

THE BLANK PAGE BEFORE YOU: SHOULD THE PREEMPTION DOCTRINE APPLY TO UNWRITTEN PRACTICES?

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This Note argues that the preemption doctrine should be extended to cover unwritten practices of state agencies. Preemption is a judicially created doctrine, grounded in the Supremacy Clause, which allows courts to invalidate state laws if they conflict with or otherwise obstruct a federal law. The Supreme Court has applied preemption to a range of state actions, from statutes to adjudicatory decisions of state agencies. The Court has not, however, indicated whether it would apply preemption in the absence of a textual statement of the rule by the state agency. Unwritten practices are repeated patterns of decisionmaking that evidence some implicit norm guiding the decision. Applying the preemption doctrine to them is desirable because, like other forms of agency action, such unwritten practices can significantly interfere with the operation of federal regulatory regimes. Unwritten practices by definition are decisions being continuously implemented. Courts, however, should be cautious in applying preemption in this realm because of the risk of infringing on states' autonomy interests. Preemption is disruptive because it invalidates state action; as applied to unwritten practices, it is even more so because the courts are reaching day-to-day actions that the state agencies may not have fully articulated and defined. This Note argues that to resolve the tension between federal interests and state autonomy, the courts should find preemption to apply only when the unwritten practice constitutes a custom, borrowing from § 1983 municipal liability claims the "persistent and widespread" standard for finding instances where an unwritten practice constitutes the equivalent of a law.

INTRODUCTION

How can individuals force states to comply with federal law? Traditionally, § 1983 civil rights actions allowed individuals to obtain relief through federal courts.¹ The § 1983 doctrine, however, has narrowed in recent years,² prompting a search for alternatives. One possibility to

1. 42 U.S.C. § 1983 (2000). The provision reads:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Id.

2. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) ("We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a

which civil rights practitioners have turned is the preemption doctrine, which grants courts the ability to override state laws whenever they conflict with federal law.³ Unlike § 1983, preemption is solidly grounded in the text of the Constitution and applies outside the civil rights context, making it more difficult to restrict. The Constitution's Supremacy Clause is clear that federal law, as "the supreme Law of the Land," overrides "any Thing in the Constitution or *Laws of any State*."⁴ What is unclear is whether the doctrine, with its reference to states' "Laws," can reach instances where an individual state officer is acting outside the specific commands of a written law, regulation, or policy.⁵

This Note addresses that uncertainty: It examines whether the preemption doctrine should reach unwritten policies of state agencies in order to address repeated interferences with federal law that are not based on written laws.⁶ Unwritten practices are litigated frequently, most often

cause of action brought under § 1983 [I]t is rights, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section."); see also Simon Lazarus, *Federalism R.I.P.? Did the Roberts Hearings Junk the Rehnquist Court's Federalism Revolution?*, 56 DePaul L. Rev. 1, 23 (2006) (noting increasingly stricter standards used by Court in establishing whether Congress intended statutes to allow § 1983 relief).

3. Lauren K. Saunders, *Preemption as an Alternative to Section 1983*, Clearinghouse Rev. J. Poverty L. & Pol'y, Mar.-Apr. 2005, at 705, 705.

4. U.S. Const. art. VI, cl. 2 (emphasis added). The full text of the Supremacy Clause reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

5. See David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 383 (2004) ("[T]here is still no Supreme Court decision that explicitly applies *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983),] to a case in which a plaintiff sues to enjoin state executive (as opposed to administrative) action that allegedly violates a federal statute."); Saunders, *supra* note 3, at 711 ("Whether preemption can be used to challenge governmental inaction, unwritten practices, customs, usages, or isolated violations is less clear Until the case law develops further, [practitioners] should not assert preemption claims in nontraditional contexts.").

6. One key related uncertainty is the cause of action used to raise a preemption claim. Preemption actions may come before the courts in one of two ways. First, defendants may raise federal preemption as an affirmative defense when they are brought to court for a violation of a state law. Jonathan V. O'Steen & Van O'Steen, *The FDA Defense: Vioxx® and the Argument Against Federal Preemption of State Claims for Injuries Resulting from Defective Drugs*, 48 Ariz. L. Rev. 67, 69 (2006). Second, plaintiffs may sue for declaratory or injunctive relief against an allegedly preempted state law, with federal jurisdiction arising from either the Declaratory Judgment Act, 28 U.S.C. § 2201 (2000), or the *Ex parte Young* doctrine, see *Ex parte Young*, 209 U.S. 123 (1908); *infra* note 81. In the latter scenario, the Supreme Court has not yet clarified what is the exact private cause of action in such a suit, though it has invariably gone on to reach the merits of each case. Sloss, *supra* note 5, at 366-67. The Second Circuit has recognized the Supremacy Clause as the source of the implied right of action to bring a preemption case, *Burgio & Campofelice*,

