NARROWING THE FIELD: THE CASE AGAINST IMPLIED FIELD PREEMPTION OF STATE PRODUCT LIABILITY LAW

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Federal preemption is one of the most powerful defenses that a product liability defendant can raise. If a court finds that federal law preempts a state law product liability claim, it must dismiss the claim. Dismissal of the state tort claim may eliminate the only source of private liability of defendants and the only source of compensation for plaintiffs. If the applicable federal statute does not contain an express preemption provision, most courts find federal preemption only if a "conflict" exists between the state and federal laws. However, in some areas, courts have held that all state product liability claims in a particular "field" are preempted because an aspect of the field is subject to federal regulation. This Note argues that this broad "field-based" preemption framework, referred to as implied field preemption, should not be invoked to preempt state law product liability claims, despite the Supreme Court's recent decision in Kurns v. Railroad Friction Products Corp. *The case against the field-based framework is strong when viewed from doctrinal, theoretical, and historical perspectives. The case studies presented in this Note illustrate the problems that result when an appellate court finds implied field preemption. Field preemption prevents lower courts from determining whether the state claims in question and federal law are actually incompatible. In some cases a field-based framework defeats the purposes behind both state tort law and federal preemption by eliminating product liability law's deterrence and compensation functions without providing a corresponding benefit to the federal regulatory structure.*

 J.D., 2013, New York University School of Law; B.S., 2009, Cornell University. I am grateful to Professor Catherine Sharkey for encouraging me to write on this topic and for her feedback during the development of this Note. I would like to thank Professor Samuel Estreicher for his input. I would also like to thank the editors of the *New York University Law Review*, including Peter Kauffman, Kade Olsen, Benjamin Zhu, and Zachary King, for their efforts. All errors are my own.

INTRODUCTION

Federal preemption, the displacement of state law by federal law, stems from the Supremacy Clause's requirement that federal law is "the supreme law of the land."[1] The Supreme Court has established a categorical framework, along with certain canons of interpretation, for determining whether a state statute, regulation, or common law rule violates the Supremacy Clause.[2]

This Note focuses on the scope of federal preemption of state product liability law. Federal preemption is one of the most powerful defenses available to product liability defendants and is often the most contested issue in cases involving product liability claims. If successfully invoked, preemption requires instant dismissal of the state law claim.[3] Furthermore, state law product liability claims are often the only claims to which the right to a jury trial attaches.[4] Finally, federal preemption of state law claims may eliminate any private liability for

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[1] U.S. CONST. art. VI, § 1, cl. 1. *See* Wyeth v. Levine, 555 U.S. 555, 584 (2009) ("Under this federalist system, 'the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.'" (quoting Tafflin v. Levitt, 493 U.S. 455, 458 (1990))).

[2] *See infra* notes 38–53 and accompanying text (setting forth the categorical framework and canons of interpretation developed by the Supreme Court to aid lower courts in their federal preemption determinations). The categories are not rigidly distinct and the canons of interpretation may not be consistently applied. *See infra* note 53 (noting that courts and commentators disagree as to the application of particular preemption categories and canons of interpretation in different contexts).

[3] *See* David G. Owen, *Federal Preemption of Products Liability Claims*, 55 S.C. L. REV. 411, 412 (2003) (referring to federal preemption as "one of the most powerful defenses in all of products liability law"); Andrew Tauber et al., *A Powerful Tool to Wield Early: How to Argue Medical Device Preemption*, *in* FOR DEF., Oct. 2012, at 44 (explaining that a preemption defense "can secure dismissal as a matter of law in the face of unfavorable facts and sympathetic plaintiffs").

[4] *See* THOMAS O. MCGARITY, THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES 233–35 (2008) (noting that federal preemption often results in the displacement of local judges and jurors in favor of federal agency staff, and arguing that this result may be undesirable in some cases).

defendants and any compensatory damages for plaintiffs, frustrating the deterrence and compensation goals of product liability law.[5]

In some cases, determining the presence of federal preemption is relatively straightforward. If a statute includes a provision expressly preempting state law in certain matters and the plaintiff's state law claim falls within that provision, the claim must be dismissed—the Supremacy Clause requires adherence to Congress's determination that the area be exclusively regulated by federal law.[6] Additionally, if compliance with both the federal and state standards is impossible, in that compliance with state law would result in violation of federal law, the state law is preempted under the Supremacy Clause regardless of the presence of an express preemption provision.[7]

However, courts and commentators are sharply divided over the correct application of federal preemption in instances when Congress has *not* included any express preemption statement or when the express preemption statement does not reach the conduct at issue. The preemption of state law in these cases is referred to as "implied" preemption.[8] For example, the federal aviation statutes expressly preempt state laws that relate to "price, route, or service"[9] but do not expressly preempt (or expressly permit) state law in other contexts, such as product liability claims against airplane component manufacturers.[10] Implied preemption doctrine determines the reach of federal preemption in these latter cases.

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[5] *See* Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 247–48 (2007) ("[*T*]*he private right of action is more important than ever* in ensuring that unsafe practices and products are identified and kept out of the market." (quoting Letter from U.S. Representative Jan Schakowsky to President George W. Bush (Feb. 16, 2006), *available at* http://schakowsky.house.gov/index.php?option=com_content&view=article&id=1227&Itemid=117)); *see also* Riegel v. Medtronic, Inc., 552 U.S. 312, 337 (2008) (Ginsburg, J., dissenting) (noting that the majority's holding that amendments to the Federal Food, Drug, and Cosmetic Act preempted the plaintiff's state law product liability claim against the defendant medical device manufacturer "remove[d] all means of judicial recourse" for the injured plaintiff (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984))).

[6] *See infra* notes 38–40 and accompanying text (discussing express preemption provisions and saving clauses).

[7] *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210–11 (1824) (finding preemption of a state law that granted a steamboat monopoly to a certain individual when federal law granted a monopoly to another individual, due to the "collision" between the two laws).

[8] *See infra* notes 38–41 and accompanying text (explaining the difference between "express preemption," which is tied to an explicit statutory statement, and "implied preemption," which has no explicit statutory basis but may be implied by the court under certain circumstances).

[9] *See* 49 U.S.C. § 41713(b)(1) (2006); *see also infra* notes 124–26 and accompanying text (discussing the scope of the Airline Deregulation Act's express preemption provision).

[10] *See, e.g.*, Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 366–72 (3d Cir. 1999) (holding that, while the federal aviation statutes do not expressly preempt state tort law outside of

Courts have employed two different methods of analysis to determine whether implied federal preemption bars state law claims. Under the first approach, the "conflict preemption" mode of analysis, courts determine whether state and federal laws are incompatible on a case-by-case basis by examining their underlying policy justifications, the views of relevant federal agencies, and other pertinent circumstances.[11] Under the second approach, the "field preemption" mode of analysis, an appellate-level court defines a "field" in which no state law claims may be brought, regardless of whether actual conflict exists.[12] The Supreme Court employed field preemption to strike down a state product liability claim in the recent case of *Kurns v. Railroad Friction Products Corp.*[13]

This Note argues that the field-based preemption framework is inferior to the conflict-based preemption framework that the Court has used in other contexts, such as motor vehicle safety. Under a field-based preemption framework, states may be barred from exercising their traditional powers to regulate defective products and to compensate individuals injured by those products even when justifications for allowing state law claims are strong and justifications for preemption are weak. In these cases, field preemption may encroach on important state interests without furthering any federal regulatory goals.

Part I of this Note provides an overview of state product liability law and the justifications for its existence in federally regulated fields. Part II introduces modern federal preemption doctrine. Part III uses case studies to critique the field-based preemption framework employed by the Supreme Court in *Kurns*. Part IV examines the Supreme Court's conflict-based[14] preemption framework in the motor

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"rates, routes, and services," no state tort claims can be brought in the "field" of aviation safety generally); *see also infra* notes 129–39 and accompanying text (discussing the implied preemption debate in the aviation safety context). *Compare* David E. Rapoport & Michael L. Teich, *The Pre-*Abdullah *Consensus that Federal Law Does Not Preempt the Field of Aviation Safety in Tort Cases Should Remain the Law*, 8 ISSUES AVIATION L. & POL'Y 241, 246 (2009) (arguing against field-based preemption of state product liability law in the aviation context), *with* Michael J. Holland, *Federalism in the Twenty-First Century: Preemption in the Field of Air*, 78 DEF. COUNS. J. 11, 21 (2011) (noting the benefits of field-based preemption of state product liability law in the aviation context).

[11] *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000) (holding that a state product liability claim against an automobile manufacturer was preempted by federal regulations because the state law stood as a significant obstacle to a specific federal regulatory objective).

[12] *See, e.g.*, Kurns v. R.R. Friction Prods. Corp., 132 S. Ct. 1261, 1264 (2012) (holding no state product liability claims can be brought in the "field" of locomotive safety generally, regardless of the specific federal statutes or regulations that apply to the issue).

[13] *Id.*

[14] The term "conflict" is a term of art in preemption doctrine. What constitutes a conflict between state and federal law is a heavily litigated issue in preemption cases. *Compare*

vehicle safety context and argues that the conflict preemption framework fosters more nuanced analysis and allows courts to properly evaluate the compatibility of state product liability law with federal law. Part V examines the two preemption frameworks in the aviation safety context and demonstrates the superiority of the conflict-based preemption framework.

The case studies this Note presents demonstrate that the field-based framework can result in preemption of state product liability laws even when the justifications for preserving the state law claims are strong and the justifications for preemption are weak.[15] The conflict-based preemption framework more precisely reconciles federal and state interests and only preempts state law claims when they are truly incompatible with the federal regulatory structure.

Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131, 1139 (2011) (declining to find a conflict between a state product liability claim against an automobile manufacturer and Department of Transportation (DOT) seatbelt regulations), *with Geier*, 529 U.S. at 869 (finding a conflict between a state product liability claim against an automobile manufacturer and DOT airbag regulations). *See infra* Part IV (discussing the conflict-based preemption framework set forth in *Geier* and applied in *Williamson*).

[15] *See infra* Part IV.B (comparing product liability cases in the motor vehicle context decided under a field-based preemption framework with cases decided under a conflict-based framework and arguing, in light of the results, that the conflict-based framework is superior). Scholars have noted their disagreement with the current federal preemption doctrine generally, as well as with broad field-based preemption in the product liability context. *See* Mary J. Davis, *The Battle over Implied Preemption: Products Liability and the FDA*, 48 B.C. L. REV. 1089, 1151–52 (2007) (arguing against categorical preemption of state product liability claims in the prescription drug context); Robert L. Rabin, *Poking Holes in the Fabric of Tort Law: A Comment*, 56 DEPAUL L. REV. 293, 301 (2007) (arguing that broad preemption of state product liability law might frustrate the compensation goal of state tort law); Rapoport & Teich, *supra* note 10, at 246 (disagreeing with federal appellate courts that have applied field-based preemption to product liability claims in the aviation field); Catherine M. Sharkey, *Against Categorical Preemption: Vaccines and the Compensation Piece of the Preemption Puzzle*, 61 DEPAUL L. REV. 643, 657 (2012) (noting that field-based preemption might be inappropriate when it would eliminate compensation for the injured plaintiff); *see also* Robert E. McFarland, *The Preemption of Tort and Other Common Causes of Action Against Air, Motor, and Rail Carriers*, 24 TRANSP. L.J. 155, 156–63 (1997) (discussing traditional arguments against preemption of state product liability law in the aviation context).

