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The Structure of Preemption Decisions

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Garrick B. Pursley*

The Structure of Preemption Decisions

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I. INTRODUCTION

Intuition suggests that preemption is a constitutional issue—when we ask whether a state law has been nullified because it conflicts with a federal law, we seem to be asking a constitutional question. But to an outsider, some of our commentary and practice would suggest that preemption has little to do with the Constitution at all. Professor Meltzer, for example, calls preemption a "subconstitutional" issue,1 and Professor Hoke urges that preemption be "de-constitutionalized."2

The Supreme Court treats preemption as a constitutional issue at one

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moment and as a statutory issue the next. Unlike other constitutional issues, some courts hold that preemption issues categorically do not warrant Pullman abstention. The rule that courts should avoid deciding constitutional questions whenever possible is not uniformly applied to preemption issues—in fact, courts often decide preemption questions in order to avoid other constitutional issues. Historically, suits to enjoin enforcement of allegedly preempted state laws did not qualify under the federal statute providing a special panel of three district court judges for suits to enjoin enforcement of state law on federal constitutional grounds.


4. R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941) (authorizing abstention where a federal constitutional question may be mooted by state court resolution of an undecided issue of state law); see, e.g., United Servs. Auto. Ass'n v. Muir, 792 F.2d 356, 364 (3d Cir. 1986) ("[A] federal court should not abstain under Pullman from interpreting a state law that might be preempted by a federal law, because preemption problems are resolved through a nonconstitutional process of statutory construction."); abrogated on other grounds by Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619 (1986), as recognized by Ford Motor Co. v. Ins. Comm'r of Pa., 874 F.2d 926, 931-33 (3d Cir. 1989); Fed. Home Loan Bank Bd. v. Empie, 778 F.2d 1447, 1451 n.4 (10th Cir. 1985) (preemption questions are not "the type of constitutional issues" that warrant Pullman abstention); Knudsen Corp. v. Nev. State Dairy Comm'n, 676 F.2d 374, 377-78 (9th Cir. 1982) (Pullman abstention was not applicable because "the [preemption] question is largely one of determining the compatibility of a state and a federal statutory scheme. No constitutional issues of substance are presented."); Mobil Oil Corp. v. Tully, 639 F.2d 912, 915-16 (2d Cir. 1981) (noting in dicta that preemption issues involved "statutory and regulatory analysis and interpretation rather than constitutional" adjudication).

5. See, e.g., Douglas v. Seacoast Prods., 431 U.S. 265, 272 (1977) (preemption "is treated as 'statutory' for purposes of our practice of deciding statutory claims first to avoid unnecessary constitutional adjudications"); N.J. Payphone Ass'n v. Town of W. N.Y., 299 F.3d 235, 239-40 & n.2 (3d Cir. 2002) (rejecting the argument of then-Judge Alito, writing in dissent, that the question of "whether state and federal laws conflict [is] a 'constitutional question' and declining to decide potentially dispositive state law issues to avoid deciding the preemption issue"); Steven M. Warshawsky, Turning the Supremacy Clause on Its Head: Bell Atlantic Maryland, Inc. v. Prince George's County, 51 CATH. U. L. REV. 191 (2001) (arguing against applying the doctrine of constitutional avoidance to preemption questions).

6. E.g., Blum, 457 U.S. at 137-38 (preemption was a "statutory ground" for decision that avoided a constitutional question).

7. Swift & Co. v. Wickham, 382 U.S. 111, 115-16 (1965). The statute, previously codified at 28 U.S.C. § 2281, was amended in 1976 to limit the availability of the three-judge procedure to cases involving certain constitutional apportionment
Preemption is obviously a constitutional issue in the sense that it is accomplished, at bottom, by the operation of constitutional provisions. I do not mean to suggest that anyone has missed this simple point. But this understanding leaves much to be said. The subconstitutional status often accorded preemption is based on the observation that preemption decisions usually involve the interpretation of federal statutes rather than the text of the Constitution. This peculiar feature of preemption decisions, the argument runs, distinguishes them qualitatively from constitutional decisions. These views do not appear to depend on judgments about the relative importance of preemption in the hierarchy of constitutional issues. Rather, preemption is separated from constitutional issues categorically. One result is that preemption questions are decided by federal courts more often, and with fewer procedural (and perhaps psychological) obstacles, than other constitutional questions.

8. See, e.g., Douglas, 431 U.S. at 271–72 (noting that preemption is "basically constitutional in nature, deriving its force from the operation of the Supremacy Clause"); Hagans v. Lavine, 415 U.S. 528, 534 n.5 (1974) ("[A] suit to have a state statute declared void and to secure the benefits of the federal statute with which the state law is allegedly in conflict cannot succeed without ultimate resort to the Federal Constitution."); Wickham, 382 U.S. at 115 (similar); Hoke, Pathologies, supra note 2, at 753–54.

9. Two other arguments at times are advanced. First, some pin the "subconstitutional" status of preemption on the fact that a judicial decision invalidating a state law on preemption grounds—as opposed to, say, equal protection grounds—can be overturned by congressional action to modify the preempting federal statute. See Douglas, 431 U.S. at 272 n.6; Hoke, Pathologies, supra note 2, at 754–55; Daniel J. Simon, Comment: Abstention Preemption: How the Federal Courts have Opened the Door to the Eradication of "Our Federalism," 99 Nw. U. L. Rev. 1355, 1375–79 (2005). This distinction is false. It is simply not true that no other constitutional decisions are subject to legislative override. See Lisa A. Kloppenberg, Avoiding Constitutional Questions, 35 B.C. L. Rev. 1003, 1038–39 & n.170 (1994) (collecting cases where the Court notes statutes that expressly overrule constitutional judicial decisions). Second, some distinguish between the constitutional provisions that authorize preemption and "substantive" constitutional provisions. See, e.g., N.J. Payphone Ass'n, 299 F.3d at 239 n.2 ("[F]ederal preemption is generally an issue requiring the determination of congressional intent rather than resolving a constitutional problem of substance."); Hoke, Pathologies, supra note 2, at 755. As I explain later in Part III, this distinction assumes the answer to the question of the textual source of the constitutional norm authorizing preemption; but the question is far from settled.


11. The Supreme Court made clear that the relative "importance" of preemption is not the ground for distinguishing preemption from other constitutional issues, at least in its own prior decisions, stressing that "[t]here is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees." New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 365 (1989).
This is no doubt troubling to those, like Professor Young, who regard preemption as the central challenge for modern federalism theory. Congressional and judicial preemption decisions mark off the boundaries of federal and state regulatory authority. When state laws are preempted, state regulatory authority is diminished. The ability of the states to provide meaningful benefits to their citizens through regulation is central to the states’ influence in the national political process. States’ influence in national politics, in turn, is an essential check on the power of the national government. In addition, state regulatory diversity—valued both for its expression of the varied interests of a heterogeneous public and for its ability to promote the improvement of policy generally—is diminished when state laws are preempted.

Where Congress is otherwise constitutionally empowered to act, Congress’s authority to preempt appears to admit of no textual limitation—it is bounded only by the limitations of legislative imagination, and whatever structural requirements can be distilled from concepts of constitutional federalism. But Young insists that a majority of the Supreme Court has not regarded preemption as having much to do with federalism either. Nevertheless, “the importance of preemption cases for federalism is not diminished by the fact that preemption cases do not arrive at the Court . . . with constitutional red flags attached.” Preemption rightfully is regarded as “enormously important” and should take center stage in our federalism debates.

12. See Ernest A. Young, Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments, 46 WM. & MARY L. REV. 1733, 1848 (2005) [hereinafter Young, Federalism Doctrine] (“I have argued for some years now that the most important problem of federalism doctrine is how to limit federal preemption of state law.”); Ernest A. Young, The Rehnquist Court’s Two Federalisms, 83 TEX. L. REV. 1, 130–34 (2004) [hereinafter Young, Federalisms] (“To the extent that virtually all regulatory authority is concurrent now . . . then preemption ought to emerge as the central preoccupation of constitutional federalism.”); Ernest A. Young, Two Cheers for Process Federalism, 46 VILL. L. REV. 1349, 1377–80 (2001) [hereinafter Young, Two Cheers].

13. Young, Two Cheers, supra note 12, at 1368–73.

14. See Young, Federalisms, supra note 12, at 53–58.


16. Young, Two Cheers, supra note 12, at 1381 (noting that “the ‘states’ rights’ Justices [formerly, Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas] seem to forget about federalism when it comes to preemption cases”).

17. Id. at 1384.


19. See Young, Federalism Doctrine, supra note 12, at 1848; Young, Federalisms, supra note 12, at 130–34 (stressing the “centrality of preemption”).
These concerns are not completely unaccounted for in judicial doctrine. Courts in many cases apply a presumption against preemption that shifts to Congress the burden to make clear its preemptive intent. Through Congress, the states thus have a say in whether state law is displaced by federal statutes. Still, the number of preemption decisions has increased dramatically. This is not only due to the increase in the number of preemptive federal laws that naturally accompanied the expansion of the administrative state. The fairly recent recognition of additional mechanisms for invalidating state laws means that the federal legislative process no longer injects state prerogatives throughout the relevant debate. The invalidation of state laws by the dormant commerce clause, the general federal power over international affairs, federal administrative regulations, and federal common law—forms of "preemption" that shift the deliberative process from Congress to the courts—occurs with little or no input from the states. And the evolution of the political process itself has reduced the effectiveness of process limitations on statutory preemp-

21. See generally U.S. Advisory Comm'n on Intergovernmental Relations, Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues (1992); David B. Spence & Paula Murray, The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis, 87 Calif. L. Rev. 1125, 1127 (1999) ("With the rise of the modern regulatory state has come an increase in the number of 'preemption disputes' . . . ."); cf. Hoke, Supremacy, supra note 2, at 829-31 & n.5 (noting the increase in the number of cases between 1946 and 1989 involving the Supremacy Clause). I do not claim that this increase is somehow attributable to an increase in judicial propensity to find preemption. I am not concerned with the reasons for the growth so much as with the fact of it.
25. Preemption of state laws by federal common law occurs, for example, in the admiralty arena. See S. Pac. Co. v. Jensen, 244 U.S. 205, 214-18 (1917); see generally Ernest A. Young, Preemption at Sea, 67 Geo. Wash. L. Rev. 273 (1999).
26. See Young, supra note 23, at 175. Young argues that "[b]ecause [the dormancy doctrines] are enforced by federal courts that neither represent the states nor face Article I's procedural gauntlet in order to act, such prohibitions evade all of these structural safeguards. They are consequently much greater threats to state authority." Id. The same argument goes for preemption by federal common law rules, which are fashioned and enforced solely by courts. As an aside, it may be better to consider the dormancy doctrines not to be preemption doctrines at all. See infra note 63.
Accordingly, some commentators urge that Congress’s power to preempt state law should be subject to stricter judicial limitation. But the majority of preemption still is accomplished by federal statutes, and the prevailing view remains that preemption debates primarily should be hashed out in the state-inclusive political process rather than the courts. Congress retains the lion’s share of the authority to decide whether and how much to preempt; courts engage in “boundary-enforcement,” applying rules of decision aimed at ensuring that Congress takes the time to “decide [the preemption] question in a sensible way.” To the extent that the rules applied in preemption cases have proved inadequate to the task of curbing preemption’s adverse effects, the observation that preemption is regarded by many as something other than a constitutional issue may suggest fruitful avenues of doctrinal revision.

I do not want to dwell on the normative doctrinal debate. In this Article, I want to focus on our understanding of the structure of constitutional decisionmaking. Professor Berman suggests the following standard model of constitutional adjudication: “A court interprets the Constitution to yield a (judicial) statement of constitutional meaning, on the back of which it may construct a constitutional rule, which rule it then applies to the facts to yield a constitutional holding . . . .” Statements of constitutional meaning obviously admit of constitutional “status.” And, despite some debate, the constitutional status of the intermediate rule of decision and the holding is similarly obvious in many cases. Preemption, however, blurs the boundary between constitutional law and ordinary law, bringing the question of constitutional status front and center. The question of preemption’s status goes to both the rules of decision applied in preemption decisions and

27. See Young, Federalism Doctrine, supra note 12, at 1817–18 (“National politicians tend to protect the interests of their private constituents but may often view state political institutions as competitors; to the extent that vertical representation of state interests is effective, it may facilitate the horizontal imposition of powerful states’ preferences on other states; and much federal law is produced through processes that avoid the ‘political safeguards of federalism’ altogether [such as rulemaking by executive agencies].”); Hoke, Pathologies, supra note 2, at 691–93.


29. Young, Federalism Doctrine, supra note 12 at 1834–35, 1849–50 (arguing that the presumption against preemption and other “[r]ules of statutory construction are a form of collaborative enforcement: They employ judicial doctrine not to limit federal regulatory authority in its own right, but rather to enhance the political and procedural safeguards that safeguard state regulatory autonomy”).