through § 1983 actions. In *Rothgery v. Gillespie County*, for example, the Court examined a Texas county's unwritten practice of not assigning a court-appointed lawyer to indigent defendants at their initial arraignment, allegedly contrary to the Sixth Amendment and the county's own written policies.⁷ Similarly, in *Johnson v. California*, the Court examined the California Department of Corrections' unwritten policy of racially segregating prisoners in cells to prevent violence by racial gangs.⁸ And in *Virginia v. Hicks*, the Court upheld against a First Amendment challenge an unwritten policy in a Richmond housing project that pamphleteers had to obtain prior permission from the facility's manager before distributing leaflets on its premises.⁹ These three cases involved constitutional issues, but unwritten state practices can just as easily violate federal statutory requirements. In *Diggs v. Housing Authority*, the public housing authority in Fredrick, Maryland had a policy of expelling and excluding visitors who were involved in violent or drug-related activities.¹⁰ The local police enforced the policy, but neither they nor the housing authority ever set it down in a single written policy document.¹¹ The district court deemed the housing authority's policy to be a violation of the United States Housing Act.¹²

What has been litigated are just ripples on the surface. Because local agency practices are often less visible than written policies to those outside the agency, there is less of a likelihood they will be challenged in the courts. The cases, therefore, provide only a hint of how often agencies utilize unwritten practices in their daily operations. These practices pervade the daily life of any administrative agency and affect individual citizens' interactions with those agencies.¹³ Most develop as a matter of administrative convenience and do not rise to the level where they can

Inc. v. N.Y. State Dep't of Labor, 107 F.3d 1000, 1006 (2d Cir. 1997), and the Fifth Circuit has recognized that an implied right of action exists, without deciding whether it arises under the Supremacy Clause or under the Declaratory Judgment Act, see *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 334 n.47 (5th Cir. 2005).

7. 128 S. Ct. 2578, 2581–83 (2008); see also *Jones v. Salt Lake County*, 503 F.3d 1147, 1158 n.13 (10th Cir. 2007) (collecting cases on unwritten policies in prisons).

8. 543 U.S. 499, 502 (2005).

9. 539 U.S. 113, 121 (2003); see also *Mason v. Wolf*, 356 F. Supp. 2d 1147, 1161 (D. Colo. 2005) (holding as unconstitutional higher education center's unwritten policy prohibiting demonstrations around flagpole).

10. 67 F. Supp. 2d 522, 525–27 (D. Md. 1999).

11. *Id.* at 526.

12. *Id.* at 531–32.

13. One Canadian scholar defends the use of these unwritten practices:

Every agency has a plethora of unwritten rules, policies, and procedures that constrain action. The problem is that too few of these tacit normative practices are understood as such. In consequence, much energy is devoted to making all agency law explicit. This is largely wasted, since there can never be the exactly appropriate canonical formulation of an agency-sensitive procedural norm. Moreover, even were this possible, the norm will actually shape and channel behaviour only when it is embedded in the on-the-ground practices that constitute an agency's implicit law.

interfere substantially with federal policies. Where they do, however, it is unclear how the preemption doctrine should treat them.

*Livadas v. Bradshaw*¹⁴ illustrates how an unwritten policy can challenge federal uniformity. An employee dismissed from a Safeway supermarket wanted California's Commissioner of Labor to enforce her claim for back pay from her ex-employer.¹⁵ The Commissioner, however, refused to do so because it interpreted a section of the Labor Code to prohibit intervention in cases where a collective bargaining agreement existed and contained an arbitration clause.¹⁶ The plaintiff claimed that this policy—which the Commissioner articulated for the first time in its letter rejecting her claim—should be preempted by the National Labor Relations Act, because the policy effectively discriminated against those with collective bargaining agreements.¹⁷ The Ninth Circuit ruled against her, holding that the decision to enforce a claim lies within the discretion of the Commissioner, even if the Commissioner based it on a misinterpretation of the statute.¹⁸ The Ninth Circuit majority held that she had no right to correct enforcement of the law, though it acknowledged that, by virtue of her collective bargaining agreement, she “may be more likely to get an erroneous eligibility determination” than other aggrieved employees.¹⁹ The Supreme Court reversed, holding that a stated agency policy that interprets state law in a manner that conflicts with federal law is itself preempted, even if the state law it is interpreting is not in conflict.²⁰ The Court cited to Judge Kozinski's dissent from the Ninth Circuit, which argued that despite the discretionary nature of the decision, the decision nonetheless discriminated on an impermissible ground against those with collective bargaining agreements.²¹

In *Livadas*, the Commissioner had not established a written policy on its interpretation; however, it articulated its reasoning in its rejection letter. What if the Commissioner had stayed silent and relied on its discretion in refusing to enforce the plaintiff's claim? Unwritten policies are often found in situations where the governmental actor has discretion under the applicable statutes and regulations, but consistently exercises

Roderick A. MacDonald, Call-Centre Government: For the Rule of Law, Press #, 55 U. Toronto L.J. 449, 478–79 (2005); see also Ann Wise, Louisiana's Division of Administrative Law: An Independent Administrative Hearings Tribunal, 68 La. L. Rev. 1169, 1195 (2008) (“State agencies have great power. They make laws through rulemaking. They interpret their own rules and laws. They create (often unwritten) policies regarding implementation, administration, and enforcement of the laws.”).