This Note offers several novel contributions to the preemption debate. It is the first to critically compare lower court product liability cases decided under a conflict-based preemption framework with cases decided under a field-based preemption framework, and to argue that the preemption framework employed by a lower court can make a critical difference in the outcome of the case. *See, e.g.*, *infra* notes 140–56 and accompanying text (analyzing the use of conflict-based preemption in the aviation context). Furthermore, this Note is the first to conduct a critical examination of *Kurns v. Railroad Friction Products Corp*., decided by the Supreme Court in February 2012, and to provide counterarguments to those who point to *Kurns* as support for the expansive use of field-based preemption. *See infra* notes 63–71 and accompanying text (discussing *Kurns*).

I
State Product Liability Law and Its Role in Federally Regulated Fields

A. State Product Liability Law: An Introduction

The state product liability tort doctrines that are the subject of this Note constitute a subset of the law of manufacturer liability, defined as "the various theories of recovery that may support a product liability action against a manufacturer."[16] Manufacturer liability may be rooted in contract law, such as the doctrine of breach of warranty. It may also derive from the tort law concept of defectiveness, including defects in product manufacturing, in product design, and in the warnings and instructions accompanying the product.[17] This Note focuses on state laws dealing with product defectiveness, which have mostly developed as common law in state courts to deter the manufacture of and compensate those injured by unreasonably dangerous products.

The standard for what constitutes an unreasonably dangerous product depends on the nature of the alleged defect. As set forth in the Restatement (Third), a product contains a manufacturing defect "when the product departs from its intended design" even if all possible care was used in its manufacture.[18] Strict liability for manufacturing defects, adopted in the vast majority of U.S. jurisdictions, attempts to fix liability for the injury to "wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market."[19] Thus, state product liability law on manufacturing defects strives to place the risks of manufacturing errors on the manufacturers, who are best positioned to minimize those risks.[20]

By contrast, design defect and failure-to-warn claims require proof of inadequacies in the design of the product or in the instructions and warnings accompanying the product. According to the

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[16] David G. Owen et al., Products Liability and Safety 37 (3d ed. 1996).

[17] *Id.* at 242; Terrence F. Kiely & Bruce L. Ottley, Understanding Products Liability Law 123–25 (2006) (categorizing the three general types of product defects as manufacturing defects, design defects, and warning defects).

[18] Restatement (Third) of Torts: Prods. Liability § 2(a) (1998) [hereinafter Restatement (Third) of Torts].

[19] *See* Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring) (outlining the justifications for strict liability for manufacturing defects).

[20] *See* Restatement (Third) of Torts § 2 cmt. a (explaining the theoretical underpinnings of strict liability for manufacturing defects and the fault-based theories of liability for design defect and failure-to-warn claims); *see also* Kiely & Ottley, *supra* note 17, at 159–63 (same).

Restatement (Third), a product contains a design defect when "the foreseeable risks of harm posed by the product could have been reduced or avoided" by a reasonable alternative design, the absence of which renders the product unreasonably unsafe.[21] A product contains a warning defect when "the foreseeable risks of harm posed by the product could have been reduced or avoided" by "reasonable instructions or warnings," the omission of which renders the product not reasonably safe.[22] These theories of liability reflect the states' interests in: (1) deterring the manufacture and use of unreasonably dangerous products in the state; and (2) compensating its citizens injured by such products; while simultaneously (3) encouraging the development of useful products.[23]

B. Justifications for State Product Liability Law in Federally Regulated Fields

There is a robust policy debate about the proper role of state product liability law in fields that are also regulated by the federal government. The controversy revolves around situations in which the state law in question is not expressly preempted by, and does not conflict with,[24] the applicable federal statutes or regulations, but arguably falls within the field being regulated by the federal regime. Scholars disagree about whether state law should be preempted despite the lack of an express congressional intent to preempt or any actual incompatibility between the state and federal regulatory standards.[25]

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[21] RESTATEMENT (THIRD) OF TORTS § 2(b).

[22] *Id.* § 2(c).

[23] *See, e.g.*, Roy v. Star Chopper, Co., Inc., 584 F.2d 1124, 1129 (1st Cir. 1978) ("Rhode Island has an interest in promoting a high standard of care in the manufacture of goods by Rhode Island corporations."); Barker v. Lull Eng'g Co., Inc., 573 P.2d 443, 447 (Cal. 1978) (acknowledging that the "relative complexity of design decisions and the trade-offs that are frequently required in the adoption of alternative designs" factors into the proper state safety standards); Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) (discussing the importance of compensating "[t]hose that suffer injury from defective products," since "[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured"); RESTATEMENT (THIRD) OF TORTS § 2 cmt. a (setting forth the theoretical justifications for the Restatement's articulation of design defect and failure-to-warn theories of liability).

[24] *See infra* Part IV.B (discussing the Supreme Court's decisions in *Geier* and *Williamson*, which applied a conflict-based preemption framework).

[25] *Compare* Richard A. Epstein, *The Case for Field Preemption of State Laws in Drug Cases*, 103 NW. U. L. REV. 463, 469–70 (2009) (arguing for strong field preemption in the context of drug and medical device regulations because state tort law overdeters the development of useful products and is subject to systematic errors), *with* David A. Kessler & David C. Vladeck, *A Critical Examination of the FDA's Efforts to Preempt Failure-to-Warn Claims*, 96 GEO. L.J. 461, 467 (2008) (arguing for the preservation of state product liability law in the drug context to the extent that it does not conflict with federal law).

This Note advocates a narrow interpretation of the Supremacy Clause that would preserve state product liability claims to the extent that they do not conflict with federal statutes and regulations. Both federalism and practical justifications support this interpretation. The first set of justifications forms the basis for the judicial "presumption against preemption."[26] States are independent sovereigns in the federal system. They have a historic role and important interests in the regulation of health and safety in their localities.[27] State courts also provide grounds for experimentation with different product liability standards.[28]

Additionally, state tort law serves as a necessary complement to federal regulations due to its deterrence and compensation functions. Federal statutes and regulations may not function perfectly. At the extreme, agency officials hoping to obtain private-sector jobs could be "captured" by the regulated industry.[29] Federal agencies' limited resources also may lead to inadequate regulation and under-enforcement.[30] Further, an agency might not regulate certain aspects of a field, even if it regulates extensively in other aspects of that field.[31]

In light of these limitations of federal law, proponents of state product liability law argue that tort claims operate as a "back end" check in a federally regulated field.[32] Tort claims may expose unexpected consequences of federal regulation or reveal hazards that were

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[26] *See infra* notes 50–53 and accompanying text (discussing this presumption).

[27] *See* Ernest A. Young, *Federal Preemption and State Autonomy*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 249, 251–52 (Richard A. Epstein & Michael S. Greve eds., 2007) (discussing how preemption, as a federalism doctrine, limits regulatory diversity by constraining state autonomy).

[28] *See id.* at 258–59 (identifying safety regulation as a traditional area of state authority and explaining that "[a]t the state level . . . many of the relevant standards are set by courts"); *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) (explaining that a "state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

[29] *See* MCGARITY, *supra* note 4, at 185–86 (asserting that captured agencies may conduct their regulatory functions less rigorously).

[30] *See* Kessler & Vladeck, *supra* note 25, at 467 (describing how limited resources hinder the FDA's monitoring capabilities).

[31] *See* MCGARITY, *supra* note 4, at 237 (arguing that agencies can never anticipate and regulate every potential aspect of a field).

[32] *See* Brief of Public Law Scholars as Amici Curiae in Support of Petitioners at 23, Kurns v. R.R. Friction Prods. Corp., 132 S. Ct. 1261 (2012) (No. 10-879); *see also* Sharkey, *supra* note 5, at 230–33 (criticizing the Consumer Product Safety Commission's inclusion of an express preemption clause in its mattress flammability standards as "[r]emoving a significant incentive for industries to improve outside of meeting the federal standard" (internal citations omitted)). Justice John Paul Stevens, dissenting in *Geier v. American Honda Motor Co.*, recognized the "possibility that exposure to potential tort liability . . . would actually further the only goal explicitly mentioned in the [federal] standard itself: reducing the number of deaths and severity of injuries of vehicle occupants." 529 U.S. 861, 903–04 (2000) (Stevens, J., dissenting).

not anticipated by regulators.[33] Additionally, state product liability law often serves as the only avenue of compensation for those injured by unreasonably dangerous products.[34]

II
Modern Federal Preemption Doctrine

Notwithstanding the justifications for the presence of state product liability law in federally regulated fields, the Supremacy Clause requires federal law to remain "the supreme law of the land."[35] The seminal case on the subject, *Gibbons v. Ogden*, dealt with the most basic problem: a situation in which it was actually *impossible* to comply with both state and federal law.[36] Since *Gibbons*, however, the Supreme Court has explained that the Supremacy Clause applies beyond situations of "impossibility." The Supreme Court has developed a categorical framework to guide lower courts confronted with Supremacy Clause challenges to state law.[37]

A. The Supreme Court's Categorical Preemption Framework

Preemption doctrine contains two general categories: (1) express preemption and (2) implied preemption. If Congress has the constitutional authority to regulate a particular subject, it also has the power to preempt a state law or category of state laws[38] by including an

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[33] *See* McGarity, *supra* note 4, at 236–38 (discussing how the common law reinforces incentives for compliance with federal regulations, fills gaps for unanticipated consequences of regulations, and provides protection while agencies take time to formulate responses to problems).

[34] *See* Davis, *supra* note 15, at 1110–11 (noting that, in the drug context, state product liability laws "operate concurrently with FDA regulations by permitting compensation for injury"); Rabin, *supra* note 15, at 301 (observing that victims may be denied compensation when defendants conform to regulations or are protected by field preemption); *infra* notes 73–78 and accompanying text (describing a decision in which federal preemption eliminated a victim's only avenue of compensation); *cf.* Sharkey, *supra* note 15, at 657 (arguing that the absence of a federal compensation scheme should preclude broad categorical preemption arguments by product liability defendants).

[35] U.S. Const. art. VI, § 1, cl. 1. *See* Wyeth v. Levine, 555 U.S. 555, 584 ("Under this federalist system, 'the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.'" (quoting Tafflin v. Levitt, 493 U.S. 455, 458 (1990))).

[36] *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (holding that a state law that granted a steamboat monopoly to an individual was preempted because federal law granted the steamboat monopoly to another individual).

[37] *See infra* notes 43–44 and accompanying text (describing and differentiating obstacle and impossibility preemption).