31. See id. at 30–50 (surveying the debate over the legitimacy of so-called “prophylactic rules”).

32. See, e.g., Int’l Brotherhood of Electrical Workers v. Pub. Serv. Comm’n of Nev., 614 F.2d 206, 209–10 (9th Cir. 1980) (“Whether preemption constitutes a consti-
the legal principles those rules purport to implement. Statements of constitutional meaning are noticeably absent, and the doctrinal rules applied to the facts, more often than not, appear to be ordinary rules of statutory construction. Despite strong intuition, then, the adjudication of preemption issues seems out of sync with our standard model of constitutional adjudication. But I want to resist the temptation to concede that preemption decisions involve something other than constitutional adjudication. Instead, I suggest that preemption decisions, properly understood, fit a more nuanced version of the standard model.

One of the principal goals of this Article is to show that, although preemption decisions appear to be primarily about statutory interpretation, this is not a reason to distinguish the adjudication of preemption questions from constitutional adjudication. My thesis is that the adjudication of preemption issues is constitutional adjudication full stop. In Part II, I elaborate on the standard model of constitutional adjudication and the ways that preemption decisions apparently fail to track it. In Part III, I argue that the adjudication of preemption issues must be constitutional adjudication because preemption holdings, insofar as they invalidate state laws, are necessarily constitutional. Assuming that constitutional holdings may only be generated by the application of constitutional rules, I suggest a way that the rules applied in preemption cases may be understood to be constitutional adjudicatory rules. Finally, continuing to work backward through the standard model, I argue that traditional judicial statements of constitutional meaning are absent from preemption decisions because the operative constitutional norms are judicially underenforced. In instances of underenforcement, a statement of constitutional meaning is not a necessary condition for constitutional adjudication. By adding the possibility of judicial underenforcement to the standard model, preemption decisions more readily fit and may be more readily recognized as instances of constitutional adjudication. In Part IV, I explain why it is important to understand preemption decisions in this way.

II. PREEMPTION'S "FIT" PROBLEM

I begin this Part by fleshing out the standard model of constitutional adjudication. Because I take the nature of preemption to be of some specific importance to constitutional practice for reasons I explain more fully in Part IV, I will resist dwelling on broader debates, such as the general debate over the nature and legitimacy of constitutional or statutory issue has elicited from the Supreme Court varying responses.


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tional doctrine-making. Next, I explain more fully preemption's failure to fit the standard model. I introduce three categories of preemption decisions: "dormant" preemption decisions which, though often lumped in with the rest of preemption cases, actually fit the standard model; "impossibility" preemption decisions, which also fit the standard model; and what I will call "modern" preemption decisions, which do not fit the standard model. This is not an exhaustive taxonomy. I am not, for example, going to examine decisions involving preemption by federal common law. Such decisions are comparatively rare and their legitimacy is widely questioned. Nor will I directly address federal regulatory preemption, which is derivative of congressional preemptive authority. I want to focus here on the more common and well-established varieties of preemption—preemption's "central cases." I take these to be those decisions involving the preemption of state statutes by federal statutes.

A. The Structure of Constitutional Adjudication

Before the fairly recent proliferation of metadoctrinal constitutional scholarship, constitutional adjudication generally was thought to consist of two steps: interpretation of the constitution and application of that interpretation to the facts, resulting in a constitutional holding. The constitutional holding is a readily distinguishable subpart of the adjudicatory process; it is the part of the decision where the court explains whether or not the constitution bars the challenged conduct. A central metadoctrinal insight is that "the con-


35. Berman, supra note 30, at 4; see also id. at 5–6 (noting "metadoctrinal ascendance").

36. Id. at 32–33.
ventional picture ignores that the application of constitutional meaning to the facts of a given 'case or controversy' is often mediated by judge-made tests of constitutional law that are not most fairly understood as themselves products of judicial constitutional interpretation." These tests are the rules of decision by which courts determine whether conduct falls within the meaning of a constitutional prohibition or permission, and are separate from the constitutional norms themselves. Professor Fallon, for instance, insists that constitutional adjudication must be understood as a process of constitutional "implementation," rather than mere interpretation and application of the text. Adjudicative rules must be distinguished from the logically prior interpretive product for the model to track the practice; hence steps one and two are separated in the modern version of the standard model.

There is debate over the nature of these two kinds of judicial work product, and the terms of the debate vary. Professor Monaghan distinguishes between "constitutional interpretation" and the making of "constitutional common law," Professor Fallon between elaboration of "constitutional meaning" and "constitutional doctrine," and Professor Sager between construction of "constitutional norms" and constitutional "rules." The pragmatist strain of metadoctrinal thought challenges the notion that the interpretive step ever may be "pure" interpretation of the text—what Professor Monaghan has called "Marbury-shielded constitutional exegesis"—accomplished without reference to extratextual considerations. They argue instead that the process of constitutional adjudication accounts for functional concerns "all the way up" and thus conclude that distinguishing between interpretive and functional judicial work product is pointless. Professor Berman's distinction between "constitutional operative propositions" and "constitutional decision rules" is agnostic as to whether or not the pragmatists are right, which makes his a fairly inert categorization of constitutional doctrine.

37. Id. at 35.
39. See Berman, supra note 30, at 50.
40. Monaghan, supra note 33, at 2-3.
41. Fallon, supra note 33, at 57.
42. Sager, supra note 33, at 1222-24.
43. Monaghan, supra note 33, at 31.
44. Levinson, supra note 33, at 873. See also Strauss, supra note 33, at 207 (stating that "courts create constitutional doctrine by taking into account both the principles and values reflected in the relevant constitutional provisions and institutional realities").
45. See, e.g., Levinson, supra note 33, at 873; Strauss, supra note 33, at 207-08; see also Berman, supra note 30, at 45-46 (describing Professor Strauss's views).
46. See Berman, supra note 30, at 12-15 ("[T]o recognize the distinction between operative propositions and decision rules does not depend upon (though is not in-
Like Professor Berman, here I am concerned only with the distinction between judicial statements of constitutional meaning on the one hand and the application of adjudicative rules on the other, regardless of whether both are, at bottom, determined by instrumental considerations. The adjudicative rules need not resemble, in content or scope, the constitutional norms that they implement. This creates a "strategic space" between norm and rule, where the content of the rule may be influenced by instrumental concerns. The play of instrumental considerations in the creation of doctrinal rules often results in rules that prohibit more or less conduct than is prohibited by the constitutional norm itself; that is, the strategic space between norms and rules allows for judicial overenforcement and underenforcement of constitutional norms. The separation of "constitutional interpretation" and "constitutional rules" and the relationship between the two are critical to understanding preemption's departure from the standard model. Three examples will help pinpoint what I am calling preemption's "fit" problem.

B. Three Categories of "Preemption" Decisions

In Zschernig v. Miller, the Supreme Court struck down an Oregon probate statute under the "dormant foreign affairs doctrine." The Court explained that "the Constitution entrusts [foreign affairs] solely to the Federal Government" and that state laws "must give way if they impair the effective exercise of the Nation's foreign policy." The Court then set out the rule that state laws are invalid under this principle if they have a "direct impact upon foreign relations," but not if they "have only 'some incidental or indirect effect in compatible with) an assumption that courts derive 'constitutional meaning' in a fashion uninfluenced by pragmatic or instrumental calculations.

47. See id. at 12 ("As a conceptual matter, the number and variety of options in the making of constitutional decision rules is limited only by judicial imagination and by the (ever-changing) constraining norms of professional practice.").


49. See generally Sager, supra note 33 (underenforcement); Monaghan, supra note 33 (overenforcement).


52. Zschernig, 389 U.S. at 436.

53. Id. at 440. The Zschernig Court relied in part on Hines v. Davidowitz, 312 U.S. 52 (1941), in which the Court made a similar statement: "Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." Id. at 63.

54. Zschernig, 389 U.S. at 441.
foreign countries.'"\(^{55}\) For a nonresident alien to inherit, Oregon's statute required proof that his or her home government granted Americans reciprocal inheritance rights. The Court held the statute unconstitutional because the required judicial inquiry invited criticism of foreign governments when "the so-called 'rights' are [found to be] merely dispensations turning upon the whim or caprice of government officials."\(^{56}\) This judicial criticism was "forbidden state activity"\(^{57}\) amounting to an "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress."\(^{58}\) Similarly, the Court has interpreted the "negative or dormant implication of the Commerce Clause" to "prohibit[] state taxation or regulation that discriminates against or unduly burdens interstate commerce,"\(^{59}\) and has crafted an implementing rule that "[state] economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors," will be struck down "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."\(^{60}\)

The dormancy doctrines are the subject of interminable debate.\(^{61}\) Regardless, decisions invalidating state laws under the dormancy doctrines clearly track the standard model.\(^{62}\) The Court interprets con-

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55. Id. at 433 (quoting Clark v. Allen, 331 U.S. 503, 517 (1947)).
56. Id. at 434. See also id. at 435–37 (noting several instances of criticism in published probate court opinions).
57. Id. at 436.
58. Id. at 432. Justice Brennan's concurrence underscores the constitutional status of this holding. He believed that the relevant provisions of the Oregon statute "on their face are contrary to the Constitution of the United States," because they "launch the State upon a prohibited voyage into a domain of exclusively federal competence." Id. at 442 (Brennan, J., concurring).
62. Professor Young's observation that, contradistinguished from other forms of preemption, the dormancy doctrines are judicially created and judicially enforced is suggestive. See Young, supra note 23, at 175–76. The standard model's general case is, after all, that judicially identified constitutional norms are implemented by judicially created rules as applied to the facts of specific cases.
stitutional provisions, or their negative implications, and creates rules for applying the interpretations to the facts of a case. When a court invalidates a state law under one of these rules, the holding is undoubtedly constitutional, following as it does from the execution of the other steps of the standard model.63

Where state and federal law logically conflict—"when courts cannot apply both state law and federal law, but instead must choose between them"64—and where there is no evidence of congressional intent to displace state regulatory authority, the holding simply invalidates the state law as applied.65 The paradigmatic case of this "impossibility preemption" is Gibbons v. Ogden, where a New York statute granted a steamboat operator the right to exclude a competing operator from navigable waters in New York, but the competing operator was granted a federal license to traverse those same waters.66 The Court in Gibbons explained that if "the laws of New-York . . . have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles


64. Caleb Nelson, Preemption, 86 VA. L. REV. 225, 251 (2000). Professor Nelson criticizes the traditional statement that conflict preemption occurs where it is logi- cally impossible for a person to comply with both the federal and state laws; if federal law permits something that state law prohibits, it is possible to comply with both by not engaging in the conduct. See id. at 228 & n.15. This form of preemption, properly conceived, occurs where a court cannot sensibly apply both the federal and the state law. It is only impossible to comply with both federal and state law where one requires that the other forbids. See id. at n.15; Geier v. Am. Honda Motor Co., 529 U.S. 861, 873 (2000) (recognizing as an actual "case of impossibility" only the situation "in which state law penalizes what federal law requires").


him . . . the acts of New-York must yield."67 This kind of conflict between state and federal law "does not deprive states of their preexisting, concurrent lawmaking powers in a given area; rather, it means that a particular state law in conflict with a particular federal law will be trumped in cases where both apply."68

Impossibility decisions, too, clearly track the standard model; they are straightforward applications of the Supremacy Clause. It should not be surprising that in some cases the constitutional text is clear enough to dictate the outcome without an implementing rule. The Supremacy Clause provides that federal statutes "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."69 Other controversies aside, the plain language at least requires application of federal law where conflicting federal and state laws are otherwise both applicable.70 In impossibility cases, the rule spelled out in the constitutional text is applied to the facts to compel the holding, making for a clear instance of constitutional adjudication, even on the pre-metadoctrinal, two-step model.