14. 512 U.S. 107 (1994).

15. *Id.* at 111.

16. *Id.* at 112.

17. *Id.* at 113.

18. *Livadas v. Aubry*, 987 F.2d 552, 559 (9th Cir. 1991), *rev'd sub. nom. Livadas v. Bradshaw*, 512 U.S. 107.

19. *Id.* at 559.

20. *Livadas v. Bradshaw*, 512 U.S. at 118.

21. *Id.* at 116 n.10 (citing *Livadas v. Aubry*, 987 F.2d at 562 (Kozinski, J., dissenting)).

that discretion according to some unarticulated principle.²² In such circumstances where discretion is allowed, the Ninth Circuit convincingly argues that no one individual has a right in the correct application of law to her case, absent some actual violation of her rights.²³ The Ninth Circuit regarded it as a matter of tendency that cases involving certain factors were “more likely” to be decided wrongly, but ruled that this tendency was not in itself actionable under preemption.²⁴ But at some point, courts should be able to infer from agency tendencies that there are certain policy judgments within the range of discretion that may, across multiple cases, lead to a point where the decisions can no longer be treated as an isolated misapplication of discretion. When does a pattern become a practice, and a practice a policy? And when should such unwritten policies be subject to preemption?

Such unwritten policies lie on the spectrum between codified laws on one end and isolated acts on the other; they are persistent patterns of conduct, undirected by any explicit written policy. Can they be treated as “Laws” for purposes of preemption? On the one hand, there is a long tradition of treating some types of unwritten practices as “custom” or “usage” with the force of law.²⁵ And as a matter of policy, unless preemption doctrine treats unwritten practices in a principled manner, it will create a

22. The other common scenario in which unwritten practices arise is where the written policy commands one specific course of action, while actors in practice follow a different course of action. See, e.g., *Rothergery v. Gillespie County*, 128 S. Ct. 2578, 2583 n.6 (2008) (“[The plaintiff] does not challenge the County’s written policy for appointment of counsel, but argues that the County was not following that policy in practice.”).

23. As the Ninth Circuit noted in *Livadas v. Aubry*:

Every employee who seeks enforcement is subject to an eligibility determination, and every employee who seeks enforcement is subject to the risk that the Commissioner will get it wrong Thus, we do not see how the Commissioner, simply by making an erroneous eligibility determination, has penalized Livadas for the exercise of her right to bargain collectively because he has treated her exactly the same as every other employee in the state.

987 F.2d at 559 (majority opinion).

24. *Id.* The Ninth Circuit’s full reasoning on this point is illustrative:

Of course, by virtue of the fact that Livadas is covered by a collective bargaining agreement, she may be more likely to get an erroneous eligibility determination than employees who do not work under collective bargaining agreements because the Commissioner is more likely to hold that her claim is preempted by federal labor law. But that is a function of the condition placed on enforcement that the claim not be preempted—a condition to which she does not object and could not object. It is also perhaps a function of the complexity of preemption law and of the inherent tension between federal and state systems for adjudicating labor disputes. It is not a function of the Commissioner’s placing any kind of impermissible condition on the benefit of his enforcement.

Id.

25. See, e.g., *State ex rel. Thornton v. Hay*, 462 P.2d 671, 678 (Or. 1969) (looking to “an ancient and accepted custom” to establish state law for public access to dry sand areas of beaches). For a detailed history of the evolving understanding of “custom” and “usage” in the § 1983 context, see generally George Rutherglen, *Custom and Usage as Action*

perverse incentive for states to keep their policies off the books. One possibility, suggested by David Sloss, is to extend preemption to cover all types of state action, legislative or executive, which would give broad coverage to the doctrine and cover the potential loophole.²⁶ On the other hand, recognizing a potent version of a preemption doctrine threatens state autonomy interests within federalism. Such unwritten practices can easily be characterized as discrete decisions by local actors. Allowing preemption to reach into daily practices of state agencies might subject large swaths of state action to federal regulation. If state autonomy is critical, preemption doctrine can refuse to recognize anything not codified as written state policy. But that poses the opposing problem that at least some degree of state interference with federal regulatory regimes will go uncorrected.