[38] State laws subject to federal preemption include both state statutes and common law tort claims. *See* Riegel v. Medtronic, Inc., 552 U.S. 312, 323–26 (2008) (holding that New York state tort duties constituted impermissible "requirements" imposed on medical device manufacturers such that the plaintiff's state law product liability claims were

express preemption clause in the applicable federal statute.[39] Under express preemption analysis, the court determines whether the state law in question falls within the federal statute's express preemption clause. To determine the scope of an express preemption clause courts employ conventional tools of statutory interpretation. In addition to, or in lieu of, an express preemption clause, the federal statute might contain a saving clause. A saving clause constitutes express congressional *permission* for states to regulate certain activities that are also regulated by the federal law.[40]

If the federal statute does not contain an express preemption clause, or if the state law in question falls outside of the scope of the express preemption clause, federal preemption can still be implied.[41] Current preemption doctrine offers two possible modes of analysis when Congress's intent is unclear: (1) implied "conflict" preemption and (2) implied "field" preemption.[42] Implied conflict preemption is limited to two situations: (i) "impossibility" and (ii) "obstacle" preemption. Impossibility preemption of the state law occurs when it is "impossible for a private party to comply with both state and federal requirements."[43] Obstacle preemption of state law occurs when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[44]

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expressly preempted by the Medical Device Amendments to the Food, Drug, and Cosmetic Act).

[39] *See, e.g.*, Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1075–82 (2011) (analyzing the National Childhood Vaccine Injury Act's preemption clause using conventional tools of statutory interpretation and holding that the Act expressly preempts all state law design defect claims against children's vaccine manufacturers); *see also* JAMES T. O'REILLY, FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION AND LITIGATION 51–53 (2006) (providing an overview of express preemption).

[40] *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000) (holding that the express preemption clause of the National Traffic and Motor Vehicle Safety Act does not expressly preempt state common law product liability claims, but that the saving clause of the Act does not expressly permit these claims, thus requiring the Court to determine whether the state law claims conflict with federal regulations).

[41] *See id.* at 867 (holding that a state law design defect claim that would have required certain automobile manufacturers to provide airbags was preempted by federal regulations because the state law claims stood as an obstacle to the federal agency's objectives, even though the state law claim was not expressly preempted by the text of the National Traffic and Motor Vehicle Safety Act).

[42] *See, e.g.*, Kurns v. R.R. Friction Prods. Corp., 132 S. Ct. 1261, 1265–66 (2012) (noting the existence of implied conflict preemption and implied field preemption).

[43] PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2577 (2011) (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)) (holding that a state law failure-to-warn claim against a generic drug manufacturer was preempted by federal regulations because it was impossible for the manufacturer to comply with both state and federal law).

[44] *Geier*, 529 U.S. at 873 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). This blackletter language is, of course, ambiguous. The scope of obstacle preemption can only be evaluated by examining the federal statutes and regulations at issue, and then

The Supreme Court has also indicated, however, that a field-based preemption framework might be used in some cases. In a field-based preemption framework the court defines a field in which all state law claims are invalidated, rather than conduct a conflict analysis of the compatibility of the particular state law at issue in each case with the relevant federal law. The Supreme Court employed field preemption in *Kurns v. Railroad Friction Products Corp.* to invalidate all state law product liability claims in the field of locomotive safety regulation.[45]

B. Preemption Canons of Interpretation

There are two cornerstones of federal preemption jurisprudence that are known as the preemption canons. The first is that "the purpose of Congress is the ultimate touchstone in every pre-emption case."[46] This maxim clearly applies in the express preemption context. The purposes behind a federal law may be relevant when interpreting an ambiguous preemption clause in that statute. It is an awkward fit, however, in the implied preemption context. As Professor Thomas Merrill notes, it makes little sense to ask whether Congress intended that state and federal law be incompatible.[47] Nevertheless, findings of field preemption are often accompanied by vague references to congressional intent that a particular field be subject only to federal regulation.[48]

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comparing state laws that are invalidated as obstacles to those federal laws, with state laws that are held not to be obstacles. For an illustration in the automotive safety context comparing the decision in *Geier*, which found obstacle preemption, with the decision in *Williamson*, which did not, see *infra* Part IV.B. Importantly, these federal "purposes and objectives" can be implied. *See Geier*, 529 U.S. at 867, 884 (holding that the state product liability claim was preempted because it stood as an obstacle to the federal objective of fostering development of passive restraint technology, even though those objectives were not in the text of the federal regulation).

[45] *See* 132 S. Ct. at 1270 (applying an implied field preemption framework, and invalidating all state product liability laws in the field of locomotive safety regulation). In *Rice v. Santa Fe Elevator Corp.*, a case often cited in support of this field-based framework, the Supreme Court stated that an entire field of state law may be preempted if the "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." 331 U.S. 218, 230 (1947).

[46] Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

[47] Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 740 (2008) ("[I]t is somewhat anomalous to say that legislative intent or purpose is the 'touchstone' of a doctrine in which implied preemption plays such a large role.").

[48] *See, e.g.*, *Kurns*, 132 S. Ct. at 1266 (describing implied field preemption as executing Congress's intent to occupy a field exclusively).

The second cornerstone of federal preemption law is known as the "presumption against preemption."[49] The presumption against preemption arises out of respect for the states as "independent sovereigns in our federal system."[50] When a state regulates in a field that states have traditionally occupied, the state law should not be preempted unless the "clear and manifest purpose of Congress" requires it.[51] State regulations of health and safety, such as product liability laws, are entitled to the presumption against preemption.[52] Critically, the preemption framework adopted by an appellate court can affect a lower court's preemption determination, since the lower court must frame its analysis in the manner required by the binding interpretation of the appellate court, even though the preemption categories and canons are not applied with absolute consistency or rigidity.[53]

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[49] *See, e.g.*, Merrill, *supra* note 47, at 741 (describing the presumption against preemption).

[50] *Wyeth*, 555 U.S. at 565 n.3 (quoting *Medtronic*, 518 U.S. at 485) (applying the presumption against preemption and holding that a state law failure-to-warn claim against a brand name drug manufacturer was not preempted by FDA labeling regulations because the brand name drug manufacturer could have unilaterally strengthened its label to comply with the state law standard of care without pre-approval by the FDA).

[51] *Id.* at 565 (quoting *Medtronic*, 518 U.S. at 485 (internal quotation marks omitted)).

[52] *See id.* at 565 n.3 ("[S]tate regulation of health and safety [are] matters to which the presumption [against preemption] does apply." (citing Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347–48 (2001))). The Supreme Court in *Wyeth* noted that the presumption against preemption is even stronger when there is evidence that Congress was aware of extensive state law product liability litigation in the field and yet refused to enact an express preemption provision. *Id.* at 574–75.

[53] *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 n.6 (2000) (noting that the preemption categories may not be mutually exclusive in some cases). In *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1075–82 (2011), the Supreme Court used principles of implied conflict preemption in interpreting an ambiguous express preemption clause. In *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 104 n.2 (1992), the plurality opinion and concurring opinion reached the same result but disagreed about whether express preemption or implied conflict preemption applied. The plurality opinion in *Gade* concluded that the Occupational Health and Safety Act (OSH Act) impliedly preempted an Illinois law requiring certain workers at hazardous waste facilities to obtain licenses. *See id.* at 98–99. Justice Kennedy, concurring in the judgment, would have found that the OSH Act's express preemption provision preempted the Illinois law, and cautioned against "an undue expansion of our implied pre-emption jurisprudence." *Id.* at 109 (Kennedy, J., concurring). The presumption against preemption is emphasized in some cases but not mentioned in other cases. *See* O'REILLY, *supra* note 39, at 7–8 (discussing the discrepancies in the weight given to the presumption against preemption); Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 1013–14 (2002) (arguing that the presumption against preemption does not result in less preemption in areas of traditional state regulation and that there may be a presumption in favor of preemption). The Court has referred to field preemption in dicta as "a species of conflict preemption." *Gade*, 505 U.S. at 104 n.2 (quoting English v. Gen. Elec. Co., 496 U.S. 72, 79 n.5 (1990)). *But see infra* note 157 (arguing that implied field preemption results in substantial differences in courts' preemption evaluations, and should not be recast under the guise of implied conflict preemption).

III
THE FIELD-BASED PREEMPTION FRAMEWORK USED IN *KURNS* AND ITS LIMITATIONS

As explained in Part II, courts faced with statutory ambiguity must decide whether to evaluate the preemption question under a conflict-based framework or a field-based framework. The Supreme Court's most recent use of a field-based preemption framework occurred in the 2012 case *Kurns v. Railroad Friction Products Corp*.[54] The Court determined that federal law preempted all state product liability law in the field of locomotive safety.[55] In doing so, the Court ignored significant differences between product liability theories and the various deterrence and compensatory benefits served by the state laws. The Court's decision may result in underdeterrence of the manufacture of dangerous products and lack of compensation to injured plaintiffs.

Kurns and its progeny illustrate the practical effect that an appellate court's adoption of a field-based preemption framework has on subsequent litigants' ability to bring state law product liability claims in the field. A finding of implied field preemption by the Supreme Court or a federal court of appeals prevents the lower courts from differentiating between state laws that interfere with the federal law and those that do not in subsequent cases. A lower court that is required to apply a field-based preemption framework can only do one thing: determine if the state law falls within the occupied field. If the state law falls within the field, the lower court must conclude the state law is preempted even if it does not impede any federal goals.[56]

This Part begins by detailing the Supreme Court's field preemption decision in *Kurns* in light of the relevant federal statutes. It then

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[54] 132 S. Ct. 1261 (2012).

[55] *Id.* at 1266–70.

[56] *See, e.g.*, Duvall v. Avco Corp., No. 4:CV-05-1786, 2006 WL 1410794, at *2 (M.D. Pa. May 19, 2006) (dismissing state law design defect and manufacturing defect claims because they fell within a preempted field defined by the Third Circuit despite recognizing that there might be differences between design defect and manufacturing defect claims' effect on federal regulations); *see also infra* notes 140–43 and accompanying text (discussing the *Duvall* decision). The Court's decision in *Kurns* will probably require congressional action to overrule in the locomotive context. However, in other areas the Supreme Court has yet to decide the issue, leaving the appropriate preemption framework to be argued in and determined by lower courts. *See, e.g.*, Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 364–65 (3d Cir. 1999) (applying a field-based preemption framework for product liability claims in the aviation context); Brief for Ranbaxy Pharm., Inc. et al. as Amici Curiae Supporting Petitioner at 12–14, Mutual Pharm. Co. v. Bartlett, 133 S. Ct. 694 (2012) (No. 12-142) (citing *Kurns* in support of a categorical preemption argument that design defect and failure-to-warn claims against generic drug manufacturers should not be considered separately).

critiques *Kurns* and the field-based preemption framework for being too inflexible to deal with the different types of state product liability claims brought by injured parties.

The federal government regulates locomotive safety through two principal statutes, the Locomotive Inspection Act (LIA)[57] and the Federal Railroad Safety Act (FRSA).[58] The statutes confer authority on the Federal Railroad Administration of the Department of Transportation (FRA) to regulate locomotive safety. The LIA permits, but does not require, the FRA to regulate "the locomotive or tender and its parts and appurtenances."[59] The LIA does not contain an express preemption clause or a saving clause. Under the LIA, if a railroad violates federal regulations, an injured railroad worker can bring a claim against the railroad without being required to prove negligence.[60] The LIA's strict liability provision, however, only applies to railroad employees who suffered injuries while the locomotive was "in use."[61] FRA regulations do not confer a private right of action for violations.