I want to emphasize, however, that most modern forms of preemption cannot fairly be viewed as unmediated applications of the plain language of the Supremacy Clause.71 The impossibility situation falls within the core of the meaning of the "to the Contrary" language of the Clause; other sorts of preemption, such as instances of conflicts between the goals of the pertinent state and federal laws,72 are not so clearly contemplated.73 Another example is express preemption. There is no obvious reading of the Supremacy Clause that authorizes Congress to enact a statutory provision affirmatively prohibiting state

67. Id.
68. Gardbaum, supra note 15, at 770. The distinction between rendering an otherwise applicable state law inapplicable in a given case and invalidating the state law for all cases ought not detain us. In either case, the validly enacted state law is stripped of some of its intended effect. That this is the result of preemption is what is important here.
69. U.S. Const. art. VI, cl. 2.
70. See Gardbaum, supra note 15, at 770–73; Nelson, supra note 64, at 245–61.
71. See Hoke, Supremacy, supra note 2, at 853 ("Most federal preemption questions do not present a situation of logical contraries . . . . the types of conflicts presented for adjudication are more subtle. The Supremacy Clause does not expressly answer when differences, although not constituting logical contraries, are sufficient to displace state law."); Nelson, supra note 64, at 251 (arguing that rules of applicability, priority, and construction may be derived from the Supremacy Clause, but not without work; moreover, these rules describe not current practice but a desirable doctrinal revision).
72. See, e.g., Geier v. Am. Honda Motor Co., 529 U.S. 861, 874–84 (2000) (explaining that state tort claims against automobile manufacturers regarding use of passive safety restraints "would have presented an obstacle to the variety and mix of devices that the federal regulation sought" and were therefore preempted).
73. See Hoke, Supremacy, supra note 2, at 847–48.
legislation in a given area without regard to whether the state legislation will likely turn out to be “contrary to” federal law.\textsuperscript{74} Indeed, it is not clear how the Supremacy Clause permits the displacement of state regulatory authority at all; on its face, the clause appears to apply only to already-enacted state laws.\textsuperscript{75} Decisions involving these and other modern varieties of preemption which do not obviously fit the standard model are the ones I am concerned with.

\textit{Lorillard Tobacco Co. v. Reilly}\textsuperscript{76} is typical of what I am calling “modern” preemption decisions. The question in \textit{Lorillard} was whether Massachusetts cigarette advertising regulations were preempted by the Federal Cigarette Labeling and Advertising Act,\textsuperscript{77} which expressly prohibited state imposition of tobacco regulations “based on smoking and health.”\textsuperscript{78} Though the Court referred to the preemption issue as a “Supremacy Clause claim,”\textsuperscript{79} aside from a recitation of the language of that clause,\textsuperscript{80} the Court engaged in no further discussion (much less interpretation) of the constitutional text.\textsuperscript{81} Instead, the Court made clear that “[i]n [preemption] cases, our task is to identify the domain expressly pre-empted [by the statute],” and that “[c]ongressional purpose is the ‘ultimate touchstone’ of our [preemption] inquiry.”\textsuperscript{82} To determine the scope of the preemption provi-

\begin{itemize}
\item \textsuperscript{74} One might object that where a statute contains an express preemption provision, any state law that falls within that provision is void under the plain language of the Supremacy Clause as “contrary” to the preemption provision. But this argument assumes, rather than explains, the constitutional authorization for congressional enactment of express preemption provisions in the first place. See Gardbaum, supra note 15, at 775–77.
\item \textsuperscript{75} See id. at 773–77 (explaining that express and field preemption cannot be derived from the Supremacy Clause); Hoke, \textit{Supremacy}, supra note 2, at 843–53 (arguing that judicial statements implying that all modern forms of preemption flow directly from the Supremacy Clause “are not only misleading presentations of law, but their habitual invocation obscures the complex interpretive task required by the Supremacy Clause and conceals the analytic morass pervading decisions in which the Clause is invoked”); see generally Nelson, supra note 64.
\item \textsuperscript{76} \textit{Lorillard}, 533 U.S. 525 (2001).
\item \textsuperscript{78} 15 U.S.C. § 1334(b) (2000).
\item \textsuperscript{79} \textit{Lorillard}, 533 U.S. at 537. The Court sometimes pitches preemption issues in constitutional lingo at the outset of an opinion. See, e.g., \textit{Edgar v. MITE Corp.}, 457 U.S. 624, 630 (1982) (“We first address the holding that the Illinois Take-Over Act is unconstitutional under the Supremacy Clause.”); \textit{Kewanee Oil Co. v. Bicron Corp.}, 416 U.S. 470, 479 (1974) (“The question [is] whether the Ohio trade secret law is void under the Supremacy clause . . . .”). The confusion over the constitutional status of preemption issues is not caused by the Court’s failure to consistently call preemption claims “constitutional claims,” or by any other linguistic peculiarity. As I said, it appears to flow from the fact that the adjudication of preemption claims is not like other constitutional adjudications.
\item \textsuperscript{80} \textit{Lorillard}, 533 U.S. at 540 (quoting U.S. CONST. art. VI, cl. 2).
\item \textsuperscript{81} See \textit{id.} at 540–42.
\item \textsuperscript{82} \textit{Id.} at 541 (quoting \textit{Cipallone v. Liggett Group, Inc.}, 505 U.S. 504, 516 (1992)).
\end{itemize}
sion, the Court employed the presumption against preemption and a number of conventions of statutory interpretation: the congressional purpose for the preemption provision, that provision’s amendment history, and the legislative history of the overall statutory scheme. The Court concluded that in enacting the preemption provision, Congress intended to “prohibit[ ] state cigarette advertising regulations motivated by concerns about smoking and health.” Since the Massachusetts regulations “attempted to address the incidence of underage smoking,” a motivation “intertwined with the concern about cigarette smoking and health,” the Court held them preempted.

Leaving aside the holdings, noticeably absent from modern preemption decisions, of which Lorillard is an example, is anything resembling constitutional interpretation or the application of a constitutional rule. To be sure, the Court often begins by quoting the Supremacy Clause; but as Professor Gardbaum has observed, “[S]tatements of preemption law almost routinely ‘start from the top’ with a reference to the Supremacy Clause . . . .” The mere recitation of the Supremacy Clause is not “constitutional interpretation” for purposes of the standard model; there is no “determination of constitutional meaning” involved. Justice Harlan, for one, thought that deciding preemption questions avoided constitutional interpretation altogether. The constitutional rules of the standard model—“the judicial direction regarding how courts are to decide whether [a statement of constitutional meaning] has been complied with”—are similarly absent, or at least disguised. As Justice Breyer observed, the determinative decisional rules applied in preemption decisions appear to be the rules of “statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.” This is

83. Id. at 541–42 (“[W]e ‘work on the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that is the clear and manifest purpose of Congress.’” (brackets omitted) (quoting Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 325 (1997)).
84. See id. at 542–48.
85. Id. at 548.
86. Id.
88. Berman, supra note 30, at 57–58.
89. See, e.g., Amalgamated Food Employees’ Union v. Logan Valley Plaza, Inc., 391 U.S. 308, 333 (1968) (Harlan, J., dissenting) (“Because reliance on pre-emption would invoke the authority of a federal statute through the Constitution’s Supremacy Clause, it would avoid interpretation of the Constitution itself.”); Zschernig v. Miller, 389 U.S. 429, 443, 444–45 (1968) (Harlan, J., concurring) (arguing that the majority should have relied on preemption for its disposition in order to adhere to the canon of constitutional avoidance).
90. Berman, supra note 30, at 58.
so regardless of the type of preemption. Whether it is "express,"92 "implied,"93 "impossibility,"94 "obstacle,"95 or "field"96 preemption, courts focus almost exclusively on questions of statutory construction and congressional intent.97

One might think that parts of the standard model are absent from most preemption decisions because all of the steps need only be followed in cases of first impression. This brings to mind Professor Fallon's distinction between "extraordinary" and "ordinary" constitutional adjudication:

In "ordinary" cases the Court—or at least a majority—treats the issue for decision as framed by established doctrine. . . . [T]he Justices assume that their obligation of fidelity to the Constitution is met by fidelity to an established structure for implementing the Constitution, grounds for reasonable disagreement notwithstanding. . . . By contrast, in "extraordinary" cases, the Court concludes that it cannot resolve the question before it without either crafting new doctrine or reconsidering the wisdom or applicability of an existing doctrinal framework.98

Courts in ordinary decisions do not engage in original constitutional interpretation—they need only apply a familiar decisional rule. If the first step is only necessary in extraordinary decisions, then we should expand the category of constitutional decisions to include both decisions exhibiting all steps of the standard model—extraordinary decisions—and decisions merely applying rules crafted in extraordinary decisions.


94. See supra notes 64–68 and accompanying text.


98. Fallon, supra note 38, at 43.
The logical rub is that ordinary decisions are only *constitutional* decisions if they result in constitutional holdings, and thus involve application of constitutional decisional rules. In other words, they must be decided by reference (though not necessarily direct reference⁹⁹) to precedent in which the relevant rule was somehow derived from the Constitution. Ordinary preemption decisions, however, are not applications of earlier generative decisions in which the standard model was obviously followed—they are not iterations of any obviously constitutional extraordinary decisions. There are, of course, preemption decisions that might be called "extraordinary" because they involved the creation of new doctrinal rules; for example, in the *Geier* case, the Court established the rule that an express preemption provision does not preclude the possibility of broader implied preemption.¹⁰⁰ Other cases are "extraordinary" because they constitute the first judicial application of one of the modern forms of preemption. But even these cases lack at least the first step of the standard model.

For example, *Rice v. Santa Fe Elevator Corp.*,¹⁰¹ considered by many to be a foundational case of modern preemption jurisprudence, contains no substantive explanation of the operative constitutional principles. Instead, the Court explained only that

> it is clear that since warehouses engaged in the storage of grain for interstate or foreign commerce are in the federal domain ... Congress may, if it chooses, take unto itself all regulatory authority over them ..., share the task with the States, or adopt as federal policy the state scheme of regulation....

> The question in each case is what the purpose of Congress was.¹⁰²

So while *Rice* may be an "extraordinary" case in that it represents the first modern application of the field preemption doctrine, the Court did not interpret the pertinent constitutional provisions or otherwise explain the operative constitutional norms.

Preemption's fit problem goes beyond the omission of pertinent citations. The problem is that preemption decisions appear to disclose neither generalized constitutional decisional rules nor any instances of constitutional interpretation. Steps one and two of the standard model are missing.

### III. PREEMPTION AND THE STANDARD MODEL

In this Part, I suggest a way that preemption decisions may be understood to fit the standard model. First, I argue that the holdings of

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⁹⁹. Courts often cite other ordinary decisions that contain a good statement of the relevant rule rather than the case in which the rule was established. Nevertheless, the rule should be ultimately traceable through the cases to an instance of extraordinary constitutional adjudication.


¹⁰¹. 331 U.S. 218 (1947).

¹⁰². *Id.* at 229–30.
preemption cases are necessarily constitutional. Because constitutional holdings can only result from constitutional adjudication, it follows that preemption decisions are instances of constitutional adjudication. This is a definitional relationship; the standard model's structure depends on it, as does the internal legitimacy of judicial constitutional analysis. Indeed, if the structure of preemption decisions were not reconcilable with the standard model, but preemption holdings were unquestionably constitutional, we would just have to recognize another form of constitutional adjudication.

After arguing that the central decisional rule applied in preemption decisions is not itself distinguishable from other constitutional adjudicative rules, I turn to step one of the standard model. To explain why constitutional interpretation appears utterly absent from preemption decisions, I argue that the pertinent constitutional norms are underenforced in preemption cases. Congress, not the Court, bears the primary responsibility for interpreting the nature and scope of the Constitution's grant of preemptive authority. This conclusion meshes well with the fact that the operative adjudicative rule in preemption cases resembles a rule of deference to congressional judgment. As a criterion of correctness for this preliminary discussion, I think that if my suggestion turns out to be useful in describing the judicial practice in deciding preemption questions, there will be reason to believe that it comes close to the mark.

A. Preemption Holdings as Constitutional Holdings

We might designate certain judicial holdings as constitutional holdings (as we did with the dormancy decisions) because they follow after recognizable instances of the other steps in the standard model. That avenue is of course unavailable for modern preemption holdings. But even when the process of adjudicating a particular issue is distinct, if the resulting holding can be shown to be a constitutional holding, then the legal principles and adjudicative rules applied must be constitutional. The task then is to explain why the anomalous principles and rules are nevertheless constitutional, and to reconcile them with the standard model. I propose to do this for the principles and rules applied in preemption decisions.

To begin, I will concentrate on another aspect of what makes certain judicial holdings constitutional—their legal effect. Continuing with Professor Berman's version of the standard model, a constitutional holding is "quintessentially, a declaration that challenged governmental conduct is, or is not, constitutionally permissible."103 Where the declaration is one of impermissibility, the legal effect is to

103. Berman, supra note 30, at 38.
render the challenged conduct null and void.\textsuperscript{104} If the legal effect of a holding (e.g., to nullify a certain type of conduct) can only be the result of the operation of the constitution (its legal force or effect), then it must be a constitutional holding.