Taking into consideration both the federal interests of regulatory uniformity and supremacy, and the states' interest in autonomy, this Note argues certain unwritten state practices should be subject to preemption, but that preemption should apply only to practices that the common law would treat as "custom" with the force of law. This standard would draw upon jurisprudence developed in the § 1983 civil rights context for claims against municipalities. Part I will review the preemption jurisprudence, developing the interests involved and the types of state actions that have previously been found to be susceptible to preemption analysis. Part II will examine the concept of unwritten practices and the policy arguments for and against recognizing it in preemption. Finally, Part III will argue for recognizing unwritten practices within the preemption doctrine and for a limiting standard for what can be reached through the preemption doctrine.

I. THE EXPANSIVE REACH OF THE PREEMPTION DOCTRINE

The preemption doctrine safeguards the supremacy of federal regimes. In a dual-layered system of government, each politically independent of the other, it is inevitable that the laws of one will occasionally conflict with those of the other.²⁷ The Constitution mandates that in all such cases of conflict between federal and state laws, the Federal "Constitution, and the Laws of the United States" will govern as the "su-

Under Color of State Law: An Essay on the Forgotten Terms of Section 1983, 89 Va. L. Rev. 925 (2003).

26. Sloss, *supra* note 5, at 431. Sloss argues that there are three possibilities: (1) ignore all executive actions, (2) allow preemption of all executive actions that are ongoing, and (3) allow preemption of executive action only when a "legal rule" has been promulgated. *Id.* at 430-32. He then argues that the second option is preferable. *Id.* By his typology, this Note argues that the third option would be preferable.

27. Federalist No. 45 (James Madison) (answering objections that federal government would be fatal to state governments).

preme Law of the Land,”²⁸ and serve as the rule of decision.²⁹ The preemption doctrine, which provides that federal law not only trumps but invalidates conflicting state law, grew out of this principle of federal supremacy. Part I.A summarizes the typology of the doctrine, illustrating how it has been interpreted to cover a wide range of conflicts. Part I.B outlines the policy justifications articulated by the courts for and against finding preemption, arguing that it is a functionalist analysis. Part I.C explores the state actions which may be preempted, arguing that the courts have not allowed form to trump substance. By establishing the contours of the doctrine and its policy considerations, Part I informs the discussion in Part II about the potential expansion of the preemption doctrine.

A. *The Typology of the Preemption Doctrine*

Preemption occurs wherever courts determine that Congress intended for federal law to displace state laws. Modern preemption doctrine divides preemption into three categories: express, field, and conflict.³⁰ The difference between these categories of preemption depends on how clearly Congress expressed its intent to displace state laws.³¹ The central inquiry is whether a given state law somehow interferes with a congressional enactment,³² and whether Congress would have wanted that conflict to stand. This inquiry gives the preemption doctrine a potentially wide area of coverage.

Express preemption occurs when Congress itself defines the preemptive scope of its statutes. Congress can use preemption clauses,³³ which

28. U.S. Const. art. VI, cl. 2; see also Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 247–48 (2000) (noting that, in contrast to current Constitution, in Articles of Confederation, specific acts of Congress were not applicable in state courts until state legislatures passed laws implementing Congress’s directives).

29. Daniel J. Meltzer, The Supreme Court’s Judicial Passivity, 2002 Sup. Ct. Rev. 343, 367 (noting Supremacy Clause “supplies a rule of priority” for judges needing legal rules to decide cases).

30. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (laying out typology).

31. Stephen A. Gardbaum, The Nature of Preemption, 79 Cornell L. Rev. 767, 775 (1994) (describing differences between express, field, and conflict preemption); see also Laurence H. Tribe, Constitutional Law § 6-28, at 1177 (3d ed. 2000) (“[E]ven when Congress declares its preemptive intent in express language, deciding exactly *what* it meant to preempt often resembles an exercise in implied preemption analysis.”).

32. The Supreme Court has been clear that the categories are not distinct:

By referring to these three categories [of preemption], we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress’ intent (either express or plainly implied) to exclude state regulation. Nevertheless, because we previously have adverted to the three-category framework, we invoke and apply it here.

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

33. See, e.g., 5 U.S.C. § 8902(m)(1) (2006) (“The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits . . . shall

define the types of state laws to be preempted, and/or savings clauses,³⁴ which clarify which state laws should be left undisturbed, to control a statutory regime's preemptive scope. For example, the Employee Retirement Income Security Act (ERISA) has a provision expressly preempting any state laws governing employee benefits, which both invalidates the effect of all past state laws and stops future state legislation in the area, in order to create a uniform federal regime to govern employee benefits.³⁵

Field preemption occurs when the courts infer, absent an explicit preemption clause, that Congress intended for a given federal regime to occupy the entire area of regulation.³⁶ This inference may be made:

where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation . . . [or] where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."³⁷

Given the modern reality of federal regulation over diverse areas, courts have required specific intent from Congress before determining that federal law would cover the entire field.³⁸

Finally, conflict preemption—the broadest form and the one most relevant to this Note—comes in two flavors: impossibility and obstacle.³⁹ Impossibility preemption is found when state and federal laws command

supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.”)