In the 1926 case of *Napier v. Atlantic Coast Railroad Co.*, the Supreme Court held that the LIA's delegation of authority to the ICC to regulate all parts and appurtenances of locomotives preempted the entire field from state regulations, including state product liability

[57] Pub. L. No. 63-318, 38 Stat. 1192 (1915) (codified at 49 U.S.C. §§ 20701–20703 (2006)). Federal regulation of railroads began with the Interstate Commerce Act of 1887, which created the Interstate Commerce Commission (ICC). Pub. L. No. 49-41, 24 Stat. 379. Initially, the ICC regulated railroad rates. In 1908, the Federal Employers Liability Act (FELA) created a federal cause of action for injured railroad employees against their employers. Pub. L. No. 60-100, 35 Stat. 65 (codified as amended at 45 U.S.C. § 51 (2006)). In 1911, Congress passed the Boiler Inspection Act (BIA), which gave the ICC authority to regulate steam powered locomotive boilers. Pub. L. No. 61-383, 36 Stat. 913 (codified as amended at 49 U.S.C. §§ 20701–20703 (2006)). In 1915, the LIA amended the BIA and gave the ICC the authority to regulate "the entire locomotive and tender and all parts and appurtenances thereof." Pub. L. No. 63-318, 38 Stat. 1192, 1192 (codified at 49 U.S.C. §§ 20701–20703 (2006)). In 1966, Congress transferred authority to implement and enforce the LIA from the ICC to the Federal Railroad Administration of the Department of Transportation (FRA), where it remains today. *See* Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931, 939 (1966). In modern cases, the LIA and the BIA are used interchangeably to refer to Congress's delegation of authority to the ICC to regulate the parts and appurtenances of locomotives. The locomotives at issue in the modern cases, of course, are not powered by steam boilers.

[58] Pub. L. No. 91-458, 84 Stat. 971 (codified as amended at 49 U.S.C. § 20101 (2006)).

[59] 49 U.S.C. § 20701 (2006).

[60] *See* Law v. Gen. Motors Corp., 114 F.3d 908, 912 (9th Cir. 1997) (noting that the Federal Employers' Liability Act, 45 U.S.C. §§ 53–54 (2006), allows an injured railroad worker to establish negligence as a matter of law based on proof of a violation of the BIA).

[61] *See, e.g.*, Crockett v. Long Island R.R., 65 F.3d 274, 277 (2d Cir. 1995) (interpreting the reach of strict liability under the BIA).

laws.[62] In February 2012, the Supreme Court affirmed the validity of *Napier*'s field-based preemption framework in *Kurns*,[63] despite arguments by the product liability plaintiff and the United States, as amicus curiae, that certain state law claims brought in that particular case did not touch on, much less interfere with, any federal regulatory purpose.[64]

The Supreme Court's determination in *Kurns* that federal laws occupied the field of locomotive regulation prevents future lower courts *from even considering*, in light of the considerations discussed in Part I, whether the state and federal laws are compatible. Consequently, field preemption could, in some cases, invalidate state laws and frustrate the deterrence and compensation goals of product liability laws without any corresponding benefits to the federal regulatory regime.

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[62] 272 U.S. 605 (1926). The state law at issue in *Napier* was a Georgia statute that required a certain safety device on all locomotives. The Court assumed the Georgia law was "a proper exercise of [the state's] police power," and noted the ICC did not promulgate any applicable regulations in this area. *Id.* at 610, 613. Without much explanation, the Supreme Court determined that the "broad scope of the authority" granted to the ICC rendered any state law that entered the field unconstitutional. *Id.* at 613.

[63] 132 S. Ct. 1261 (2012). In *Kurns*, the Court addressed product liability claims brought by the widow and executrix of a railroad worker who was allegedly exposed to asbestos through the defendant's products during his tenure as a railroad brake repairman. *Id.* at 1264. Despite the lack of any federal law or regulations concerning the chemical composition of railroad brakes, the Court, in an opinion by Justice Clarence Thomas, held that under *Napier*, the states could not regulate at all in this area. *Id.* at 1270. Under the Court's reasoning, preemption seems to occur even when the connection of the state product liability claim to locomotive parts or appurtenances is attenuated. *See id.* at 1269 (holding that the LIA occupies the entire field and makes no exceptions for state common law duties of care).

[64] Even though it was briefly discussed in the plaintiffs' petition for certiorari in *Kurns*, the plaintiffs did not ask the Supreme Court to overrule *Napier*. *Compare* Petition for Writ of Certiorari at 25–26, *Kurns*, 132 S. Ct. 1261 (No. 10-879), *with* Brief for Petitioner at 1, *Kurns*, 132 S. Ct. 1261 (No. 10-879). Rather, the plaintiffs made five arguments before the Court against preemption, all of which the Court rejected in light of *Napier*. First, the Court rejected the plaintiffs' argument that the FRSA, passed in 1970 well after *Napier* was decided in 1926, narrowed the scope of the preempted field. *Kurns*, 132 S. Ct. at 1267. Second, the Court rejected arguments that there existed a crucial difference between the regulatory purpose of the LIA, involving traditional issues of railroad safety, and the type of tort claim at issue in the present case, involving employee exposure to asbestos. *Id.* at 1267–68. Third, the Court rejected the plaintiffs' theory that, even if their design defect claims were preempted, failure-to-warn claims should not be; the Court held that the field preemption framework provided by *Napier* does not distinguish between state law causes of action. *Id.* at 1268–70. Fourth, the Court rejected petitioners' argument that the claims were not preempted because manufacturers were not regulated under the LIA when the plaintiff was exposed. *Id.* at 1268–69. Finally, the Court rejected the plaintiffs' argument that a distinction existed between state statutes and common law tort claims, again relying on *Napier*'s notion of a field in which no state law can exist. *Id.* at 1269–70.

Scrutiny of the relationship between the particular state product liability claims and the federal statutes at issue in *Kurns* illustrates the drawbacks of the field-based framework. The plaintiff brought both design defect and failure-to-warn claims against the brake manufacturer, alleging their asbestos contents caused his cancer.[65] The LIA does not contain an express preemption clause. The applicable FRA regulations did not contain any warning requirements for hazardous materials or restrict the chemical composition of locomotive brake pads.[66] Further, the LIA's strict liability provision, the only source of compensation to injured people under federal law,[67] did not apply to this case because the locomotives at issue were not "in use" when the decedent was repairing them.[68]

The field-based framework required the Court to dismiss the plaintiffs' claim without any inquiry as to the relationship between the state and federal laws.[69] The result was the invalidation of state product liability claims; but invalidating the state product liability claims did nothing to further the purposes behind the federal

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[65] *Id.* at 1264.

[66] *See* Brief of Public Law Scholars as Amicus Curiae Supporting Petitioner at 15, *Kurns*, 132 S. Ct. 1261 (No. 10-879) (explaining that the FRA "has declined to issue rules on asbestos in locomotives, not because it believes asbestos to be non-hazardous or because it wishes to deny remedies to those injured by it, but because it found that railroad manufacturers have largely ceased using asbestos").

[67] *See id.* at 23–24 (noting that the plaintiff in *Kurns* will be denied all compensation if a field-based preemption framework is used); *see also supra* note 34 and accompanying text (discussing the compensation goal).

[68] *See supra* note 61 and accompanying text.

[69] *Cf. infra* notes 104–06 and accompanying text (explaining how the invalidation of the state product liability claim in *Geier* was necessary for the federal government to achieve its safety goals, whereas in *Williamson* the Court correctly declined to find preemption when that was not the case). Justice Elena Kagan, concurring in *Kurns*, expressed doubt that the case would have been decided the same way in the absence of *Napier* and the doctrine of *stare decisis*. Justice Kagan referred to *Napier* as an "anachronism" and observed that "under [the Court's] more recent cases, Congress must do much more to oust all of state law from a field." *Kurns*, 132 S. Ct. at 1270 (Kagan, J., concurring). Justice Sonia Sotomayor, dissenting in *Kurns*, recognized a criticism of field-based preemption advanced in this Note: The framework did not allow the *Kurns* Court to consider the plaintiffs' design defect claims and failure-to-warn claims separately, even though these two product liability claims present dramatically different theories of liability, not to mention significant differences in federal regulation in each area. *See id.* at 1271–73 (Sotomayor, J., dissenting). Justice Sotomayor would have reinstated the plaintiffs' failure-to-warn claims (as opposed to the design defect claims). She did not feel bound by *Napier* with respect to the failure-to-warn claims because, in her view, *Napier* only held that states cannot regulate the "physical composition" of a locomotive. *See id.* at 1272. Justice Sotomayor noted that "[n]either the Interstate Commerce Commission, to which Congress first delegated authority under the LIA, nor the Federal Railroad Administration (FRA), to whom that authority now belongs, has ever regulated locomotive repair and maintenance." *Id.* at 1274.

regulatory regime.[70] In fact, given the *lack of* federal regulation governing brake pad composition, the justifications for preemption appear extremely weak.[71]

The Ninth Circuit case of *Forrester v. American Dieselectric*,[72] provides another example of the problematic consequences of field preemption. In *Forrester*, the court applied *Napier*'s field-based preemption framework and held that an employee of a metal company injured by a railroad crane in the company scrap yard could not maintain a state law design defect claim against the crane's manufacturer.[73] The plaintiff was an employee of a metal company that did not operate railroads.[74] The company owned a railroad crane to transport metal beams around its scrap yard. The plaintiff was injured when the crane reversed toward him without warning and dragged a piece of metal over his leg.[75] The plaintiff sued the manufacturer of the crane, alleging the crane was unreasonably dangerous without a certain safety system, but the court dismissed his claim even though no FRA regulations dealt with locomotive cranes[76] and preemption eliminated any opportunity for the plaintiff to receive compensation for his injuries.[77] As was the case in *Kurns*, no federal benefit was obtained by the preemption of state law.[78]

IV
The Conflict-Based Preemption Framework: A Superior Alternative to Field Preemption

In contrast to the bluntness of field-based preemption, which may frustrate important state objectives without furthering any federal goals, the conflict-based framework of preemption can more precisely

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[70] *See infra* note 115 and accompanying text (discussing the justifications offered for broad federal preemption of state product liability law).

[71] *See* Brief of Public Law Scholars as Amicus Curiae Supporting Petitioner at 15, *Kurns*, 132 S. Ct. 1261 (No. 10-879) (noting the lack of federal regulations in the area).

[72] 255 F.3d 1205 (9th Cir. 2001).

[73] *Id.* at 1209–10.

[74] *Id.* at 1210.

[75] *Id.* at 1207.

[76] *Id.* at 1208. The FRA does not even inspect locomotive cranes confined to industrial installations for general safety. *Id.* at 1209. The parties disputed whether the railroad crane in question was a "locomotive" for purposes of the LIA. The Ninth Circuit accepted the FRA's interpretation of the statute that a locomotive crane is subject to regulation under the LIA, even though the agency specifically excluded locomotive cranes from its safety standards. *See id.* at 1207–09 (summarizing the FRA's position concerning the scope of the LIA).

[77] *Id.* at 1209–10.