The different types of preemption are well catalogued elsewhere.\textsuperscript{105} On the one hand, there are the impossibility decisions, which result in nullification of one particular application of state law.\textsuperscript{106} At the other end of the spectrum are field preemption decisions, which both invalidate the state law and strip away large areas of state regulatory jurisdiction, even absent any conflict between state and federal law.\textsuperscript{107} Field preemption is said to occur where "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where "the 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."\textsuperscript{108}

Where Congress has expressly or impliedly preempted a regulatory field, even state laws perfectly harmonious with the federal scheme are nullified, as the states are taken to have no regulatory jurisdiction at all.\textsuperscript{109} Between these two extremes lies the majority of modern preemption decisions, where state law is displaced for varying degrees of conflict with federal law or for varying degrees of intentional congressional displacement of state regulatory jurisdiction.\textsuperscript{110} The holding of \textit{Lorillard}, for example, had both effects.\textsuperscript{111}

In short, preemption holdings are declarations of the permissibility of either validly enacted state laws or the existence of state regulatory jurisdiction—often both. The legal effect of a preemption holding is to

\textsuperscript{104} See, e.g., Cipollone v. Liggett Group, 505 U.S. 504, 516 (1992) ("[S]ince our decision in \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316, 427 [(1819)], it has been settled that state law that conflicts with federal law is 'without effect.'"); Edgar v. MITE Corp., 457 U.S. 624, 631 (1982) ("Of course, a state statute is void to the extent that it actually conflicts with a valid federal statute . . . ."); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 479 (1974) (preemption is a question of whether the state law is "void under the Supremacy clause").


\textsuperscript{106} See supra notes 64–68 and accompanying text.

\textsuperscript{107} See Dinh, supra note 105, at 2098–112; Nelson, supra note 64; Pursley, supra note 63, at 385–91.


\textsuperscript{109} See Dinh, supra note 105, at 2105.

\textsuperscript{110} See supra notes 87–97 and accompanying text.

\textsuperscript{111} See Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 551 (2001) (holding that Massachusetts's "outdoor and point-of-sale advertising regulations targeting cigarettes are pre-empted by the FCLAA" and that "the FCLAA prevents States and localities from imposing special requirements or prohibitions 'based on smoking and health' with respect to the advertising or promotion' of cigarettes").
render the challenged state law or area of state regulatory jurisdiction null and void.\(^{112}\) Courts and commentators may understand such holdings to be, at bottom, constitutional holdings, but the reasons for that understanding are seldom explained.\(^{113}\) By focusing on what it means for a judicial decision to invalidate a state law or strip state regulatory jurisdiction, I want to show that preemption holdings can only be constitutional holdings. To see why, return for a moment to first principles.

The states “entered the Union ‘with their sovereignty intact’”;\(^{114}\) they surrendered aspects of that sovereignty to constitute the national government.\(^{115}\) This surrender was voluntary: “Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act.”\(^{116}\) The notion that constitutional requirements must at times override state sovereign prerogatives, then, is consistent with the principle, central to any persuasive theory of sovereignty, that the acts of a sovereign government may only be undone with the consent of the sovereign itself:\(^{117}\) The limitations on state sovereignty reflected in the Constitution are what the states agreed to at ratification. But as Madison explained, “[T]he States . . . retain, under the proposed Constitution, a very extensive portion of active sovereignty . . . .”\(^{118}\) The Tenth

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112. Professor Gardbaum traces these legal effects to distinct constitutional principles: the Supremacy Clause for the invalidation of the state law as applied on impossibility grounds; the Necessary and Proper Clause for the invalidation of the state law and state regulatory jurisdiction, where there is no conflict, on congressional-intent grounds. He calls these effects “supremacy” and “preemption,” respectively. See Gardbaum, supra note 15, at 770–73. Professor Young would no doubt characterize the invalidation of validly enacted state laws as effecting state sovereignty, and the displacement of state regulatory authority as effecting state autonomy. See generally Young, Federalisms, supra note 12. Young notes, however, that the sovereignty/autonomy distinction is malleable: “Autonomy cannot long be preserved without some form of sovereignty, and sovereignty is pointless without autonomy.” Id. at 160. Both distinctions are logically subsequent to the question I am addressing here.

113. See, e.g., authorities cited supra note 8.


115. See THE FEDERALIST No. 44 (James Madison) (Isaac Kramnick ed., Penguin Books 1987) (explaining that the powers of the national government were “transferred” from the state governments).


Amendment reflects the "truism that all is retained which has not been surrendered[,]"\(^1\) that "what is not conferred, is withheld, and belongs to the state authorities."\(^2\) This is the dual sovereignty that federalism, broadly conceived, is intended to maintain.\(^3\)

Although the structural principles of federalism are not easily translated into rules of judicial decision,\(^4\) there are acknowledged outer limits to the continuum of actions permissible within the structure. For instance, we know that congressional control of state executive officials is out of bounds.\(^5\) Another limitation derives from the fact that the states retained their legislative independence after ratification. The idea of continuing state legislative independence is not controversial: if the notion that the retained sovereignty of the states is popular sovereignty means anything at all,\(^6\) it must at least mean that the prerogatives of state citizens, expressed through their legisla-

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Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868) (stating that even after joining the Union, "the people of each State compose a State, having its own government, and endowed with all the functions necessary to separate and independent existence"); Sturgis v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193 (1819) ("[I]t was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.").

120. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833).
124. See THE FEDERALIST No. 46, at 297 (James Madison) (Isaac Kramnick ed., Penguin Books 1987) ("The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen . . . must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone . . . ."); THE FEDERALIST No. 51, at 321 (James Madison) (Isaac Kramnick ed., Penguin Books 1987) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."")
tures, are not always, or even often, subject to external override.\textsuperscript{125} Apparently serving this principle, the Framers rejected the New Jersey Plan, which proposed that Congress be empowered to act directly on state governments as it had been under the Articles of Confederation,\textsuperscript{126} and instead "extend[ed] the authority of the Union to the persons of the citizens—the only proper objects of government."\textsuperscript{127} Indeed, in comparing each government's capacity to resist encroachment by the other, Madison observed that the national government would be at a decided disadvantage because of continuing state legislative independence: "If an act of a particular State, though unfriendly to the national government, be generally popular in that State . . . it is executed immediately and, of course, by means on the spot and depending on the State alone."\textsuperscript{128}

Not surprisingly, the Madisonian theory of vertical separation of powers,\textsuperscript{129} which engenders the political process protections for federalism,\textsuperscript{130} depends on continuing state legislative independence. On Madison's view, the states' command of the popular loyalty, a principal bulwark against national encroachment, would persist in large part because "[b]y the superintending care of [the state governments], all the more domestic and personal interests of the people will be regulated and provided for."\textsuperscript{131} The states' capacity to retain popular allegiance by providing regulatory benefits to their citizens would be undermined, of course, if state legislative decisions were regularly subject to federal override.\textsuperscript{132} The modern Supreme Court reaffirmed these principles in \textit{New York v. United States} when it held that Con-

\textsuperscript{125}. I am not arguing for "dual federalism," which has been fairly conclusively debunked. See Martin H. Redish, \textit{Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism}, 19 GA. L. REV. 861, 877 (1985) (recognizing the general rejection of the view that "recognition of power in one sovereign inherently implies an absence of concurrent power in the other sovereign."); Young, \textit{Federalisms}, supra note 12, at 104–05. There are few if any "spheres" of regulatory jurisdiction exclusively committed to either the federal or state governments. There are instead vast swaths of concurrent regulatory jurisdiction. See Nelson, supra note 64, at 225; see generally Young, supra note 23. Legislative independence is the state legislatures' freedom to act without federal control.

\textsuperscript{126}. 1 M. FERRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (1911).

\textsuperscript{127}. \textit{The Federalist} No. 15, at 149 (Alexander Hamilton) (Isaac Kramnick ed., Penguin Books 1987). Indeed, Hamilton explained that "[t]he great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contra-distinguished from the INDIVIDUALS of whom they consist." \textit{Id.} at 147.

\textsuperscript{128}. \textit{The Federalist} No. 46 (James Madison), supra note 124, at 299–300.

\textsuperscript{129}. See generally \textit{The Federalist} Nos. 46, 51 (James Madison).

\textsuperscript{130}. See supra notes 12–13 and accompanying text.

\textsuperscript{131}. \textit{The Federalist} No. 46 (James Madison), supra note 124, at 297.

\textsuperscript{132}. See Young, \textit{Two Cheers}, supra note 12, at 1355–60; see also \textit{The Federalist} No. 51 (James Madison). This is one of Professor Young's most important arguments in favor of greater limitations on preemption.
gress cannot, even by otherwise legitimate exercises of its enumerated
powers, "commandeer[r] the legislative processes of the States by di-
rectly compelling them to enact and enforce a federal regulatory pro-
gram." The Court based its conclusion on the observation that "the
Constitution has never been understood to confer upon Congress the
ability to require the States to govern according to Congress' in-
tuctions."

Imagine that there was no constitutional grant of preemptive au-
thority to Congress. In that case, preemption, in either of its legal
effects, would clearly run afoul of the principle of continuing state leg-
islative independence. Congressional nullification of validly enacted
state statutes overrides the will of the state citizenry, undermining
the popular sovereignty of the states. And, even more telling, Con-
gressional stripping of state regulatory jurisdiction coerces state legis-
lative forbearance. Indeed, most express preemption provisions are
phrased just this way. For example, the Airline Deregulation Act pro-
vides that "a State ... may not enact or enforce a law, regulation, or
other provision having the force and effect of law related to a price,
route, or service of an air carrier." So, too, the Clean Air Act pro-
vides that "[n]o state ... shall adopt or attempt to enforce any stan-
dard relating to the control of emissions from new motor vehicles or
new motor vehicle engines." Such coercion undermines state popu-
lar sovereignty and, *ceteris paribus*, contravenes the rule of New York,
which is designed to preserve state legislative independence. I do not
think it matters that preemptive federal statutes, formally speaking,
operate on individuals rather than state governments. The effect is
the same as if the statutes were expressly directed at state legisla-
tures. Of course, preemption's two possible effects differ by degree of
interference. While invalidating a state law as applied in an impossi-
bility case overrides a single instance of state popular choice, stripping
state regulatory jurisdiction imposes a durable, temporally extended
constraint on the state's polity.

Nevertheless, *New York* makes clear the enumerated powers alone
do not grant Congress the authority to abrogate state legislative inde-
pendence. Thus, preemption's effects cannot fairly be attributed to
the naked legal force of federal legislation validly enacted pursuant to
the enumerated powers. State legislative independence may only

137. This point is particularly pertinent to the discussion *infra* section III.C.
138. This conclusion eliminates one possible implication of the Court's cryptic state-
constitutional act of Congress ... becomes the supreme law of the land, and oper-
ates by its own force on the subject-matter, in whatever state or territory it may
be overridden pursuant to the state consents reflected in the Constitution. It follows that preemption may only be accomplished by the legal force of the constitution itself. Consistent with this view, the Court in New York described preemption as a constitutionally enshrined exception to the rule against federal interference with state legislative independence, rather than as an effect somehow entailed by the nature of federal legislation itself and thus beyond the reach of conceptual limitations like the rule of New York.139 It is the operative constitutional provision reflecting the states' consent to abrogation of their legislative independence that confers Congress's preemptive authority.140

Constitutional, rather than congressional, mediation of conflicts between federal and state regulatory authority is consistent with the Framers' view that, "in controversies relating to the boundary between the two jurisdictions . . . the decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality."141 This calls into question the idea that the line between federal and state regulatory jurisdiction was entrusted entirely to the political process.142 Impartial constitutional mediation suggests judicial review.143 And while the proper scope of judicial review of preemption depends in part on the textual source of preemptive authority, which is a matter of some dispute,144 my claim does not require settling that

139. New York, 505 U.S. at 167-68.
140. There are additional reasons, beyond the holding of New York, to conclude that the pertinent constitutional provision cannot be the enumerated powers themselves, which I explain below. See infra notes 206-12 and accompanying text.
141. THE FEDERALIST No. 39 (James Madison), supra note 116, at 258.
142. For a seminal presentation of the process view, generally see JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980). See also Hoke, Supremacy, supra note 2, at 868-69 (arguing that the addition of the Supremacy Clause "shifted from the legislative branch to the judiciary the responsibility for . . . securing state fidelity to national law," which "guaranteed [the states] that, first, they would have a forum in which to defend their laws," contrary to the view that the political process provides sufficient protection); Young, Two Cheers, supra note 12, at 1350-51 (explaining that "the debate has generally been over whether we should have any judicial review or none at all; between total reliance on the political process to protect federalism or anything short of that" (emphasis omitted)).
143. See FALLON, supra note 38, at 130-31 ("Congress is . . . an interested party, and the desirability of judicial review . . . plain, when a statute is challenged as exceeding the scope of federal legislative authority or as threatening the structurally grounded prerogatives of the states.").
144. Compare Nelson, supra note 64, at 234 ("As the Supreme Court and virtually all commentators have acknowledged, the Supremacy Clause is the reason that valid
question. The point to take away is this: Because preemption can only be accomplished by the legal force of the Constitution, any legitimate judicial holding that state law is preempted is necessarily a constitutional holding—"a declaration that challenged [state law] ... is not[ ] constitutionally permissible."145 It follows that preemption decisions must be instances of constitutional adjudication.146

Having concluded that preemption holdings are necessarily constitutional, and thus that preemption decisions must be instances of constitutional adjudication, I discuss in the next two sections a way to reconcile the form of preemption decisions with the standard model of constitutional adjudication.