34. See, e.g., 46 U.S.C. § 4311(g) (2000) (“Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.”).

35. 29 U.S.C. § 1144(a)(2000) (providing that titles I and IV “supersede any and all state laws” so far as the state laws “relate to any employee benefit plan”).

36. Viet D. Dinh, *Reassessing the Law of Preemption*, 88 *Geo. L.J.* 2085, 2105 (2000) (explaining field preemption as Congress marking regulatory area “as its own”).

37. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). But see *N.Y. State Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 415 (1973) (“We reject . . . the contention that pre-emption is to be inferred merely from the comprehensive character of the federal work incentive provisions. The subjects of modern . . . legislation often . . . require intricate and complex responses . . . , but without Congress necessarily intending its enactment as the exclusive means of meeting the problem.” (internal citation omitted)).

38. See *Dublino*, 413 U.S. at 415–17 (looking to legislative history and legislative structure to reject argument that Congress intended to preempt state’s work rules for welfare programs); *Montalvo v. Spirit Airlines*, 508 F.3d 464, 471 (9th Cir. 2007) (looking to “purpose, history, and language” of Federal Aviation Act to determine that “Congress intended to have a single, uniform system for regulating aviation safety”); see also Nelson, *supra* note 28, at 225 (arguing that in most areas, federal and state law are concurrent); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 *Tex. L. Rev.* 1, 130–34 (2004) [hereinafter Young, *Two Federalisms*] (“To the extent that virtually all regulatory authority is concurrent now . . . then preemption ought to emerge as the central preoccupation of constitutional federalism.”).

39. Meltzer, *supra* note 29, at 364–65.

different actions, making it impossible to comply with both.⁴⁰ In the more frequent case of obstacle preemption, state law is seen as conflicting if it stands “as an obstacle to the accomplishment of Congress’s full objectives under the federal Act.”⁴¹ Courts look to congressional intent to infer the underlying congressional objective, to determine whether the state law interferes with that objective, and to decide whether Congress would have wanted that interference.⁴²

Obstacle preemption is potentially very broad, because courts can preempt any state policy that is incompatible with the perceived purposes of the federal regime. In *Crosby v. National Foreign Trade Council*, Massachusetts passed certain trade sanctions against Myanmar, and, soon after, a similar federal statute was also enacted. The Court invalidated Massachusetts’s sanctions on the reasoning that the state law “undermines the intended purpose and ‘natural effect’” of the federal statute by hindering the President’s ability to use federal sanctions as bargaining chips in negotiating with Myanmar.⁴³ Despite the fact that it was possible to comply with both federal and Massachusetts regimes by accepting Massachusetts’s law as simply more restrictive sanctions, the Court found that adhering to the state regime would dampen the effects of the federal regime. Because it is potentially much easier to find conflicts under this theory, obstacle preemption has been criticized as an overly broad application of the preemption doctrine, giving judges discretion to reach into the nebulous mind of Congress to strike down otherwise nonconflicting state laws.⁴⁴

40. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (finding preemption of state law requiring judicial determination of certain contractual claims for which Federal Arbitration Act mandates arbitration). Conceptually, these are the strongest cases for arguing preemption, because they fall under a textual reading of the Supremacy Clause. However, they are relatively rare. Meltzer, *supra* note 29, at 364. Even *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), would not be an instance of impossibility preemption, because it is theoretically possible, if not desirable, to have a national bank that pays state taxes on its bank bills.

41. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000); see also *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (“The Court has not previously driven a legal wedge—only a terminological one—between ‘conflicts’ that prevent or frustrate the accomplishment of a federal objective and ‘conflicts’ that make it ‘impossible’ for private parties to comply with both state and federal law.”).

42. See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (“This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference.”).

43. *Crosby*, 530 U.S. at 373–74, 377.

44. See Meltzer, *supra* note 29, at 364 (noting “the fact that the Court’s conflict preemption jurisprudence is untethered by statutory text,” and “the range of judicial policymaking that is involved in the application of conflict preemption principles”); Nelson, *supra* note 28, at 278–82 (arguing preemption analysis requires courts to impute intention to the legislature—the desire to “pursue[] its purposes at all costs”—that is often

B. *Finding Intent: The Policy Considerations of Preemption*

Congressional intent is the “touchstone” of preemption.⁴⁵ The clearest case for preemption is express preemption, where Congress has explicitly articulated a desire to preempt state law. But the Court has rejected a strictly textual approach that would confine the inquiry to the statutory text.⁴⁶ The Court’s willingness to look beyond the statutes with express preemption provisions depends upon a set of functionalist policy considerations, which mirror the arguments for and against federal regulation in general.⁴⁷ The Court does recognize a general “presumption” against preemption,⁴⁸ but this presumption is only a single factor in the functionalist balancing analysis,⁴⁹ with constitu-

nonexistent (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 646 (1990))).