[78] *See infra* notes 105–06 and accompanying text (explaining that an important justification for federal preemption is the free and unimpeded operation of the federal regulatory structure).

reconcile state and federal interests. This Part describes the conflict-based framework of preemption employed by the Supreme Court in the context of motor vehicle safety. It argues that the conflict-based framework provides a viable and superior alternative to the field-based framework employed in *Kurns* because conflict preemption preserves the benefits of state product liability law[79] while ensuring that state law does not conflict with federal regulatory objectives.

A. Federal Regulation of Automotive Safety

In 2000 and 2011, the Supreme Court decided two significant preemption cases concerning the compatibility of state law product liability claims with the Safety Act and accompanying Department of Transportation (DOT) regulations.[80] The Safety Act delegates broad power to the DOT "to prescribe motor vehicle safety standards."[81] The Safety Act defines a safety standard as "a minimum standard for motor vehicle or motor vehicle equipment performance."[82]

The Safety Act contains both an express preemption clause and a saving clause.[83] The express preemption clause prohibits states from passing statutes regulating any aspect of motor vehicle performance that is regulated by the DOT unless those statutes are identical to the federal standard.[84] The saving clause, however, clarifies that state common law claims are not preempted.[85] The product liability claims discussed in this Section, and elsewhere in this Note, are state common law claims.

Consequently, courts confronted with state common law claims in an area also subject to regulation by the DOT must face the same

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[79] *See supra* Part I.B and accompanying text (discussing the justifications for preserving state product liability law in federally regulated fields).

[80] *See* Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131 (2011); Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).

[81] 49 U.S.C. § 30101(1) (2006).

[82] 49 U.S.C. § 30102(a)(9) (2006). A full discussion of the Safety Act's delegation of regulatory power to the DOT is beyond the scope of this Note. What is important for federal preemption purposes is that the Safety Act commands the DOT to set "minimum" safety standards, not necessarily maximum standards.

[83] *See supra* notes 38–40 and accompanying text (providing an overview of express preemption clauses and saving clauses).

[84] 49 U.S.C. § 30103(b)(1). In *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), the Supreme Court clarified the scope of the Safety Act's express preemption provision in relation to the Act's saving clause. The Court held that, in light of the saving clause, the Act's express preemption clause does not preempt state common law product liability claims. *See id.* at 286–87.

[85] 49 U.S.C. § 30103(e) (2006) ("Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.").

types of "implied preemption" issues dealt with in *Kurns*.[86] In two cases decided ten years apart, the Supreme Court has provided a conflict-based framework for lower courts to evaluate the preemption of state law product liability claims under the Safety Act.

B. The Conflict-Based Framework of Geier *and* Williamson

In *Geier v. American Honda Motor Co.*, the Supreme Court applied a conflict-based framework of preemption to evaluate whether a Federal Motor Vehicle Safety Standard (FMVSS) promulgated by the DOT preempted state product liability claims.[87] At issue in *Geier* was the relationship between a state law claim alleging that a passenger car was defective because it lacked airbags, and FMVSS

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[86] *See supra* Part III (discussing *Kurns*). The Supreme Court in *Geier* addressed the relationship between the Safety Act's express preemption clause and the saving clause before reaching the "conflict" preemption analysis discussed in the next Subpart. The Court first held that, in light of the saving clause, the Act's express preemption clause did not cover the plaintiff's common law product liability claim. 529 U.S. at 868. However, the Court then held that the saving clause does not foreclose the operation of ordinary implied preemption principles even where claims are brought under state common law, such as product liability claims. *Id.* at 869. Thus, despite the statutory language concerning preemption in the Safety Act, the two Safety Act cases discussed in Part IV.B, *infra*, provide a model of implied preemption jurisprudence and are applicable in other contexts such as railroads and aviation regulation.

[87] *Geier*, 529 U.S. at 874–86. In *Geier*, the Court declined to apply a field preemption theory, due in part to the Safety Act's saving clause. *See id.* at 884. This should not mean, however, that the absence of a saving clause indicates a stronger case for the application of field preemption. As explained in Part I, *supra*, the touchstone of any preemption question is Congress's intent. If the statute does not contain an express preemption clause or saving clause, courts often reach different conclusions regarding Congress's intent with respect to the same statute. For example, in the aviation context, courts are split about whether to evaluate preemption issues under a conflict-based framework or field-based framework. *See infra* Part V. The Court in *Geier*, however, rejected a field theory of preemption, noting that a field-based framework is inappropriate, at least when the federal law at issue is a federal agency regulation. *See Geier*, 529 U.S. at 884 ("[T]he Court has looked for a specific statement of pre-emptive intent where it is claimed that the mere 'volume and complexity' of agency regulations demonstrate an implicit intent to displace *all* state law in a particular area . . . so-called 'field preemption' . . . .").

The above statement in *Geier* has been misinterpreted by courts and commentators to mean that implied preemption *can* result from agency regulations *without* any express preemption provision. For example, in *Bank of America v. City of San Francisco*, 309 F.3d 551 (9th Cir. 2002), the Ninth Circuit misinterpreted Justice Stephen Breyer's statement in *Geier* to mean that "[i]n such cases of field preemption, the 'mere volume and complexity' of federal regulations demonstrate an implicit congressional intent to displace all state law." *Id.* at 558. *See also* O'REILLY, *supra* note 39, at 70 (incorrectly citing *Geier* for the proposition that "[t]he mere volume and complexity of federal regulations can be used to demonstrate implicit intent to displace state actions"). The term "agency preemption" is used to refer to preemption of state law by federal agency regulations, as opposed to congressional statutes. *See* Sharkey, *supra* note 5, at 242–47 (summarizing the agency preemption debate and discussing recent attempts by federal agencies to preempt state law in preambles to their regulations).

208, a federal regulation concerning "passive" restraint devices, a category that includes airbags.[88] The version of FMVSS 208 in force at the relevant time[89] required manufacturers to equip a minimum of ten percent of their new passenger cars with passive restraint devices.[90] There was no cap on the percentage of cars that could contain passive restraint devices, nor was there a requirement that the cars must contain a certain type of passive restraint device. The regulation allowed manufacturers to choose among the devices feasible at the time, including airbags, to satisfy the ten percent requirement.[91]

The plaintiff in *Geier* brought state law design defect claims against Honda after she was injured in a car crash while driving a 1987 Honda Accord that did not contain airbags. The plaintiff alleged that, under state law, the product was defectively designed because it lacked airbags.[92] Critically, allowing the plaintiff's state product liability claims to succeed in this case would be tantamount to upholding a *state law requirement* that automobile manufacturers *must* install airbags in their passenger cars, since the cars would be considered defective under state law without the airbags.[93]

The Court examined in detail the relationship between FMVSS 208 and the specific product liability theory advanced by the plaintiff in the case, and held that the state law claims were incompatible with the federal law and must be dismissed. The Court explained that, although it was not technically impossible to comply with both

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[88] *See* Occupant Crash Protection, 49 Fed. Reg. 28,962, 28,965 (July 17, 1984) (codified as amended at 49 C.F.R. § 571.208 (2012)). "Passive" restraint devices, such as airbags and automatic seatbelts, are different from "active" restraint devices, such as manual seatbelts, because passive restraint devices do not require any affirmative act by the operator of the vehicle for activation. Active restraint devices, on the other hand, require the operator of the vehicle to activate the safety device. *See id.* at 28,965.

[89] The version of FMVSS 208 considered in *Geier* was promulgated in 1984 and in force in 1987, the year in which the vehicle in question was manufactured. *See Geier*, 529 U.S. at 864–65.

[90] *See* Occupant Crash Protection, 49 Fed. Reg. at 28,963.

[91] FMVSS 208 provided manufacturers with an "extra credit" of "one-half of an automobile" that would count toward the ten percent requirement if the manufacturer equipped a car with airbags. *Id.* According to Justice Stevens, dissenting in *Geier*, this credit was meant "to encourage wider use of airbags." *Geier*, 529 U.S. at 891 (Stevens, J., dissenting). Manufacturers were not required, however, to equip any of their cars with airbags and could satisfy the ten percent requirement by installing other passive restraint devices. *See* 49 C.F.R. § 571.208 (1984) (explaining the different ways manufacturers might satisfy the new standards).

[92] *Geier*, 529 U.S. at 865. The product liability claim was brought under the law of the District of Columbia, which is the equivalent of state law for federal preemption purposes. *See id.* at 865–66.

[93] *See id.* at 881 ("Such a state law . . . would have required manufacturers of all similar cars to install airbags rather than other passive restraint systems, such as automatic belts or passive interiors.").

FMVSS 208 and the state product liability standard because FMVSS 208 set only a floor and not a ceiling, the state claims advanced by the plaintiff clearly would frustrate a carefully planned federal objective.[94] Taking into account FMVSS 208, its extensive history, and the DOT's view as represented by the United States as amicus curiae,[95] the Court found that the DOT's long range safety goals *required* automobile manufacturers to have a *choice* between installing airbags or other passive restraint devices.[96]

Ten years after *Geier*, the Court in *Williamson v. Mazda Motor of America, Inc.*, considered a different safety standard and state product liability claim under the same conflict-based framework.[97] The federal regulation at issue in *Williamson*, a different subpart of FMVSS 208, concerned seatbelt requirements for passenger vehicles.[98] At the time of manufacture, FMVSS 208 required lap and shoulder belts to accompany the outer rear seats of a passenger vehicle, but only required lap belts to be installed in the inner rear seats.[99] The

[94] *See id.* at 877–81 (describing the complex cost-benefit balancing and considerations reflected in FMVSS 208).

[95] *See* Brief for the United States as Amicus Curiae Supporting Affirmance at 15–16, *Geier*, 529 U.S. 861 (No. 98-1811) (arguing that allowing the state product liability claim could frustrate FMVSS 208's policy of encouraging the development of a variety of passive restraints).

[96] *See Geier*, 529 U.S. at 875 ("[FMVSS 208] deliberately provided the manufacturer with a range of choices among different passive restraint devices."). According to the majority in *Geier* and the United States as amicus curiae, the DOT intended for FMVSS 208's phased-in requirement to lead to better safety technology rather than an exclusive focus on airbags. *See id.* at 879 ("[T]he phased-in requirement would allow more time for manufacturers to develop airbags or other, better, safer passive restraint systems."). This long-term federal safety goal would have been incompatible with state product liability law that effectively requires manufacturers to install airbags in all of their passenger cars. *Id.* at 881.

[97] 131 S. Ct. 1131 (2011). The analysis in *Williamson* is similar to the conflict-based preemption determination employed in *Sheesley v. Cessna Aircraft Co.*, No. Civ-02-4185, 2006 WL 1084103 (D.S.D. Apr. 20, 2006). On the other hand, the *Williamson* opinion differs from other district court opinions that use a field-based preemption framework. *Compare Williamson*, 131 S. Ct. at 1137–40, *and Sheesley*, 2006 WL 1084103, at *23–25 (applying a conflict-based preemption framework), *with* Duvall v. Avco Corp., No. 4:CV-05-1786, 2006 WL 1410794, at *2–3 (M.D. Pa. May 19, 2006), *and* Sikkelee v. Precision Airmotive Corp., 731 F. Supp. 2d 429 (M.D. Pa. 2010) (applying a field-based preemption framework). *See infra* Part V (comparing *Sheesley*, which employed a conflict-based preemption framework, with other district court decisions in the aviation context applying a field-based preemption framework).