B. Mediating Adjudicative Rules

The conclusion that preemption holdings must be constitutional holdings brings us back to the initial question: Why do preemption decisions look different than other standard-model constitutional decisions if they are, in fact, instances of constitutional adjudication? To get at the answer, we should begin by reviewing our understanding of the rules of decision applied in constitutional cases.

Recall Professor Fallon's view that constitutional adjudication is a process of constitutional "implementation."147 He uses "implementation" rather than "interpretation" to encompass "two conceptually distinctive functions: one of identifying constitutional norms and specifying their meaning and another of crafting doctrine or developing standards of review."148 The Court creates doctrines or standards of review—what I have been calling constitutional "rules"—to enforce constitutional meanings or norms, which are often themselves too abstract to effectively mediate actual disputes.149 In creating constitutional rules, the Court takes into account the practicalities of implementation: institutional capacity, efficiency, costs, and the de-
sire for decisional accuracy, among other things. The rules, while not always obviously derivable from the constitutional norms they enforce, are nevertheless directly tied to those norms. Without the norm, the rule would have nothing to enforce, and, \textit{ex hypothesi}, no legitimate reason to exist. Without the rule, the norm would lack a feasible mechanism of enforcement. The question is: Are there any such rules to be found in preemption decisions?

At first blush, the prospects do not look good. The Supreme Court itself has recognized that no clear constitutional rules have been specified in preemption decisions:

This Court, in considering the validity of state laws in the light of . . . federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.

It seems that the Court views the constitutional part of the preemption inquiry as proceeding on an essentially ad hoc basis. That it appears so should not be surprising; as has been repeatedly observed, preemption decisions appear to be all about statutory construction, and different statutes require different rules and forms of analysis. But appearances can be deceiving.

To be sure, the Court has applied a number of rules of statutory construction in preemption cases, including, for example, the rule that absent ambiguity courts give effect to the plain language of a statute; the rule that where "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to

\begin{itemize}
\item \textquote{See} Sager, \textit{supra} note 33, at 1213–14 (explaining the “difference between the meaning of a normative precept [a ‘concept’] and the application of that precept through the modeling of a theory or structure of analysis [a ‘conception’]” and stating that “the concept governs the conception, for the very purpose of the conception is the realization or understanding of the concept”).
\item Dinh, \textit{supra} note 105, at 2092; Ernest A. Young, \textit{The Last Brooding Omnipresence: Erie Railroad Co. v. Tomkins and the Unconstitutionality of Preemptive Federal Maritime Law}, 43 St. Louis U. L.J. 1349, 1383 (1999); Young, \textit{Two Cheers}, \textit{supra} note 12, at 1383 (noting that preemption decisions, “while carrying profound implications for the federal balance, are fundamentally about statutory interpretation”).
\end{itemize}
incorporate its . . . judicial interpretations as well";\textsuperscript{155} the "familiar principle of \textit{expressio unius est exclusio alterius}";\textsuperscript{156} and the rule that among statutory provisions "the specific governs the general."\textsuperscript{157} And as I noted, the Court in preemption cases has relied on sources of extrinsic evidence familiar in statutory construction—legislative history, related statutory provisions, and so forth.\textsuperscript{158} The central role of such rules in preemption decisions, for many, suggests a nonconstitutional process of adjudication.\textsuperscript{159} But these are not the central decisional rules. They are instead subsidiary to another, more fundamental rule of decision that is generally applicable in modern preemption cases. Concentrating on the ubiquity of statutory interpretation rules in preemption decisions mistakes the forest for the trees.

In modern preemption cases (aside from cases of impossibility\textsuperscript{160}), congressional intent is determinative of the outcome.\textsuperscript{161} Where there is an express preemption provision in the statute, the existence of preemption generally is clear, but the scope of preemption turns on congressional intent.\textsuperscript{162} Where there is no preemption provision, congressional intent determines both the existence and scope of preemption.\textsuperscript{163} For courts, the general rule of decision in preemption cases requires discovering and giving effect to congressional intent: preemption is legitimate and state law is inapplicable (or invalid, or state regulatory jurisdiction is foreclosed, or all three) if and to the extent that Congress intended that it be so. Could this "congressional-intent rule" be a constitutional rule?

Some of the most recognizable constitutional rules do not resemble the norms that they implement. For example, the familiar tiers of

\textsuperscript{158} See supra notes 76–86 and accompanying text.
\textsuperscript{159} E.g., United Servs. Auto. Ass'n v. Muir, 792 F.2d 356, 363 (3d Cir. 1986) ("[F]ederal court[s] should not abstain under \textit{Pullman} from interpreting a state law that might be preempted by a federal law, because preemption problems are resolved through a non-constitutional process of statutory construction."); Dinh, supra note 105, at 2092.
\textsuperscript{160} See supra notes 64–70 and accompanying text.
scrutiny—rational basis, intermediate, and strict—do not bear obvious traces of the Fourteenth Amendment's admonition that the states shall not "deny to any person within its jurisdiction the equal protection of the laws." And the rule of Miranda rendering inadmissible statements made during custodial interrogations that are not preceded by proper warnings bears little resemblance to the Fifth Amendment's requirement that no person may be "compelled in any criminal case to be a witness against himself." So it is not disqualifying that the congressional-intent rule does not point us immediately to the constitutional norm that it implements. We might stop with this observation, conclude preliminarily that the congressional-intent rule may be a constitutional rule, and move on to see whether the preemption decisions explain what constitutional norm the rule serves to implement.

But it is also worth noting that the congressional-intent rule is similar to other kinds of recognizably constitutional rules, such as "appropriate deliberation tests" that "ask[, ]... whether a challenged statute or policy resulted from fair or appropriate deliberative processes." For instance, the Court in Grutter v. Bollinger established the rule that colleges and universities may consider race in their admissions processes without violating the Equal Protection Clause, but only when such consideration goes to a student's capacity to contribute to diversity in the institution. Of course, in most preemption cases the legitimacy of the federal statute, and thus the process of its enactment, is not challenged. But central (though unstated) questions raised in preemption cases do appear to be whether, if so, preemption has been legitimately effected and whether preemption is nevertheless precluded by federalism concerns. By applying only the congressional-intent rule to determine the holding, courts condition


165. U.S. Const. amend. XIV, § 1; see Planned Parenthood of S. Pa. v. Casey, 505 U.S. 833, 930–31 (1992) (Blackmun, J., concurring in part and dissenting in part) ("[T]he Constitution makes no mention of the rational-basis test, or the specific verbal formulations of intermediate and strict scrutiny by which this Court evaluates claims under the Equal Protection Clause." (internal quotation marks omitted) (quoting Webster v. Reproductive Health Servs., 492 U.S. 490, 548 (1989)).


167. U.S. Const. amend. V.

168. Fallon, supra note 38, at 79.

preemption's existence (and thus its legitimacy) as well as its scope on Congress's having engaged in appropriate deliberation on the issue.

The congressional-intent rule also qualifies as what Professor Young has called a "resistance norm"—a "constitutional principle[] that make[s] it harder, but not impossible, for the government to do certain things." Other examples of resistance norms include the rule that courts should construe statutes to avoid constitutional doubts, which "makes it harder—but still not impossible—for Congress to write statutes that intrude into areas of constitutional sensitivity," and the presumption against preemption, which forces Congress to make clear its intent to preempt when legislating in areas of traditional state authority. While the congressional-intent rule perhaps does not make it as hard for Congress to preempt state law as does the presumption against preemption, it certainly does place an obstacle in Congress's path. Save for instances of impossibility, preemption is not an automatic byproduct of the national legislative process; Congress must intend preemption alongside the other substantive effects of the statute. Regardless of its similarities to other kinds of constitutional rules, the congressional-intent rule applied in preemption cases requires considerable deference to congressional judgment about when and how much to preempt.

Having identified a potentially constitutional rule at work in preemption cases, I turn now to consider whether the decisions disclose any interpretation or explanation of the constitutional norm that the rule implements.

171. Young, Two Cheers, supra note 12, at 1389.
172. Young, supra note 170, at 1552.
173. See Young, Two Cheers, supra note 12, at 1388–89. Professor Young argues that the application of the presumption against preemption is constitutional review:

[The presumption against preemption] cause[s] a judge to reject the interpretation of a statute she would otherwise prefer, in favor of an interpretation that is less persuasive ceteris paribus, all in favor of some substantive value that Congress probably never had in mind at all. . . .

[When a court chooses one statutory interpretation over another based on constitutional imperatives, that court has engaged in constitutional review.

Id. This may be true, but it does not explain the failure of preemption decisions in general to fit the standard model. The argument does not account for all preemption decisions since the presumption against preemption is only applied where the federal statute touches on an area of "traditional state concern." See, e.g., Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The presumption is inapplicable in express preemption cases, see Bates v. Dow Agrosciences LLC, 544 U.S. 431, 457 (2005) (Thomas, J., concurring in part and dissenting in part), and, ex hypothesi, in cases that do not involve displacement of an area of traditional state authority.
C. Statements of Constitutional Meaning

As I said, modern preemption decisions lack any recognizable statements of constitutional meaning—or instances of judicial working-out of constitutional meaning—"pure" or otherwise. But again, two constitutional questions, and thus at least two constitutional norms, are implicated in preemption controversies. First, there is the question of whether Congress has the constitutional authority to preempt. Second, even if Congress has the constitutional authority, there is the question of whether preemption is nevertheless precluded by other constitutional norms. The first question concerns the constitutional norm that authorizes preemption—the "authorizing norm." The second question could involve a number of constitutional norms that constrain otherwise legitimate congressional action, but since preemption decisions implicate federalism in particular, here I simply will refer to "federalism norms." When courts hold state law void on preemption grounds, they implicitly conclude that neither of these norms precludes the result.

The first question is never thoroughly addressed in preemption decisions, the second only rarely. In modern preemption decisions like Lorillard, the constitutional discussion typically begins and ends with a brief reference to the Supremacy Clause. There has been no judicial elaboration of how, exactly, the modern varieties of preemption are authorized by the Supremacy Clause. This is a particularly thunderous silence considering that express and field preemption, for example, defy explanation as direct applications or obvious implications of the clause's plain language. The academic dispute over the textual source of the authorizing norm surely is provoked in part by the absence of judicial comment on the matter. Of course, the ab-

174. See supra notes 87–90 and accompanying text; Gardbaum, supra note 18, at 803 (explaining that the "standard view" that preemptive authority is founded on the Supremacy Clause is "asserted peremptorily and without explanation both in scholarly works and in virtually every modern preemption case decided by the Supreme Court"); id. at 803 n.28 (collecting cases); see also Hoke, Supremacy, supra note 2, at 835–53 (arguing that deriving the modern forms of preemption from the Supremacy Clause involves substantial interpretive complexity).

175. See supra notes 42–44 and accompanying text.

176. See supra notes 3, 76–86 and accompanying text; Hoke, Pathologies, supra note 2, at 723–28 (comparing "model one" preemption adjudications, in which courts recite the Supremacy Clause and superficially characterize the controversy as a constitutional question, with other instances in which the question is treated as essentially nonconstitutional).

177. See supra notes 87–97 and accompanying text; authorities cited supra note 174; Hoke, Supremacy, supra note 2, at 835–53; see generally Nelson, supra note 64 (arguing for a reinterpretation of the Supremacy Clause that would alter the varieties of preemption available to Congress).

178. See supra notes 69–75 and accompanying text.

179. See infra notes 223–29 and accompanying text.
sence of judicial explanation does not rule out the Supremacy Clause as the source of the authorizing norm (although some commentators suggest alternative sources). But because the modern Court has not even hinted that preemption may be attributable to any other constitutional provision, the nature of preemption's authorizing norm remains unexplained. Nor, aside from indirect references in setting out the presumption against preemption, and a few statements in concurrence or dissent, has the Court thoroughly explained what restrictions on preemption, if any, are required by federalism norms. I suggest that the reason for the absence of judicial explanation of these norms is that the norms are systematically under-enforced in preemption decisions. Recognizing preemption decisions as instances of judicial underenforcement of constitutional norms reconciles the structure of preemption decisions with the standard model of constitutional adjudication.

In setting out his underenforcement thesis, Professor Sager first describes something like the distinction between constitutional interpretation and constitutional rules, referring to "statement[s] which describe an ideal which is embodied in the Constitution" as concepts, and "statement[s] which attempt to translate such an ideal into . . . workable standard[s] for the decision of concrete issues" as conceptions. He then explains:

In applying the provisions of the Constitution to the challenged behavior of state or federal officials, the federal courts have modeled analytical structures ["constructs"] . . . . The important difference between a true constitutional conception and the judicially formulated construct is that the judicial construct may be truncated for reasons which are based not upon the analysis of the constitutional concept but upon various concerns of the Court about its institutional role. These concerns operate to produce some judicial constructs which are not at all exhaustive of the constitutional concepts they reflect. . . . When this is the case, the construct will let go unchecked some official behavior which may well be in conflict with the concept itself.