45. *Montalvo v. Spirit Airlines*, 508 F.3d 464, 471 (9th Cir. 2007) (“[O]ur analysis of the scope of the statute’s preemption is guided by the oft-repeated comment that the purpose of Congress is the ultimate touchstone in every preemption case.”).

46. See *Geier*, 529 U.S. at 873 (moving beyond statute’s language to “considerations of . . . purpose . . . and administrative workability”); see also *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (asserting preemption may be “compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose”). *Geier* overruled *Cipollone v. Liggett Group, Inc.*, which had held that “[w]hen Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue . . . there is no need to infer congressional intent.” 505 U.S. 504, 517 (1992) (internal citations omitted).

47. In light of the close link to federalism, it is interesting that several scholars have noted that those sitting Justices who most closely identify with states’ sovereignty are more sympathetic to preemption claims. Meltzer, *supra* note 29, at 368; Young, *Two Federalisms*, *supra* note 38, at 130–34.

48. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“[W]e have long presumed that Congress does not cavalierly pre-empt state-law causes of action.”); *Cipollone*, 505 U.S. at 516 (stating that preemption analysis “start[s] with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that [is] the clear and manifest purpose of Congress.” (alterations in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

49. See Fl. State Conference of the NAACP v. *Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008) (“[I]n practice it is difficult to understand what a presumption in conflict preemption cases amounts to, as we are surely not requiring Congress to state expressly that a given state law is preempted using some formula or magic words.”). Whether the presumption still holds force is itself a matter of debate. Cf. *Geier*, 529 U.S. at 906 (Stevens, J., dissenting) (“[T]he presumption against pre-emption should control. Instead, the Court simply ignores the presumption”). For scholarly discussion critiquing the Court’s move away from enforcing such a presumption, see Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. Rev. 967, 971 (2002) (“[T]he Supreme Court’s recent preemption decisions . . . ha[ve], in effect, created a presumption *in favor of* preemption”); Calvin Massey, “Joltin’ Joe Has Left and Gone Away”: The Vanishing Presumption Against Preemption, 66 Alb. L. Rev. 759, 759 (2003) (stating that presumption against preemption “is devoid of force and no longer even hortatory”); Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did Geier v. American Honda Motor Co. Eradicate the Presumption Against Preemption?*, 17 BYU J. Pub. L. 1, 8 (2002) (“Most blatantly, the Supreme Court’s five-member majority ignored the long-standing presumption against preemption”). But cf. Jack W. Campbell IV, *Regulatory Preemption in the Garcia/Chevron Era*, 59 U. Pitt. L. Rev. 805, 818–19 (1998) (“[T]he

tional and regulatory considerations also having some weight on the scale.⁵⁰

The most prominent consideration is the allocation of responsibilities between the federal and state governments. In protecting states' autonomy, the Court has emphasized that there is a stronger presumption against preemption when the area of law is one close to states' traditional "police powers."⁵¹ Conversely, the Court gives great weight to strong federal interests. When the area is one that is constitutionally entrusted to the federal government, such as foreign affairs⁵² or immigration,⁵³ when there are "unique Federal concerns," such as in military procurement,⁵⁴ or when there has been a history of federal presence, such as in regulating maritime activity,⁵⁵ the Court has been more willing to find preemption, and has even declared that there is no presumption at all in such cases.⁵⁶

Beyond the allocation of responsibility, the next important consideration is the overall structure of the regulatory regime. This analysis is not a simple one of statutory interpretation, but an in-depth inquiry into the

Court itself began the trend toward putting teeth into the presumption against preemption by developing and applying a *de facto* clear statement rule [disfavoring implied preemption].").

50. See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714–16 (1984) (balancing strength of state's interests against degree of interference with federal ones); *N. States Power Co. v. Minnesota*, 447 F.2d 1143, 1146–47 (8th Cir. 1971) (listing key factors in determining whether Congress has, by implication, preempted a particular area so as to preclude state regulation, including intent of Congress as revealed by statute and its legislative history, pervasiveness of federal regulatory scheme as authorized by legislation and carried into effect by administrative agency, whether nature of subject matter demands exclusive federal regulation to achieve uniformity vital to national interests, and whether state law is obstacle to accomplishment of congressional objectives).

51. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003) ("[I]t would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted."); *Rice*, 331 U.S. at 230 ("Congress legislated here in a field which the States have traditionally occupied So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (internal citations omitted)).