[98] *See* Occupant Crash Protection, 54 Fed. Reg. 46,257, 46,257 (Nov. 2, 1989) (codified as amended at 49 C.F.R. § 571.208 (2012)) (requiring forward-facing lap and shoulder belts in rear outboard seating positions).

[99] *Id.* This difference might seem trivial, but in the car crash at issue in *Williamson*, the two passengers on the outer rear seats of the vehicle, which contained lap and shoulder belts, survived, whereas the passenger in the middle seat, which only contained a lap belt, was killed. The plaintiff alleged the lack of a shoulder belt caused the injury. *See* Brief for

decedent's estate in *Williamson* brought a state law design defect claim against Mazda, alleging defect in the minivan in which the decedent was riding because the middle rear seat in which the decedent sat was equipped with only a lap belt and not a lap and shoulder belt.[100]

The Court applied the conflict-based framework set forth in *Geier* and unanimously[101] concluded that the federal standard did *not* preempt the plaintiff's product liability claim.[102] The Court held, after taking into account all of the factors considered in *Geier*, that FMVSS 208's lap belt requirement was only a minimum standard, was not enacted to further any federal safety objective, and did not conflict with state product liability law.[103]

Had the Court employed a field-based preemption framework, the claim in *Williamson* would likely have been preempted because the federal government regulates passive restraint devices, even though, in light of the state and federal interests set forth in Part I of this Note, strong reasons existed to preserve the state law claim. The federal regulation at issue in *Williamson* merely provided a floor for standards of safety, and state product liability law fit comfortably within the federal regulatory framework by operating as a back-end check on federal regulation and providing compensation to injured victims.[104] There was no federal objective to require car manufacturers to *only* install lap belts in middle rear seats, and allowing state claims based on the lack of lap belts would not have interfered with the federal regulatory regime. In contrast, preemption in *Geier* allowed the federal government to conduct a program designed to increase long-term motor vehicle safety.[105] Allowing the state product liability claims in *Geier* would have resulted in a de facto state law requirement eliminating manufacturers' discretion in choosing

Petitioner at 1, Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131 (2011) (No. 08-1314).

100 Brief for Petitioner at 1, *Williamson*, 131 S. Ct. 1131 (No. 08-1314).

101 Justice Kagan took no part in the consideration of the *Williamson* case.

102 *See Williamson*, 131 S. Ct. at 1137–40 (holding that although the state claim might restrict manufacturers' choice, it did not act as a complete obstacle to the goals of the federal law).

103 The Court took into account the text, regulatory record, and history of the federal regulation, as well as the United States's argument against preemption as amicus curiae when evaluating whether the plaintiff's particular design defect claim could coexist with the federal seatbelt regulations. *Id.* at 1137–40.

104 *See* Brief of Public Law Scholars as Amici Curiae Supporting Petitioner at 23–24, Kurns v. R.R. Friction Prods. Corp., 132 S. Ct. 1261 (2012) (No. 10-879) (noting that common law tort claims could incentivize higher safety standards where federal regulations fail or are inadequate).

105 *See supra* notes 93–96 and accompanying text (discussing the rationale for applying preemption in *Geier*).

between airbags and other passive safety restraints when an important objective of the federal program was to allow such discretion.[106]

C. *The Superiority of the Conflict-Based Preemption Framework*

Unlike the field-based framework used in *Kurns*, the *Geier* and *Williamson* framework captures a critical point often overlooked in the preemption debate. Notwithstanding the justifications for preserving state tort law in a federally regulated area,[107] an even more fundamental doctrinal argument against field preemption in the product liability context exists: The strength of the arguments for *and* against preserving product liability claims varies substantially with each individual claim.[108] Lower courts bound by a field preemption holding cannot even weigh the competing considerations in determining whether subsequent state claims are preempted. The benefits of preemption in each case may differ dramatically based on the particular type of state product liability claim and the relevant federal statutes or regulations, but lower courts are limited to determining whether the case fits in a preempted field—if so, the claim must be preempted, even if preemption does not further any federal objectives.[109] The conflict-based framework, however, allows consideration

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[106] Justice John Paul Stevens disagreed with the majority's holding that the state law product liability claim stood as an obstacle to any federal safety goal. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861, 906–13 (2000) (Stevens, J., dissenting). According to Justice Stevens, "[n]either Standard 208 nor its accompanying commentary includes the slightest specific indication of an intent to pre-empt common-law no-airbag suits." *Id.* at 910. For the purposes of this Note, the outcome of *Geier* is not as important as the framework that *Geier* employed in its preemption analysis. While four Justices disagreed with applying preemption in *Geier*, the majority's conflict-based preemption framework allowed the Court, in the subsequent *Williamson* decision, to undertake a detailed analysis of the compatibility of the state and federal laws and prevent unnecessarily broad preemption. *See Williamson*, 131 S. Ct. at 1140–41 (Sotomayor, J., concurring) (noting that *Williamson* constitutes a correction of some lower court decisions that had read *Geier*'s conflict-based decision too broadly).

[107] *See supra* Part I.B (discussing these justifications).

[108] For example, opponents of broad field-based preemption of product liability law in the aviation context have argued that Congress did not intend this type of preemption, that it represents federal courts' distaste for state tort law, that the field-based mode of analysis had fallen into disfavor in light of Supreme Court precedent, or that injustice occurs from the elimination of compensation to those injured by dangerous products. *See, e.g.*, Rapoport & Teich, *supra* note 10, at 252–75; Sharkey, *supra* note 15, at 656–58. This Note posits, however, that there is a more fundamental objection to the field-based framework—it fails to take into account dramatic differences between different product liability cases and different theories of liability.

[109] *See Kurns*, 132 S. Ct. at 1270 (Kagan, J., concurring) (explaining that under current law, the scope of the agencies' power as granted by Congress "determines the boundaries of the preempted field"). The case studies in this Note illustrate how the concerns Justice Kagan identifies with broad field-based preemption manifest themselves in other regulatory contexts. In certain cases, a state product liability claim will be preempted under a

of each product liability claim in light of its compatibility with federal law.

For example, consider a product liability case involving a product for which federal law closely regulates the design process but not the manufacturing process. The plaintiff brings two claims: (1) a design defect claim; and (2) a strict liability manufacturing defect claim. Assume these claims are brought against the manufacturer of a defective airplane fuel pump that caused a plane to crash. If, as in *Geier*, the federal government regulates the precise aspects of the aircraft's design at issue in the case, a court will find the state claim in conflict with and preempted by federal law—the desirability of a national standard for that particular aircraft component properly trumps state product liability law, despite the state interests involved.[110]

But, as in *Williamson*, strong justifications exist for preserving the manufacturing defect claim. Strict liability encourages manufacturers, the parties who can best manage risks and spread losses, to maximize safety in the manufacturing process.[111] By contrast, the arguments for preemption of the claims are weak. Strict liability is the rule in the vast majority of states, ensuring that manufacturers will not face a patchwork of regulations, and the claim is relatively cheap to adjudicate.[112] Moreover, federal statutes and regulations may not even

field-based preemption framework when the theoretical justifications for preemption are nonexistent or very weak. *See infra* Part V (presenting case studies in the aviation context).

[110] *See* Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Respondent at 2, *Kurns*, 132 S. Ct. 1261 (No. 10-879) (arguing that "[t]ort lawsuits are often the most unpredictable and disruptive form of interference with uniform federal regulation"); *see also* Law v. Gen. Motors Corp., 114 F.3d 908, 910–11 (9th Cir. 1997) (hypothesizing that, in the absence of field preemption of state law product liability claims against them, locomotive operators would have to either change equipment as they entered each state or conform to the standards of the state with the strictest product liability laws). For other arguments in favor of broad preemption, see Epstein, *supra* note 25, at 472 (arguing that state product liability law in the drug context is "likely to deter new drug innovation by adding private law sanctions to the impressive administrative obstacles that now impede new drug development"); Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 GEO. L.J. 2167, 2171–75 (2000) (discussing the limitations of product liability law and advocating that administrative agencies and the attendant federal regulations should take precedent over state product liability claims, based on their comparative expertise as compared to layman juries).

[111] *See* Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 440–44 (Cal. 1944) (Traynor, J., concurring) (outlining the policy justifications in favor of strict liability for manufacturing defect claims). Strict liability in this case is also desirable from a corrective justice perspective. *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 744 (9th ed. 2008) (defining corrective justice as the theory that "prima facie, the loss should be placed upon the party that created the condition, not the party who suffered from it").

[112] *See* Robert A. Sachs, *Product Liability Reform and Seller Liability: A Proposal for Change*, 55 BAYLOR L. REV. 1031, 1032 n.2 (2003) (noting that almost all states apply strict liability for manufacturing defects).

regulate the manufacturing process of small aircraft components.[113] Nevertheless, if this manufacturing defect claim was brought in a court required to apply a field-based preemption framework to all product liability claims in the field of aviation, it would be dismissed without much consideration.[114]

Scholars who advocate field-based preemption might argue that claim-by-claim preemption determinations are not worth their administrative costs relative to blanket determinations of field preemption.[115] Concededly, this Note proposes a framework where lower courts are *required* to wrestle with "conflict preemption" questions rather than applying a field-based approach, which may result in increased administrative costs.

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[113] *See, e.g.*, Brief for Plaintiff at 14–15, Sikkelee v. Precision Airmotive Corp., 731 F. Supp. 2d 429 (M.D. Pa. 2010) (explaining that federal regulations do not often cover the manufacturing process of aircraft components).

[114] This was the case in *Duvall v. Avco Corp.*, No. 4:CV-05-1786, 2006 WL 1410794, at *3 (M.D. Pa. May 19, 2006), and *Sikkelee v. Precision Airmotive Corp.*, 731 F. Supp. 2d 429, 431 (M.D. Pa. 2010). For a discussion of these cases, see *infra* notes 140–47 and accompanying text. If the court applied the conflict-based preemption framework instead, the result with respect to the manufacturing defect claim would likely have been different.

[115] Thus, arguments similar to those Richard Epstein makes against Catherine Sharkey's "agency reference model" might be used in support of implied field preemption. The agency reference model, advocated by Sharkey, requires a comprehensive evaluation of the agency record to determine the level of deference afforded to an agency's preemption determination. *Compare* Catherine M. Sharkey, *What* Riegel *Portends for FDA Preemption of State Law Products Liability Claims*, 103 Nw. U. L. REV. 437 (2009) (discussing the agency reference model and applying the model to the prescription drug context), *with* Epstein, *supra* note 25, at 473 (arguing that the agency reference model is too costly for implementation and will result in "huge protracted battles over preemption" in the courts and instead favoring field preemption).