180. See generally Gardbaum, supra note 15; Gardbaum, supra note 18 (Necessary and Proper Clause); Hoke, Supremacy, supra note 2, at 874–75 (suggesting that preemptive authority arises from "the balance of the Constitution," i.e., federalism principles, rather than the Supremacy Clause).

181. See supra notes 87–89 and accompanying text.

182. See supra notes 21, 173 and accompanying text.


184. See Young, Two Cheers, supra note 12, at 1377–80 (describing the Court’s failure to address the federalism implications of preemption as a "glaring omission" in the putative "federalist revival").

185. Sager, supra note 33, at 1213.

186. Id. at 1214–15.
In short, courts may have nonconstitutional reasons to create constitutional rules that do not invalidate the full spectrum of conduct prohibited by the relevant constitutional norm, fairly understood.\textsuperscript{187} Underenforcement is not limited conceptually to restrictive norms; courts may underenforce power-conferring constitutional norms, \textit{mutatis mutandis}, by enforcing constitutional rules that allow a greater range of conduct than is authorized by the norm, fairly understood.\textsuperscript{188}

However, the critical second part of Sager's argument makes clear that the full range of obligations imposed by constitutional norms remains binding, even when judicially underenforced:

\begin{quote}
[C]onstitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the boundaries of the federal courts' role in enforcing the norm: By "legally valid," I mean that the unenforced margins of underenforced norms should have the full status of positive law which we generally accord to the norms of our Constitution, save only that the federal judiciary will not enforce these margins. Thus, the legal powers or legal obligations of government officials which are subtended in the unenforced margins of underenforced constitutional norms are to be understood to remain in full force.\textsuperscript{189}
\end{quote}

Where constitutional norms that confer or constrain congressional authority are judicially underenforced, Congress is nevertheless obligated to ensure compliance with the full conceptual reach of the norms. The underenforcement thesis describes a "constitutional divi-

\begin{footnotes}
\item[187] As I said above, I do not take a position on the pragmatist critique of "pure" constitutional interpretation. See supra notes 43-47 and accompanying text. And, I do not believe that Sager takes an anti-pragmatist view of constitutional interpretation. In Chapter 5 of his book \textit{Justice in Plainclothes}, Sager describes a complex "partnership" between the Framers and the modern judiciary which "is concerned with bringing rich content and close detail to the general principles announced in the text." \textit{Lawrence G. Sager, Justice in Plainclothes: A Theory of American Constitutional Practice} 71 (2004). Sager makes clear that the job of the modern constitutional interpreter—to make decisions in conformity with "[t]he requirements of political justice"—is "an exquisitely practical matter" which involves assessing "the ability or tendency of real-world institutions to make decisions in conformity with those requirements." \textit{Id.} I do not believe that Professor Berman attributes to Sager an anti-pragmatist view. See \textit{Berman, supra} note 30, at 50 (classifying Sager as a "taxonomist," in contradistinction to the pragmatists). Professor Berman may only mean to say that Sager, unlike the pragmatists, sees the value in distinguishing judicial elaboration of constitutional meaning from the creation of constitutional decisional rules. I agree with that point. See supra text accompanying note 186.

\item[188] When it comes to the question of substantive limits on congressional power, a power conferring norm may also be viewed as a limiting norm. This is certainly true when a power historically treated as plenary is suddenly subjected to substantive limitations, as was the commerce power in \textit{United States v. Lopez}, 514 U.S. 549 (1995). Power conferring norms are conceptually distinct, in that what we call substantive limitations on conduct are in fact instances where the norm simply does not authorize the conduct in the first place.

\item[189] Sager, \textit{supra} note 33, at 1221.
\end{footnotes}
sion of labor" between the federal judiciary and other governmental actors.\textsuperscript{190} Underenforcement on the one hand is justified by the value of judicial observation of meaningful limitations on its institutional capacity, and on the other by the importance of nonjudicial governmental actors' participation in the enforcement of constitutional obligations.\textsuperscript{191} The promise of this view—a more descriptively accurate and normatively potent account of our constitutionalism—has prompted its widespread acceptance.\textsuperscript{192}

Sager focuses on judicial underenforcement of the "liberty bearing" provisions of the Constitution.\textsuperscript{193} One of his examples is the Supreme Court's decision in \textit{Jones v. Alfred H. Mayer Co.}, where the Court held that Congress had the constitutional authority to prohibit private racial discrimination pursuant to Section 2 of the Thirteenth Amendment.\textsuperscript{194} Section 2 empowers Congress to enforce Section 1, which provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereby the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."\textsuperscript{195} Instead of attempting to define the scope of the authority granted under Section 2 by interpreting Section 1, the Court noted that, in passing the first Civil Rights Act nearly a century before, Congress had rejected the view that Section 2 "merely authorized Congress to dissolve the legal bond by which the . . . slave was held to his master."\textsuperscript{196} The Court upheld Congress's authority to act on subjects other than slavery itself on the ground that, in 1866, "the majority leaders in Congress—who were, after all, the authors of the Thirteenth Amendment—had no doubt that its Enabling Clause contemplated the sort of positive legislation" that was challenged in \textit{Jones}. The underenforcement thesis thus both explains and justifies the Court's decision in \textit{Jones}. The Thirteenth Amendment was intended to eliminate not only slavery itself, but the "badges and incidents" of slavery.\textsuperscript{197} The Court, I think properly, deferred judgment on appropriate remedial actions to Congress, which is better suited to make such determinations.\textsuperscript{198}

\begin{flushleft}
\textsuperscript{190} SAGER, supra note 187, at 102.
\textsuperscript{191} See id. ("If the judiciary is constrained by durable features of its institutional role from fully enforcing the Constitution, it follows that we should encourage and welcome the assistance of other governmental actors in realizing more fully the Constitution's aims.").
\textsuperscript{192} See id. at 93.
\textsuperscript{194} 392 U.S. 409 (1968); see also SAGER, supra note 187, at 105–09 (discussing \textit{Jones}).
\textsuperscript{195} U.S. CONST. amend. XIII.
\textsuperscript{196} \textit{Jones}, 392 U.S. at 439.
\textsuperscript{197} \textit{Id.} at 441 (referencing The Civil Rights Cases, 109 U.S. 3, 20 (1883)).
\textsuperscript{198} See SAGER, supra note 187, at 105–09.
\end{flushleft}
Courts surely may underenforce other, non-liberty bearing, constitutional norms as well. The essential features of instances of judicial underenforcement are (1) a constitutional norm that fairly may be understood to impose obligations more extensive than those imposed by the corresponding constitutional rule enforced by the courts, and (2) some reason or reasons not drawn exclusively from the constitutional norm itself that justify judicial underenforcement. If I am right that in preemption decisions the courts do not enforce the authorizing and federalism norms to their "full conceptual limits," then these basic requirements for underenforcement must be somewhere present.

Judicial underenforcement of federalism norms in preemption decisions is well recognized, though not necessarily in Sager's terms. Professor Young argues at length that although the preservation of state regulatory authority is perhaps the most important requirement imposed by federalism norms, the Court has eschewed full substantive enforcement of that requirement in favor of "soft" limitations that reinforce Congress's obligation to observe federalism-based requirements on its own. The Rehnquist Court's sovereign immunity decisions, which deny Congress the authority to subject state governments to suit in state court or in most federal question cases, demonstrate that substantive federalism constraints are amenable to judicial enforcement. So, too, do the Court's recent forays into enforcing substantive limits on Congress's commerce power. But Young, for one, insists that judicial underenforcement of federalism norms in preemption cases is justified because Congress, not the judiciary, is best structured to take account of the state interests effected by preemption. Underenforcement thus appears to explain why federal-
ism norms are barely discussed in preemption decisions. But I believe that the same holds true for preemption's authorizing norm.

But before proceeding, I want to address a competing view. One might argue that little or no explanation of preemption's authorizing norm is necessary because, where congressional action is permissible, Congress simply possesses plenary authority to preempt state law. There are two possible bases for such a view.

First, the congressional power of preemption may derive directly from the enumerated powers—in most instances, the Commerce Clause. On this view, preemption is authorized both wherever Congress is authorized to act and because Congress is authorized to act, end of story. Even leaving aside its dependence on the questionable premise that the preemption of state law is, for example, an instance of the regulation of interstate commerce under the Commerce Clause, this idea directly conflicts with the principle of continuing state legislative independence recognized in New York. In short, this "enumerated powers theory" of preemption proves too much. Recall the broad rationale for the holding of New York: Congress may not abrogate state legislative independence solely by exercising its enumerated powers.

Assuming no other, independent constitutional authorization for preemption, the enumerated powers view is reconcilable with this principle only if we imagine that state legislative independence is divisible into halves—an affirmative half representing states' freedom to enact legislation and a negative half representing states' freedom to choose not to enact legislation.

This is problematic as a conceptual matter. It just does not make much sense to say that the enumerated powers cannot abrogate the negative half on the one hand, but that they abrogate the affirmative

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205. This is not to say that federalism norms are not implemented in preemption decisions. The presumption against preemption, applied where the putatively preemptive federal statute touches on an area of "traditional" state authority, is grounded in federalism concerns. See supra note 173 and accompanying text.

206. See Gardbaum, supra note 18, at 805 (noting this as a possible alternative to the Supremacy Clause). But see id. at 805 n.34 (indicating that there are no serious advocates of this position).

207. See id. at 805.

208. See supra notes 122–34 and accompanying text.

209. See supra notes 133–34 and accompanying text.
half automatically on the other. And this distinction is fundamentally inconsistent with the fact, emphasized in *New York*, that the Constitution was structured to preserve state legislative independence against bare exercises of the enumerated powers. That protection would be of little significance on the enumerated powers account of preemption since the power to coerce state legislative forbearance alone could quite easily subvert state legislative independence entirely. States could, after all, be left with all the affirmative legislative independence in the world to no useful end without any permissible regulatory jurisdiction. In fact, it is easier and less costly for Congress to coerce state legislative forbearance, since the implied- and field-preemption doctrines obviate the need to do so expressly. If Professor Young is correct that protecting state regulatory authority is federalism's central concern, *New York* would fail utterly in its goal of recognizing a meaningful federalism-based limitation on the enumerated powers, if it left intact, inherent in those same powers, the congressional authority to force state legislatures to refrain from acting altogether.

But to conclude that the power to preempt is not inherent in the enumerated powers does not eliminate the possibility that it may be coextensive with the enumerated powers. It merely shows that the two kinds of powers cannot be coextensive in virtue of the fact that they are identical. This leads to the second possible basis for the view that Congress possesses unlimited preemptive power—the idea that some constitutional norm simply augments exercises of the enumerated powers to "add" an automatic preemptive effect. On this view, preemptive force is a constitutionally imbued characteristic of all federal

210. I will not dwell on it, but talk of "automatic" preemption again calls to mind the long since rejected "dual federalism" concept—one of the proverbial mischievous leprechauns of constitutional theory. See Gardbaum, supra note 15, at 801-07 (describing the rejection of "automatic" preemption in the 1930s); see also supra note 125 and accompanying text (discussing rejection of the dual federalism concept).

211. Professor Young makes a similar argument to support his view that limiting pre-emption is more important for federalism than protecting state sovereign immunity:

State sovereign immunity limits the national government's ability to subject states to national policy, but it does little to protect states' ability to enact and implement policies of their own. The key to state autonomy lies in the ability to regulate the vast majority of human activity carried on by private individuals and entities; sovereign immunity has the effect—at most—of excepting state institutions from themselves being the objects of regulation. One can imagine, at the extreme, a state government which was perfectly exempt from all federal requirements but which had been left with nothing at all to do.


212. See generally Young, *Two Cheers*, supra note 12.
legislation. That being so, the argument runs, the judicial business in preemption cases is properly limited to determining whether and to what extent Congress has exercised this conceded authority.

This is obviously correct for impossibility preemption: The plain language of the Supremacy Clause requires that valid federal statute always will prevail against an otherwise applicable state law where a court must choose one or the other. For the other varieties of preemption, however, the lack of consensus on the source of the authorizing norm means that arguments for the plenary power view must be based on circumstantial evidence. The courts' interpretive silence in preemption decisions alone does not provide a reason for accepting the plenary power view in particular, since the gap is explained just as well by my underenforcement proposal. One might think it telling, empirically, that the Court has never declined to find preemption on the ground that Congress lacked preemptive authority. But as against the underenforcement thesis, the selection bias of this contention is obvious. If preemption norms are underenforced, then judicial decisions are not the place to look for the enforcement of limitations on the authorizing norm. The underenforcement view predicts judicial silence on the matter. The substantive limits on preemption are enforced upstream, by Congress or other nonjudicial actors, to the extent they are enforced at all.

