preemption, especially the "stands as an obstacle" theory, require an approach that will ensure a meaningful search for the purpose underlying the federal law and a meaningful presumption against preemption, and that will permit courts to resolve the preemption issue in a manner that promotes a harmonious fabric of the law.

V. CONCLUSION

As the Court moves toward a preemption continuum in which implied theories of preemption may inform the express preemption analysis, difficult conceptual and interpretative issues must be confronted. In future cases, the Court should address the conceptual issues avoided in *Boggs* and more appropriately delimit the use of the implied theories in cases involving a federal law with an express preemption clause. Specifically, the Court should follow the approach initiated by the dissenting Justices in *Boggs* and thoughtfully integrate the implied theories into the existing doctrinal framework developed for the express preemption provision at issue.

The Court should also confront the interpretive issue arising from the integration of a theory developed during a period when the Court used a more purposive approach to interpretation into an analysis grounded in a textual approach to interpretation. Although a textual approach to statutory interpretation may be workable in many contexts, the approach is incompatible with the fundamental tenets underlying the preemption doctrine. Implied conflict preemption turns on the purpose to be attributed to the federal law. Further, preemption constitutes a distinct type of policy statement by the legislature because it inherently raises the core federalism question of which government, federal or state, has the authority to regulate. Thus, rather than a textual and "purported" search for congressional intent, the implied doctrines require an approach which ensures a meaningful search for congressional purpose and permits courts to promote fundamental policies implicated in the preemption context.

The Common Law "Duty To Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring

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This Article explores the implications of retail competition in public utility markets, particularly electricity, for customer service obligations. The common law duty to serve, encompassing both service extension and continuation obligations, has a strong basis in economic efficiency. As utility markets are restructured around a competitive model, however, the nature and justifications for extraordinary service obligations must be reassessed. This Article assesses the structure and financing of utility service obligations in various institutional market settings. The Article concludes that, in a retail competition environment, extraordinary service obligations should not extend to service suppliers and marketers, but should be limited to distribution utilities. As a structure for implementing and financing service obligations, mandated bidding of power supply into a power exchange coupled with financing through a distribution surcharge is advocated over alternatives as a way of minimizing the inefficiency of imposing extraordinary service obligations. In addition, the possibility of competition in distribution and its implications for service financing are explored.