Furthermore, commentators urging broad field-based preemption take the view that "the arrival of federal regulation[s] . . . transform[s] the regulatory universe." *E.g.* Epstein, *supra* note 25, at 467. In 2009, prior to the Supreme Court's anti-preemption decision in *Wyeth v. Levine*, 555 U.S. 555 (2009), Epstein argued for field preemption of state product liability law in prescription drug cases. In a federally regulated area, notes Epstein, a defective product is often removed from the market before the start of tort litigation, reducing tort law's effectiveness as a deterrent. *Id.* at 470. Tort law might disrupt a detailed federal agency approval process such as that employed by the FDA. *See* Stewart, *supra* note 110, at 2184 & n.79 (noting that the imposition of tort liability is equivalent to a determination that the product should not have been marketed, despite the fact that regulators determined the product's benefits outweighed its costs). Epstein also argued for field preemption in the drug context (and elsewhere) because of the administrative costs associated with judicial determinations of conflict preemption. Epstein, *supra* note 25, at 472–73. These field preemption arguments were also advanced by prescription drug manufacturers prior to the Court's decision in *Wyeth*. *See, e.g.*, Levine v. Am. Home Prods., Inc., No. 670-12-01 Wncv, 2003 WL 25648135, at *1 (Vt. Super. Dec. 23, 2003) (rejecting the defendant's argument that FDA regulations occupied the field to the exclusion of all state product liability law in the prescription drug context). The defendant in *Wyeth* did not press its field preemption argument in the U.S. Supreme Court. *Wyeth*, 555 U.S. at 560.

However, these costs might not be significant, and, in any case, they are justified in light of the benefits provided by the conflict-based preemption framework. First, in the absence of a straightforward express preemption clause or impossibility of compliance with both state and federal law, litigants have a strong incentive to contest the preemption issue because it is a complete defense.[116] While a court's job might be slightly easier if it only has to determine whether the state law is "in the field" or "out of the field," the marginal efforts required of the court to make a conflict-based determination may not be substantially greater. Moreover, courts are extremely experienced and competent in conducting statutory interpretation and analyses of state and federal law, so judges are well equipped to make case-by-case determinations of conflict preemption.[117] Finally, and perhaps most importantly, in cases of serious injuries, corrective justice concerns counsel against preemption of state product liability claims that *do not impede* any federal interest.[118] The potential marginal benefit to judicial economy does not, by itself, justify the invalidation of claims held by seriously injured plaintiffs when the invalidation does not promote any federal regulatory objective.

V
Competing Preemption Frameworks in the Aviation Context

Kurns, *Geier*, and *Williamson* demonstrate that both field-based preemption and conflict-based preemption remain viable frameworks for determining when federal law preempts state product liability claims. The Court's application of field preemption in *Kurns* was likely heavily influenced by *stare decisis* and the precedent of *Napier.*[119] In the context of aviation safety, in which there is no Supreme Court precedent on point, a circuit split has developed over the proper framework for resolving questions of preemption. Since

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[116] *See* Owen, *supra* note 3, at 412–13 (discussing the power of the federal preemption defense); Tauber et al., *supra* note 3, at 44–50 (same).

[117] *See* Merrill, *supra* note 47, at 758 (discussing the relative competencies of Congress, federal agencies, and courts in making sound preemption determinations).

[118] *See* Epstein, *supra* note 111, at 744 (defining corrective justice as the theory that "prima facie, the loss should be placed upon the party that created the condition, not the party who suffered from it"); McGarity, *supra* note 4, at 235–36 (stating that potential conflicts between federal regulations and state common law arise out of the common law setting standards of care for safety, not from its corrective justice function).

[119] *See supra* note 69 (discussing Justice Kagan's concurrence in *Kurns*).

the courts of appeals bind all district courts in their jurisdictions,[120] their choice of framework has significant effects on the scope of federal preemption of state laws. This Part examines the circuit split, and argues that the aviation safety cases provide another demonstration of the superiority of the conflict-based preemption framework in accommodating both state and federal interests. The aviation safety cases suggest that courts deciding issues of preemption in other regulatory contexts without Supreme Court precedent on point should apply conflict preemption rather than field preemption.

The federal government regulates aviation through three principal statutes: the Federal Aviation Act, the Airline Deregulation Act (ADA), and the General Aviation Revitalization Act (GARA). The Aviation Act,[121] passed by Congress in 1958, created the Federal Aviation Administration (FAA). As interpreted by courts, the Aviation Act delegates to the FAA "the power to frame rules for the safe and efficient use of the nation's airspace."[122] The Aviation Act does not contain an express preemption clause and contains a saving clause for state law remedies.[123]

In 1978, Congress enacted the ADA.[124] The ADA contains an express preemption clause that prohibits states from enacting "any law, rule, regulation, standard, or other provision having the force and effect of law related to rates, routes, or services of any air carrier

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[120] Moreover, since preemption decisions are a matter of federal constitutional law, decisions of the federal courts on federal preemption issues are highly persuasive to state courts in the jurisdiction as well.

[121] Pub. L. No. 85-726, 72 Stat. 731 (1958) (codified as amended in scattered sections of 49 U.S.C. §§ 40101–49105 (2006)).

[122] *See, e.g.*, Air Line Pilots Ass'n v. Quesada, 276 F.2d 892, 894 (2d Cir. 1960) (discussing the Aviation Act).

[123] The Aviation Act's saving clause states: "Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." Pub. L. No. 85-726, 72 Stat. 731 (current version at 49 U.S.C. § 40120(c) (2006)). In 1972, Congress supplemented the Aviation Act with the Noise Control Act. Pub. L. No. 92-574, 86 Stat. 1234 (current version at 42 U.S.C. §§ 4901–4918 (2006)). The Noise Control Act requires the FAA, after consultation with the EPA, to promulgate regulations regarding aircraft noise that are necessary to protect the public health and welfare. 42 U.S.C. § 4904(c). In *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973), the Supreme Court held that the Noise Control Act prohibited states from regulating aircraft noise. At issue in *Burbank* was a city ordinance that prohibited pure jet aircraft from taking off from the city's airport between 11:00 P.M. and 7:00 A.M. The majority concluded that the federal Noise Control Act prohibits state regulation of aircraft noise. *Id.* at 633. The Court did not discuss whether the federal aviation statutes preempted state product liability laws, or the impact of the decision on state product liability laws.

[124] Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in 49 U.S.C. § 41713) (2006)).

having authority . . . to provide interstate air transportation."[125] It is well established that state personal injury claims are not within the scope of this express preemption clause.[126] GARA, passed by Congress in 1994, introduced an eighteen year statute of repose on civil actions for death, personal injury, or property damage relating to general aviation aircraft and parts.[127]

A circuit split has developed over the scope of implied preemption under the aviation statutes beyond the ADA's express preemption of state regulations relating to rates, routes, or services. Some circuits apply a conflict-based preemption framework to address product liability claims in this federally regulated field, whereas other circuits apply a field-based preemption framework.[128]

In *Cleveland v. Piper Aircraft Co.*,[129] the Tenth Circuit applied a conflict-based preemption framework to evaluate product liability claims relating to aviation safety. The plaintiff in *Cleveland* had piloted a small plane from the rear seat to shoot a television commercial.[130] Piper's instructions certified this mode of operation. The plaintiff was severely injured when the plane crashed into a van parked on the runway during takeoff. The plaintiff sued Piper, alleging that an inadequate field of vision from the rear seat and the lack of a safety harness on the rear seat constituted a defective design.[131] Piper argued that the federal aviation statutes and FAA regulations preempted the plaintiff's tort claim, and urged the court to apply a field-based preemption framework.[132]

The Tenth Circuit applied a conflict-based preemption framework, similar to that applied in *Geier* and *Williamson*, and upheld the

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125 *Id.* § 105(a)(1) (codified as amended at 49 U.S.C. § 41713(b)(1) (2006)).

126 *See* Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 372 (3d Cir. 1999) (explaining that courts have found that state law personal injury claims do not fall within the language of the ADA's express preemption clause, but finding that the federal aviation statutes impliedly preempt the field of aviation safety to the exclusion of all state product liability law).

127 General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101 (2006)).

128 *See* Rapoport & Teich, *supra* note 10, at 244–46 (discussing the circuit split); *see also infra* note 133 and accompanying text (noting that the Ninth, Tenth, and Eleventh Circuits apply a conflict-based preemption framework to state product liability claims in the aviation context); *infra* note 138 (noting that the First, Third, Fifth, and Sixth Circuits apply a field-based preemption framework to state product liability laws in the aviation context).

129 985 F.2d 1438 (10th Cir. 1993).

130 *Id.* at 1441.

131 *Id.*

132 *Id.* ("Piper argues that the Federal Aviation Act . . . and the regulations it has spawned impliedly preempt state tort actions by occupying the field of airplane safety. It asserts that the web of federal laws and regulations govern the field in a comprehensive manner, leaving no room for state regulation.").

plaintiff's claims.[133] The court noted that FAA regulations did not require or prohibit the design Piper implemented and merely acted as a "minimum check on safety."[134] As in *Williamson*, the conflict-based framework applied in *Cleveland* enabled the Tenth Circuit to assess critically whether the justifications for preemption were met in this particular case, given the lack of any federal regulation on point.[135]

In contrast to the Tenth Circuit's decision in *Cleveland*, the Third Circuit adopted a field-based preemption framework in *Abdullah v. American Airlines, Inc.*[136] to evaluate product liability claims in the aviation context. Instead of analyzing the compatibility of the particular state product liability claim in the case[137] with the federal statutes and FAA regulations, the Third Circuit proclaimed that "any state or territorial standards of care relating to aviation safety are federally preempted."[138]

The field-based preemption framework adopted by the Third Circuit in *Abdullah* prevents lower courts bound by the decision from deciding whether the state and federal laws actually come into conflict, and thus prevents lower courts from determining, in light of the considerations discussed in Part I, whether federal law should preempt the state law. Two cases from the Middle District of

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133 *Id.* at 1445–47. The Ninth and Eleventh Circuits have also declined to apply a field-based approach to preemption in the aviation context. These circuits permit plaintiffs to bring product liability claims that do not conflict with the federal aviation statutes or FAA regulations. *See, e.g.*, Martin *ex rel.* Heckman v. Midwest Exp. Holdings, Inc., 555 F.3d 806, 809–12 (9th Cir. 2009); Hughes v. Att'y Gen., 377 F.3d 1258, 1266–71 (11th Cir. 2004).

134 *Cleveland*, 985 F.2d at 1446.

135 *See supra* notes 101–06 and accompanying text (arguing that the Supreme Court's conflict-based preemption framework, adopted in *Geier*, allowed the Court to reach the correct decision in *Williamson* in not preempting state product liability claims that did not interfere with the federal regulatory structure).

136 181 F.3d 363 (3d Cir. 1999).

137 In *Abdullah*, passengers were injured when an American Airlines flight encountered turbulence. The flight crew noticed a storm in the flight path and was aware of the potential for turbulence but failed to notify the passengers or change course. The injured passengers sued American Airlines, alleging the flight crew was negligent under a state law standard of care. *See id.* at 364–66 (describing the plaintiffs' allegations).

138 *Id.* at 371. Since the FAA's saving clause expressly preserves state law remedies, the Third Circuit acknowledged that state law remedies, as distinguished from substantive legal standards, were not preempted. *Id.* at 375. In 2005, the Sixth Circuit adopted the reasoning of *Abdullah* and held that "federal law establishes the standards of care in the field of aviation safety and thus preempts the field from state regulation." Greene v. B.F. Goodrich Avionics Sys., Inc., 409 F.3d 784, 795 (6th Cir. 2005) (holding that a state law failure-to-warn claim against a helicopter manufacturer was preempted under the Sixth Circuit's field-based preemption framework). The Fifth and First Circuits have also adopted the field-based framework. Witty v. Delta Air Lines, Inc., 366 F.3d 380, 385 (5th Cir. 2004); French v. Pan Am. Express, Inc., 869 F.2d 1, 4 (1st Cir. 1989).