Nor is a plenary power of preemption a necessary feature of the government's federal structure. To be sure, Congress must have the authority to provide for uniform regulation of subjects that are national in scope and thus to minimize state governmental interference. But preemption is not the only means to foster uniformity. While preemption might be more efficient, there is little doubt that Congress could achieve the same results, for example, through the exercise of its recognized authority to place conditions on federal funding

213. Most often, the Supremacy Clause is cited for the authorizing norm in this view. An example is Professor Hoke's "switch" conception of the Supremacy Clause. See Hoke, Supremacy, supra note 2, at 879–84. On this view the clause provides a rule of decision where the question is whether state or federal law should prevail, and that exhausts the clause's substance. See id. at 882 ("[T]he [Supremacy] Clause constitutes the means by which all federal rights become enforceable law and assume priority over any contrary state law.").

214. See Gardbaum, supra note 15, at 767 (paraphrasing the traditional view: "It is 'well established' that Congress has the power to preempt state law in a given area. The only issue in preemption cases is whether Congress has in fact exercised this undoubted power." (quoting Pac. Gas & Elec. Co. v. Energy Res. Comm'n, 461 U.S. 190, 203 (1983))); Nelson, supra note 64, at 265–90; see generally Hoke, Supremacy, supra note 2.

215. See supra notes 64–71 and accompanying text. When this kind of logical conflict occurs, no one has suggested any rule other than the rule that federal law prevails.

216. See Gardbaum, supra note 18, at 806–07.
for state programs in combination with a more limited power to pre-
empt.217 Efficiency is not an argument for the existence of plenary
power, of course. It is instead a reason that courts might underenforce
the limitations on Congress's preemptive authority.218

The plenary power view also appears to me inconsistent with his-
tory and the constitutional structure. I have already argued that the
enumerated powers cannot be the source of preemption's authorizing
norm in light of the principle of continuing state legislative inde-
pendence.219 I think that the implications of that principle are broader
still and bear on this discussion. If the states would not consent to
enumerated powers that automatically abrogate their legislative inde-
pendence, then it is fair to think that they would not have consented
to a separate constitutional provision intended to provide Congress
with plenary preemptive authority, which would have the same ef-
fect.220 In fact, the Framers explicitly rejected a proposal to give Con-
gress unlimited authority to veto state legislative enactments,221 and
that was just the fight to protect enacted state law. States no doubt
would have been even more troubled by the prospect, at least partially
realized in modern preemption decisions, that Congress also would
have given plenary authority to strip state regulatory jurisdiction.
But this concern, too, appears to have been addressed by the Framers

217. See South Dakota v. Dole, 483 U.S. 203, 206 (1987) (noting that use of the Con-
gressional "spending power to encourage uniformity in the States' drinking ages
... [is] within constitutional bounds"); see also New York v. United States, 505
U.S. 144, 166–67 (listing conditional spending as a means available to Congress
to "urge a State to adopt a legislative program consistent with federal interests").
While this carrot-and-stick approach is not far from coercion, it leaves intact the
freedom of choice of state citizens. This is important conceptually, even if that
choice is not always "free" as a practical matter.

218. See SAGER, supra note 187, at 86–88 (discussing strategic reasons why courts
might underenforce the right to minimum welfare: "Consider just one component
of the right to minimum welfare: minimally adequate medical care. . . . What
level of medical care is minimally adequate? How should such care be provided—
by general financial support, single payer or managed competition insurance,
medical vouchers or clinics for the poor? What level or levels of government
should be responsible for design, oversight, and support of the program? How
should the financial burden of such a program be distributed, and how should the
distribution of this burden be implemented?"); Berman, supra note 30, at 92–100
(efficiency considerations are important in shaping constitutional rules); supra
notes 149–50 and accompanying text.

219. See supra notes 206–12 and accompanying text.

220. See supra notes 116–37 and accompanying text.

221. This was Madison's proposal, but was not ultimately part of the Virginia Plan.
See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM
AND JUDICIAL REVIEW 73–75 (2004); 1 THE RECORDS OF THE FEDERAL CONVENTION
OF 1787, at 18 (Max Farrand ed., 1966); Hoke, Supremacy, supra note 2, at
864–65, 874–75; Mark R. Killenbeck, Pursuing the Great Experiment: Reserved
Powers in a Post-Ratification, Compound Republic, 1999 SUP. CT. REV. 81,
101–04.
when they refused to empower the national government to act directly on the state governments.\(^{222}\)

For all these reasons, I find a plenary power of preemption implausible. I do not mean this to be a comprehensive rebuttal of the plenary power account of preemption. That is a large project best left for future work. I only want to suggest, based on these observations, that the existence of some substantive limitation on Congress’s preemptive authority is more plausible than not. But if Congress’s authority to preempt is not plenary, what are its limitations? They depend upon the textual source of preemption’s authorizing norm. Let me sketch some possibilities.

Conventional wisdom locates preemption’s authorizing norm in the Supremacy Clause, so we should begin there.\(^ {223}\) The phrase “to the contrary” in the clause could be interpreted to require more direct forms of conflict than are required in modern preemption cases. Professor Hoke suggests that the “to the contrary” language requires judicial construction in preemption decisions.\(^ {224}\) Relying on framing-era sources, she proposes, for example, that “for a state law to be held contrary to federal law, the state law must evince a hostility toward or antagonistic effects on the federal goals.”\(^ {225}\) This would preclude, for example, field preemption\(^ {226}\) or preemption based on interference with Congress’s goals,\(^ {227}\) absent actual antagonism or hostility. Alternatively, Professor Gardbaum argues that preemption’s authorizing norm is derived from the Necessary and Proper Clause.\(^ {228}\) Emphasizing the textual requirement of “propriety,” he contends that courts in preemption cases should determine whether “Congress reasonably conclude[d] not only that national regulation is called for, but also uniform national regulation.”\(^ {229}\) Only if both requirements are satisfied,

\(^{222}\) Again, this was the structure proposed in the New Jersey Plan. See supra notes 125–27 and accompanying text.

\(^{223}\) The prevailing view is often grounded on Marshall’s statement in Gibbons that “acts of the State legislatures [which] interfere with, or are contrary to the valid laws of Congress,” are invalid under the Supremacy Clause. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824). See also Hoke, Pathologies, supra note 2, at 724 & n.181.

\(^{224}\) See Hoke, Supremacy, supra note 2, at 888–89.

\(^{225}\) Id. at 852–53.

\(^{226}\) See supra notes 107–09 and accompanying text.

\(^{227}\) See supra text accompanying note 95.

\(^{228}\) U.S. Const. art. I, § 8, cl. 18; see Gardbaum, supra note 18, at 819–20.

\(^{229}\) See Gardbaum, supra note 18, at 819–31 (emphasis omitted). Gardbaum bases the independent propriety requirement on Marshall’s famous exposition of the Necessary and Proper Clause in McCulloch v. Maryland: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” 17 U.S. (4 Wheat.) 316, 421 (1819). According to Gardbaum, the second half of this state-
on this view, is nullification of state regulatory authority "proper" and thus constitutionally authorized.

I part ways with these commentators when they suggest that their proposed limitations on preemptive authority call for doctrinal revision to enable judicial enforcement. Whatever the limitations, I think that there are good reasons that those limitations should not be fully enforced by the judiciary. If the two examples I provided resemble the actual limitations, it is easy to see what those reasons are. The proposed Supremacy Clause question is whether state enactments display antagonism toward federal statutory schemes, or, perhaps, whether as yet nonexistent state legislation will likely turn out to be antagonistic to federal plans. The proposed Necessary and Proper Clause question is whether a particular area is best governed by uniform national regulation. These are the sort of complex policy questions (and, indeed, policy predictions) that the judiciary is ill-suited to resolve.230 Even judicial review of the reasonableness of Congress's decisions on such matters would be of dubious validity.231 Rules of deference likely would end up doing most of the work, subtly loosening the standard from reasonableness to rationality.232 Indeed, the inability of courts to successfully resolve such questions, for Professor Young, is one thing that justifies judicial underenforcement of federalism norms in preemption cases.233 And given the centrality of complex federal statutes in preemption decisions, enforcement of

230. See Fallon, supra note 150, at 1290–92 (discussing "concerns about judicial capacity to grasp pertinent facts and assess the likely consequences of alternative policies"); id. at 1299–303 (giving examples of judicial institutional competence gaps that justify underenforcement); Sager, supra note 33, at 1217–18 (noting that underenforcement is justifiable where courts cannot derive "workable standards").

231. Professor Fallon notes that deferential standards are a common guise for underenforcement:

[Wh]en the Court pronounces that it must give "deference" to the judgments of military authorities or prison officials . . . its conclusion is not that the Constitution, within broad bounds, "means" whatever such officials say that it means. Nor is it that constitutional guarantees have little meaning in some contexts. The Court's judgment, rather, is that it is not well equipped to pronounce independently on what, precisely, the Constitution means or requires in certain environments and that it should, accordingly, apply a deferential standard of review. In cases such as this, deferential standards of review do not give conscientious officials a license to behave as they choose. Rather, such standards share responsibility for specifying and implementing constitutional norms among courts and other officials.

FALLON, supra note 38, at 40–41.

232. I make this point to respond to Professor Gardbaum's suggestion that courts undertake just this inquiry. See Gardbaum, supra note 18, at 823–28.

233. See supra notes 200–05 and accompanying text.
constitutional limitations on preemption almost always will involve such policy considerations.

Additionally, as Professor Fallon points out, underenforcement allows the Court to avoid normative questions on which a consensus is not in the offing. "Submersion" of controlling normative controversies in constitutional decisions may provide "a second-best way of implementing the Constitution under circumstances of reasonable disagreement."²³⁴ Such submersion may be particularly desirable in preemption cases in light of the unresolved and complex normative questions involved.

So we have found in preemption decisions the two conditions for judicial underenforcement: constitutional norms with potentially more extensive requirements than are enforced by the congressional-intent rule and reasons why courts might decline to enforce those requirements to the fullest, which reasons are based on institutional considerations rather than the substance of the norms themselves. I want to set aside for a companion essay the questions of the specific source of preemption's authorizing norm, the apparent reasons for its judicial underenforcement, and the justifiability of that underenforcement. These are complex questions that require more lengthy treatment. Notably, regardless of the specifics, the congressional-intent rule applied in preemption cases seems particularly appropriate. It complements judicial underenforcement by reinforcing Congress's responsibility to focus on the normative prerequisites for preemption in the first instance.²³⁵

The underenforcement thesis reconciles preemption decisions with the standard model of constitutional adjudication because instances of underenforcement constitute a variation of the standard model's requirement of an explicit judicial statement of constitutional meaning. As Professor Fallon explains:

If doctrinal tests are framed to protect or implement constitutional norms, it might be thought that the Court's reasoning would typically proceed in a two-stage sequence, with an inquiry into meaning coming first, followed by a separate process in which a test is formulated. In fact, it often may happen that agreement on a doctrinal test comes first and thus forestalls further inquiry into how, precisely, underlying constitutional norms would best be specified. If, for example, the Court determines that the equal protection norm is adequately protected in most cases by a rational basis test, and that the legislation challenged in a particular case survives that test, the Court will have no

²³⁴ FALLO N, supra note 38, at 109–10.
²³⁵ Without such reinforcement, judicial deference might be inappropriate:

[Even in cases involving challenges to statutes, the legislature often will not have addressed the precise issue framed for the Court. . . . As a result, there typically will be no plausible argument that the Court should defer to the reasoned constitutional judgment of a decision maker with a strong democratic mandate.

Id. at 52.
occasion to specify what, exactly, the underlying norm of equal protection means or requires.\textsuperscript{[236]} [D]octrinal tests always reflect the meaning of constitutional norms, but do not always directly embody them.\textsuperscript{[236]} [T]he process of specification often need go no further than is minimally necessary for agreement on a doctrinal formula.\textsuperscript{[236]}

The underenforcement decision Fallon describes is quintessentially interpretive. The Court makes a strategic choice not to enforce its own interpretation of the text in order to obtain the best interpretive outcome overall.\textsuperscript{[237]} In preemption decisions, the choice is based on the Court's estimation that its own interpretation is not likely to be as right, as often, as that of Congress\textsuperscript{[238]} and that the congressional-intent rule sufficiently constrains Congress's interpretive freedom to maintain fidelity to the constitutional norm.\textsuperscript{[239]}

In fact, Congress may not be the only pertinent nonjudicial actor. State governments may also have obligations imposed by the constitutional norms governing preemption.\textsuperscript{[240]} If, for example, the authorizing norm requires preemption in cases of state law antagonism toward federal regulatory schemes, then states may have corresponding obligations not to pass antagonistic laws. And in any event, even if the norms do not impose obligations directly on the state governments, states certainly may play a role in interpreting Congress's obligations under those norms. State legislatures surely consider the possibility of preemption before enacting laws and just as surely try to craft their enactments to avoid preemption where possible. State strategies in this regard may reflect a consensus as to what should and should not be preemptable. I think that the project of discerning a "legislative

\textsuperscript{236} Id. at 38–39.