52. *Garamendi*, 539 U.S. at 429 (preempting, under executive agreement with Germany, California statute requiring disclosure of information about Holocaust-era insurance policies).

53. *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941) ("[T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, 'the act of Congress . . . is supreme; and the law of the State . . . must yield to it.'" (internal citations omitted)).

54. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507–08 (1988) ("[T]he fact that the area in question *is* one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can.").

55. *United States v. Locke*, 529 U.S. 89, 99 (2000) (noting that state "legislation [at issue is] in an area where the federal interest has been manifest since the beginning of our Republic").

56. *Id.* at 108 ("[A]n 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence.").

purposes and operations of the federal regime, weighed against the degree of conflict.⁵⁷ The Court has often referred to Congress's desire for national regulatory uniformity and used this factor as a basis for preemption.⁵⁸ For example, the Court has frequently found preemption in cases concerning the regulation of nationally traded consumer goods, including bacon,⁵⁹ car seatbelts,⁶⁰ and television advertisements.⁶¹

The type of federal-state relationship in question can also affect the perceived need for uniformity.⁶² The strongest case for preemption is where Congress has enacted a comprehensive set of mandatory regulations.⁶³ For instance, if Congress has designated a particular federal agency to regulate the area, such as the National Labor Relations Board, there is a presumption favoring the agency's regulations over state law.⁶⁴ Even if the agency has not yet spoken, the Court might still find preemption on the ground that Congress would have wanted to leave developments of future rules to that administrative agency.⁶⁵ But Congress may

57. Young, *Two Federalisms*, *supra* note 38, at 132 (arguing that many preemption cases center on identification of federal purposes and assessment of "acceptable degree of conflict" between them and state regulations).

58. See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547, 1558–59 (2007) (arguing that this desire should distinguish between federal regulation as floors and as ceilings).

59. *Jones v. Rath Packing Co.*, 430 U.S. 519, 523–24 (1977) (finding preemption when state law labeling requirements differed from federal requirements).

60. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 871 (2000) ("[The National Traffic and Motor Vehicle Safety Act's] pre-emption of *all* state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create.").

61. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 694 (1984) (preempting state prohibition against broadcasting of advertisements for alcoholic beverages on television).

62. See David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 Tex. L. Rev. 1197, 1286 (2004) (arguing that degree of preemption should differ by type of federal-state relationship).

63. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (noting purpose to preempt is present if "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it").

64. E.g., *Vaca v. Sipes*, 386 U.S. 171, 179 (1967). The Court noted:

Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.

Id. (quoting *Garner v. Teamsters Local Union No. 776*, 346 U.S. 485, 490–91 (1953)).

65. *Id.* at 180–81 ("A primary justification for the pre-emption doctrine [is] the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose").

also stop short of forcibly taking over a regulatory field.⁶⁶ For instance, in the realm of the Spending Clause legislation, states only expose their laws to the possibility of preemption if they choose to accept federal funding.⁶⁷ Though the preemptive effect of federal law is no less for it having been legislated through the Spending Clause,⁶⁸ courts are less willing to imply a broad preemptive scope in such Spending Clause cases and other joint federal-state programs. Given the sensible assumption that Congress wished to leave the states with great latitude to experiment, courts may decline to impose strenuous federal definitions over state ones.⁶⁹

Finally, there is the degree of conflict between the state law and the federal regime. On one end of the spectrum are the state laws with only minimal risk of interfering with the federal regime.⁷⁰ One common example is where the state law is directed at another issue and only incidentally touches the area regulated by the federal regime.⁷¹ Another example is where a state cause of action offers remedies unavailable in the

66. See, e.g., *O'Brien v. Mass. Bay Transp. Auth.*, 162 F.3d 40, 43 (1st Cir. 1998) (“[P]reemptive legislation enacted under the spending power presents states with a choice: they may either accept federal funds (and subject themselves to requirements imposed by federal law) or decline such funds (and avoid the necessity of abiding by those requirements.)”); Buzbee, *supra* note 58, at 1560–76 (arguing federal government can either not regulate, regulate exclusively, set regulatory floors, or set regulatory ceilings).

67. See *O'Brien*, 162 F.3d at 43.

68. See *id.* (affirming district court’s reversal of Massachusetts state court decision and declaring that drug testing requirements in Omnibus Transportation Employee Testing Act of 1991 preempted even state constitutional protections against searches and seizures). The Massachusetts superior court had expressed disbelief that “by voluntarily applying for and accepting Federal funds, [the state agency] can then eviscerate an employee’s state constitutional rights because Congress has attached a condition to those funds.” *Id.* at 42.