Pennsylvania, bound by *Abdullah*, illustrate the problematic consequences of field preemption.[139]

In *Duvall v. Avco Corp.*,[140] which arose out of a fatal small plane crash, the Middle District of Pennsylvania applied *Abdullah*'s field-based framework and held that federal law preempted all of the plaintiff's product liability claims.[141] The application of field preemption in this case resulted in an unnecessarily broad preemption of state law because the district court was not allowed to consider the crucial difference between the plaintiff's claims relating to the *operation* of the aircraft, and the plaintiff's claims relating to the *manufacture* of aircraft parts.

Certain state law claims relating to the operation of an aircraft might seriously interfere with federal aviation regulation. However, as the district court's decision appeared to recognize, the plaintiff's manufacturing defect claims were unlikely to come into conflict with the federal regulatory regime.[142] Even though no federal purpose was served, the field-based framework eliminated both the plaintiff's interest in compensation and the state's interest in deterring the manufacture and use of defective products. A conflict-based framework of preemption would have more precisely separated instances in which state law impedes on federal objectives and instances in which the two can coexist.[143]

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[139] Commentators have criticized the Third Circuit's holding in *Abdullah* as inconsistent with Congress's intent in enacting the aviation statutes. *See, e.g.*, Rapoport & Teich, *supra* note 10, at 242–46 (discussing the circuit split and arguing that a conflict-based approach, rather than a field-based approach, should apply). This Note, however, provides a broader criticism of *Abdullah.* The *Abdullah* case, and the subsequent decisions of lower courts bound by the Third Circuit's holding, illustrate the problems inherent in the implied field preemption framework itself. The problem with *Abdullah* is not the specific holding regarding the issue of preemption. Rather, the central problem is the *scope of the holding* of the case. The adoption of a field-based preemption framework by a court of appeals binds district courts (and is highly persuasive to state courts) in the jurisdiction and prevents these courts from even evaluating the state-federal relationship in each case in light of the justifications for and against product liability law. As a consequence, important state laws may be preempted without furthering any federal regulatory objectives.

[140] No. 4:CV-05-1786, 2006 WL 1410794 (M.D. Pa. May 19, 2006).

[141] *Id.* at *2 (citing *Abdullah*, 181 F.3d at 363–75). In *Duvall*, the district court granted the defendant's motion for reconsideration of an earlier decision in the same case, which had dismissed the plaintiff's claims relating to the *operation* of the aircraft, but found that the product liability claims relating to the *manufacture* of aircraft parts were not federally preempted. *See* Duvall v. Avco Corp., No. 4-CV-051786, 2006 WL 224020 (M.D. Pa. Jan. 30, 2006), *vacated*, No. 4-CV-051786, 2006 WL 1410794 (M.D. Pa. May 19, 2006).

[142] *See Duvall*, 2006 WL 1410794, at *2 ("[T]he Third Circuit *did not* limit its holding to piloting or aircraft operation and specifically rejected the approach adopted by other courts that found only certain aspects of aviation safety to be preempted.").

[143] *See supra* notes 101–06 and accompanying text (presenting the benefits of the conflict-based preemption framework).

A subsequent Middle District of Pennsylvania case, *Sikkelee v. Precision Airmotive Corp.*,[144] provides another illustration of the unnecessary preemption that can occur when lower courts are bound to apply a field-based framework. The plaintiffs in *Sikkelee* brought state law product liability claims alleging that the defendant's defective manufacture and repair of a carburetor caused a fatal plane crash.[145] Despite the lack of any federal regulations governing the manufacture or use of the carburetor, the court concluded that the field-based framework of *Abdullah* required dismissal of the claim.[146] The *Sikkelee* court seemed frustrated at being bound by the rigid field preemption framework mandated by the Third Circuit given that, with *no* federal regulation on point, the benefits of preemption in this case appeared minimal or nonexistent.[147]

In contrast to the rigid and overly broad preemption of state law resulting from *Abdullah*'s adoption of field-based preemption, courts allowed to employ the conflict-based preemption framework maintain the flexibility to reach more precise preemption decisions. In *Sheesley v. Cessna Aircraft Co.*,[148] the District Court of South Dakota explicitly declined to follow the Third Circuit's use of field preemption in the context of aviation regulations. Instead, the court engaged in a detailed conflict preemption analysis to determine whether the plaintiffs' state tort claims actually interfered with the federal aviation statutes and regulations.

In *Sheesley*, a small airplane crashed, killing every person on board.[149] Plaintiffs brought two state law negligence claims against

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144 731 F. Supp. 2d 429 (M.D. Pa. 2010).

145 *Id.* at 429–30.

146 *Id.* at 431–32. The district court also rejected the plaintiff's contention that the Supreme Court's decision in *Wyeth v. Levine* affected the field-based framework articulated by the Third Circuit. *Id.* at 438–39; *see* Wyeth v. Levine, 555 U.S. 555 (2009) (holding that a state law failure-to-warn claim against a brand-name drug manufacturer was not preempted by the FDA's labeling regulations because the defendant drug manufacturer could have unilaterally strengthened its warning label without pre-approval by the FDA). The plaintiffs in *Sikkelee* argued that the Supreme Court's decision in *Wyeth* represented a change in the doctrine of implied preemption as a whole, and was applicable to their case even though *Wyeth* concerned preemption under FDA regulations, not the federal aviation statutes. *See* 731 F. Supp. 2d at 433, 437. The court rejected the plaintiffs' argument, holding that *Abdullah* was not invalid after *Wyeth* because the aviation statutes were different from the FDA regulations at issue in *Wyeth*. *See id.* at 438–39 (rejecting the plaintiff's contention that the *Wyeth* decision, in the prescription drug context, abrogated the Third Circuit's field preemption holding in the aviation context).

147 *See Sikkelee*, 731 F. Supp. 2d at 438 ("Indeed, we find the logic [of the plaintiff's argument] alluring, and perceive the wisdom of the various decision in other Circuits that have failed to find preemption in circumstances similar to the case at bar.").

148 No. Civ-02-4185, 2006 WL 1084103 (D.S.D. Apr. 20, 2006).

149 *Id.* at *2.

FlightSafety, the flight school that trained the pilot. First, plaintiffs alleged that FlightSafety negligently trained the pilot by failing to include the appropriate emergency procedures in its curriculum.[150] Second, plaintiffs alleged that FlightSafety negligently failed to provide a flight simulator that accurately represented the plane the pilot was training to fly.[151] Under the *Abdullah* framework, *both* state law claims in *Sheesley* would have been preempted because they relate to aviation safety.[152] But since *Abdullah* did not bind the *Sheesley* court, it conducted a comprehensive analysis of the relationship between each tort claim, the federal statutes, and the FAA regulations.[153]

The court held the negligent training to be preempted because federal law required FlightSafety to use an FAA-approved curriculum. Since FlightSafety could not design its own curriculum, it would have been impossible to comply with both the FAA regulations and the standard under the state law negligence claim.[154]

However, the court determined that the second claim *was not* preempted. Although flight simulators must be approved by the FAA, nothing in the regulations suggested that the FAA would not have approved a flight simulator meeting the requirements set out in the plaintiffs' suit.[155] Consequently, the standards demanded by the state law claim did not conflict with the federal regulatory regime.

As the *Sheesley* decision illustrates, a lower court that can apply a conflict-based preemption framework rather than a field-based framework has more flexibility to maintain the supremacy of federal law, while simultaneously avoiding unnecessary preemption of state law. The *Sheesley* court's preemption of the negligent training claim comports with the theoretical justification for preemption—the unimpeded operation of federal law. Meanwhile, the court's holding that the claim relating to the failure to provide a flight simulator was not preempted avoids the invalidation of the compensation and deterrence functions of state product liability law without any corresponding federal benefits.[156]

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150 *Id.* at *14.

151 *Id.*

152 *See id.* at *22 (stating that if the district court were to accept the Third Circuit's field preemption holding in *Abdullah*, it would have no choice but to find that federal law preempted both claims).

153 *See id.* at *22 (declining to follow *Abdullah* and concluding that Congress did not intend the federal aviation statutes to preempt the entire field of aviation safety).

154 *Id.* at *23–24.

155 *Id.* at *24–25.

156 In 2010, the Third Circuit qualified its holding in *Abdullah*, but not to a significant degree. In *Elassaad v. Independence Air, Inc.*, 613 F.3d 119 (3d Cir. 2010), the court considered whether an airline passenger who fell while disembarking the aircraft could bring a state law negligence claim against the airline. *Id.* at 121. The court held that the "field of

Conclusion

The aviation case studies presented in Part V illustrate the shortcomings of the field-based preemption framework—even when the federal regulatory regime does not speak to or touch on the issue, field preemption can result in the invalidation of important state product liability laws.[157] This Note argues that, whether in the aviation context or in other federally regulated areas, courts should hesitate to adopt field preemption analysis. Courts faced with preemption issues in product liability claims should look to the Supreme Court's conflict preemption analysis in *Geier* and *Williamson* for guidance, rather than to the Court's use of field preemption in *Kurns*. Employing the conflict-based preemption framework allows courts to evaluate critically the competing federal and state policies and interests at stake in determining whether state law must give way to federal law under the Supremacy Clause.

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aviation safety" defined by *Abdullah* "does not include a flight crew's oversight of the disembarkation of passengers once a plane has come to a complete stop at its destination." *Id.* at 121. At least one district court has held, however, that *Elassaad* does not modify *Abdullah*'s holding that state law product liability claims arising from aircraft accidents, including product liability claims alleging design defect, manufacturing defect, and failure-to-warn, are field-preempted. *See* Sikkelee v. Precision Airmotive Corp., 731 F. Supp. 2d 429, 438 (M.D. Pa. 2010).

[157] A review of the case law cited and discussed in this Note casts doubt on a comment made by the Supreme Court in a 1992 opinion that "field"-type preemption should be thought of as "a species of conflict preemption." Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 104 n.2 (1992) (quoting English v. Gen. Elec. Co., 496 U.S. 72, 79–80 (1990)). Justice Sandra Day O'Connor, writing for the Court in *Gade*, theorized that field preemption might be considered a "species" of conflict preemption because a state law that falls within "[a] preempted field conflicts with Congress's intent . . . to exclude state regulation." *Id.*; *see also* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 n.6 (2000) (quoting, but not elaborating or relying upon, the Court's statement in *Gade*). However, this statement is circular, and would only change the semantic label, not the substance, of the federal preemption framework. This is because Congress's intent is the touchstone of any preemption analysis. Implied preemption exists to address situations in which Congress's intent is unclear. Furthermore, this Note's comparison of the judicial opinions applying a field preemption mode of analysis with those applying a conflict preemption mode of analysis is telling. *See supra* notes 144–56 and accompanying text (discussing the substantial differences between district court decisions when the courts are bound by a field preemption holding in the aviation context compared to those that are not).