\textsuperscript{237} Criteria for the “best interpretive outcome” may vary. For Sager, the best interpretive outcome is the one most conducive to political justice. See Sager, supra note 187, at 84–85 (“Justice-seeking theorists have the burden of explaining why the Constitution is so thin, why it stops so far short of justice if justice is its target.”). For Professor Young, it likely would be that which best balances state and federal interests. See generally Young, Federalisms, supra note 12.

\textsuperscript{238} See Fallon, supra note 38, at 51; Berman, supra note 30, at 93–94 (minimizing adjudicatory errors is a proper motivation for doctrine making).

\textsuperscript{239} By way of analogy, Professor Sager points to a similar, and often repeated, interpretive choice that is in part responsible for “the moral shortfall of constitutional law”—the choice of faithfulness to historical constitutionalism over the best “from scratch” interpretation according to the criterion of justice:

There is the text and structure of the Constitution to be contended with as well as the historical stream of decisions by the Supreme Court and federal and state judiciaries the Court superintends. There are also broad patterns of congressional and presidential behavior over time, reflecting implicit and occasionally explicit and self-conscious judgments of constitutional rectitude. Accordingly, some disparity between justice and constitutional case law is the inevitable product of constitutional law's responsibility to our constitutional past . . . .

Sager, supra note 187, at 85.

\textsuperscript{240} See Aaron Jay Saiger, Constitutional Partnership and the States, 73 Fordham L. Rev. 1439, 1441 (2005).
interpretation” of the constitutional norms pertinent to preemption would be incomplete without an examination of the views of state legislatures.241

IV. THE IMPORTANCE OF UNDERSTANDING PREEMPTION

I have suggested that preemption decisions have the following structure. In place of an obvious statement of constitutional meaning sits the Court’s standing interpretive decision to underenforce both preemption’s authorizing norm and the pertinent federalism norms. This leaves to Congress (and perhaps other actors) the task of determining the nature of its constitutional obligations with respect to preemption. The constitutional rule requires determining the existence and scope of Congress’s intent to preempt. The rule simultaneously implements the Court’s underenforcement strategy by giving effect to Congress’s decisions about the constitutional meaning and reinforces Congress’s coordinate obligation to observe the full requirements of the underenforced norms. When the Court follows this structure and declares a state law null and void on preemption grounds, the Court renders a necessarily constitutional holding. This is where we stand. But what have we gained?

First, we have dispelled the confusion over the constitutional status of preemption decisions. The underenforcement account characterizes preemption decisions as instances of constitutional adjudication, full stop. To the extent that there is reason to doubt that Congress possesses a plenary power of preemption, underenforcement explains what otherwise would be a problematic absence of constitutional interpretation in preemption decisions. It provides the alternative to the reading of the case law which implies that Congress’s preemptive authority is, for whatever reason, bounded only by legislative imagination.242 Congress is instead bound by all the requirements of preemption’s authorizing norm and those of the pertinent federalism norms, regardless of those norms’ lack of judicial specification. This recognition properly burdens legislators with independent duties of constitutional fidelity.

Importantly, the underenforcement account of preemption also enables public criticism when Congress strays from its constitutional du-

241. Cf. Ernest A. Young, Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich, 2005 Sup. Ct. Rev. 1, 32 (arguing with respect to Commerce Clause decisions that courts might choose to defer to state, rather than federal, legislative interpretations of the scope of Congress’s commerce power, and noting that “[i]n assessing whether Congressional legislation is enacted ‘pursuant to this Constitution’ so as to trigger the Supremacy Clause, there is no a priori reason that a modest Court should not defer to the state legislature’s judgments rather than to Congress’s”).

242. See supra text accompanying note 15.
ties. This criticism differs in form from the standard line that Congress has, once again, failed to adequately account for state interests in exercising its legislative discretion. Instead, one may now complain that Congress has failed to adhere to its nondefeasible constitutional obligations. If we take constitutional obligations seriously, judicially enforceable or not, then this is not a small distinction. Professor Kramer makes the parallel point regarding our public debates about Supreme Court decisions:

Whether we actively oppose a decision or course of decisions will depend on whether we think the decision or course of decisions is legitimate. But judgments about legitimacy turn not only on whether we agree or disagree with the Court's results, but also on whether we feel entitled to disagree and, more important still, to act on our disagreement.243

Underenforcement equips us with the remedy to the disempowering effect of legislative discretion. Now, we may both disagree with Congress's actions and feel as though our view of the proper result is constitutionally justified over that of Congress. Indeed, recognizing judicial underenforcement and the corresponding congressional responsibility for constitutional enforcement may prompt Congress itself to reconsider its commitments when drafting potentially preemptive legislation.

The recognition of Congress's independent constitutional obligations with respect to preemption distinguishes the underenforcement view from accounts that locate the limitations on Congress's preemptive authority solely in the structure of the federal legislative process.244 Constraints on congressional power on these process accounts depend on the ability of representatives of state interests to bring pressure to bear in national politics. But even when the states' representatives are able to apply the proper pressures, the constraints on federal power remain only hypothetical. We are left to hope that the machinery functions ideally so that state interests are properly expressed in the final legislative product. And, perhaps more and more these days, the machinery does not appear to function ideally.245 The underenforcement account, by contrast, recognizes constraints that exist, and obligate, regardless of the vagaries of the legislative process. What is more, these constraints, by virtue of their independence from the judicial process, avoid the criticisms generally leveled at judicial monitoring of national legislative power.246 As the expansion of

243. KRAMER, supra note 221, at 231 (emphasis added).
244. See generally Young, Federalisms, supra note 12, at 130–34; Young, Two Cheers, supra note 12; supra notes 20–29 and accompanying text.
245. See supra note 27 and accompanying text.
246. See Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543, 558–60 (1954) (noting that the federal judiciary is "on weakest ground when it opposes its interpretation of the Constitution to that of Congress
the mechanisms of preemption continues to diminish state influence in national politics,247 durable and conceptually independent constraints on congressional authority appear particularly desirable. Finally, the underenforcement view enables criticism independent of process. Where the process functions exactly as it should, legislation may nevertheless be indicted for failure to comply with the pertinent constitutional norms. Process account advocates cannot make sense of such criticisms; on that view the only constitutional constraint is that the requirements of the process themselves must be observed.

The underenforcement view reinforces process constraints as well. Professor Young argues that the presumption against preemption, by requiring clear notice to legislators when state authority is at stake[,...], reduce[es] the information costs associated with mobilizing against federal legislation. ..., [and] rais[es] the costs of federal lawmaking, both in terms of drafting costs and, in some cases, by requiring a judicial remand to Congress in order to clarify the preemptive scope of federal statutes.248

The congressional-intent rule has the same effects, though perhaps not to the same degree. To the extent that courts may incorrectly find an absence of congressional intent to preempt, or incorrectly judge congressional intent as to the scope of preemption, information costs are lowered and federal legislative costs are raised because preemptive intent must be made clearer. So, too, the underenforcement view’s requirement that Congress attend to its independent constitutional obligations lowers the costs to states of mobilizing against potentially harmful federal legislation and raises the deliberative and drafting costs to Congress. In other words, underenforcement provides a “constitutional red flag” for preemption in the legislative context.249

I do not claim that recognizing preemption decisions as instances of underenforcement will necessarily advance our ability to predict what courts will do. One likely could ignore underenforcement altogether and predict judicial decisions just as well on the purely statutory account of preemption. Nor does the underenforcement account suggest that courts are doing anything fundamentally wrong in preemption cases. It does, however, help explain what courts in preemption cases have been doing. The proposed view also may prove useful in explaining and predicting the behavior of Congress with respect to preemption. It would be interesting indeed to see whether congressional debates and enactments demonstrate recognition of preemption-related constitutional obligations. In fact, given judicial

247. See supra notes 21–26 and accompanying text.
248. Young, Federalisms, supra note 12, at 132.
249. Young, Two Cheers, supra note 12, at 1384; see supra notes 16–19 and accompanying text.
underenforcement, an investigation of Congress's views on preemption norms may be the only way to finally settle the question of the precise nature of the pertinent constitutional norms.

More abstractly, and as others have argued, attempts to correct confusions and misunderstandings about concepts in constitutional law contribute in a meaningful way to the extrajudicial debates that are a driving force of our constitutionalism and political culture. I believe that resolving (or at least trying to resolve) the confusion about the nature of preemption decisions makes a particularly valuable contribution because preemption is often left out of constitutional debates altogether. Professor Kramer insists that "[w]e need processes, formal and informal, by which our constitutional understandings and commitments can be challenged, reinterpreted, and renewed." Hashing out constitutional confusions outside the courts is an important informal process for "enrich[ing] the Constitution's political, cultural, and extra-adjudicatory value." As Professor Berman notes, "given the singular role that the Constitution plays in our political culture, . . . we do not want the actual, predicted, or imagined outcome of litigation to be conclusive of our arguments about whether any particular, actual, or proposed course of governmental action conforms to constitutional demands."

But if we believe that the Court's performance in preemption cases is for some reason deficient, we should, in our extrajudicial discourse, suggest correctives. This is so even if we have only a slim hope that the Court will adopt our suggestions. On that note, let me suggest two minor doctrinal changes. Preemption issues should be treated like any other constitutional issues for purposes of Pullman abstention and the rule that courts, where possible, should decide issues in the order that avoids constitutional questions. Preemption decisions cannot be categorically excluded from the operation of these rules since the rules apply to constitutional questions in general. One might think that we need not worry about addressing preemption


251. Kramer, We the Court, supra note 250, at 15.

252. Berman, supra note 30, at 86.

253. Id. at 16.

254. See supra notes 4–5 and accompanying text. This "last resort" or "procedural avoidance" rule is distinct from the rule that where there is a reasonable alternative construction of a statute that avoids a construction that raises constitutional problems. See Kloppenberg, supra note 9, at 1018–24; Young, supra note 170, at 1574–76.

255. See supra notes 10–12 and accompanying text.
questions because they do not require judicial constitutional interpretation. But preemption decisions give effect to congressional constitutional interpretations and thus constitute the judicial enforcement of constitutional norms against state legislative prerogatives—the very countermajoritarian effect that the rules are intended to minimize.\(256\)

And since it is state legislative prerogatives that are nullified in preemption cases, federalism interests also weigh in favor of avoidance and abstention.\(257\) Application of these rules in preemption decisions is called for by the understanding that such decisions are instances of standard-model constitutional adjudication. This would begin the process of incorporating preemption's constitutional status into our practice, and also would help to decrease the adverse effects of widespread preemption on the autonomy of state governments.

V. CONCLUSION

The account of preemption decisions I have offered is primarily descriptive. Even if we think that preemption is dangerous to the states, that it is "jurispathic"\(258\) and, in its malleability, difficult to constrain, it is too late in the day to try to put the genie back in the bottle. The only feasible remedy, it seems, is to proceed as Justice Breyer and Professor Young suggest—by carefully attending to the federalism implications of preemption case-by-case, "at retail."\(259\) Success requires a proper understanding of what, conceptually, preemption cases are about. More than this, it requires an adjustment of emphasis. Treating preemption decisions as mere exercises in statutory construction makes it easy for key players to overlook preemption's importance to the constitutional structure. I believe that the underenforcement view of preemption offers both a better description of our practice and a reason to place greater emphasis on preemption issues when they arise. Our decisionmaking will only improve with a fuller understanding of the normative landscape in which preemption decisions, judicial, congressional, and otherwise, are situated.

I realize that I have left much for future work. The following issues need further exposition: the source of preemption's authorizing norm; the nature of the substantive limitations on Congress's author-

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256. See Kloppenberg, supra note 9, at 1047–55.
257. See id. at 1047–66.
258. See Robert M. Cover, The Supreme Court 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 40–41 (1983) (stating that judicial elimination of competing sources of law is "jurispathic"); Hoke, Pathologies, supra note 2, at 694 ("[A] ruling of federal preemption is inherently 'jurispathic'; it kills off one line, perhaps even an entire scheme, of a particular community's law." (quoting Cover, supra, at 40)).
ity that arise from that norm; the precise role of federalism norms in preemption decisions; whether Congress in practice has accounted for the proper normative constraints; the states' understanding of the limits of preemption; and whether, given a full understanding of preemption's normative outlines, modern varieties of preemption are in fact justifiable. Despite an abundance of worthy scholarship, preemption remains confusing. I want to try to make it clearer. I think that my proposed reconciliation of the structure of preemption decisions with our intuitions about the constitutional status of preemption is a good first step in that larger project.