69. See *Anderson v. Edwards*, 514 U.S. 143, 150 (1995) (“[T]he starting point of the . . . analysis [in *Aid to Families with Dependent Children* cases] must be a recognition that . . . federal law gives each State great latitude in dispensing its available funds.” (quoting *Dandridge v. Williams*, 397 U.S. 471, 478 (1970))); see also Buzbee, *supra* note 58, at 1551 (arguing that federal regulatory regimes seldom have clearly dual layered structures, and instead depend on complex interaction/cooperation between federal and state actors).

70. See, e.g., *United States v. Locke*, 529 U.S. 89, 112 (2000) (“Local rules not preempted under Title II of the PWSA pose a minimal risk of innocent noncompliance”); *Jones v. Rath Packing Co.*, 430 U.S. 519, 544 (1977) (“The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.” (quoting *Kelly v. Washington*, 302 U.S. 1, 10 (1937) (internal quotation marks omitted))).

71. For example, in *Shaw v. Delta Air Lines*, the question was whether a state disability law conflicted with ERISA, the federal employee benefits law. 463 U.S. 85, 88 (1983). But see *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (“The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.”).

federal regime.⁷² Courts look closely at the effect that such state laws have on federal law to ascertain their degree of compatibility. The precise degree of conflict required for a finding of preemption is an open question, however, and one which courts decide on a case-by-case basis based on the particular policy considerations within that case.

C. *The Types of Governmental Actions that Can Trigger Preemption*

So far, Part I.A has laid out the typology of the preemption doctrine. Part I.B continued by showing that the Court, though mindful of Congress's explicit will, does approach the intent question with reference to practical considerations of constitutional balancing and regulatory structure. This subpart examines the types of state laws that are capable of being preempted, the subject most relevant to the main inquiry of whether federal law should preempt unwritten policies. On the federal side, the Court has been willing to find preemption based on federal statutes,⁷³ administrative regulations,⁷⁴ presidential executive

72. See, e.g., *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 63–64 (1966) (“[S]tate remedies have been designed to compensate the victim and enable him to vindicate his reputation. The [NLRB’s] lack of concern with the ‘personal’ injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption.”).

73. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) (striking down Maryland act because “states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government”).

74. *Fidelity Fed. Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 153 (1982) (“Federal regulations have no less pre-emptive effect than federal statutes.”). For a fuller discussion of regulatory preemption, see generally Paul E. McGreal, *Some Rice with Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 Case W. Res. L. Rev. 823 (1995).

The agency must be acting within its congressionally allocated authority. See *Gonzales v. Oregon*, 546 U.S. 243, 274–75 (2006) (finding that Interpretive Rule, which was to preempt state laws permitting doctors to prescribe drugs for physician-assisted suicides, exceeded its statutory authorization); *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986). In *Louisiana Public Service Commission*, the Court stated that:

[A] federal agency may pre-empt state law only when . . . it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.

Id.

An interesting question arises as to whether courts should defer to an agency’s interpretation of its own authority to preempt. See Christopher R.J. Pace, *Supremacy Clause Limitations on Federal Regulatory Preemption*, 11 Tex. Rev. L. & Pol. 157, 171 (2006) (arguing that Court should require “clear congressional intent” before accepting agency’s decision to preempt state law). The Court has so far declined to answer the question of whether an agency’s direct statement of preemption is entitled to *Chevron* deference. *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007), did not address the point, though the issue was raised in lower courts, and Stevens’s dissent in that case

orders,⁷⁵ and federal common law.⁷⁶ This section will trace the Court's expansion of the preemption doctrine into various forms of state actions, illustrating ways in which it has been willing to find a wide variety of state actions to be vulnerable to preemption.

1. *Administrative Regulations, Adjudications, and Guidelines.* — As a practical matter, the Court has not drawn any distinctions between state statutes and state administrative regulations for preemption purposes. For example, in *United States v. Locke*, the Court used federal preemption to strike down a series of regulations promulgated by Washington's Office of Marine Safety on oil tanker design, reporting, and operations.⁷⁷

Adjudicative orders of administrative agencies have also been the subject of preemption. In *Verizon Maryland Inc. v. Public Service Commission*,⁷⁸ parties contested a determination by the state agency that the term "local traffic" in a telecom contract applied to phone calls made to internet service providers.⁷⁹ Verizon, the plaintiff, argued that the determination was in contravention of a prior FCC ruling on the subject.⁸⁰ The Court, in addressing the permissibility of *Ex parte Young* jurisdiction, which allows courts to issue injunctions against state officers,⁸¹ avoided the distinction between rulemaking and adjudication, of general policy versus specific applications, and held that "enforcing an order in contra-

explicitly rejected giving the agency *Chevron* deference. *Id.* at 1584 (Stevens, J., dissenting).

75. *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 272–73 (1974) (holding that policies within executive order governing labor management preempted state law standards for defamation).

76. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–13 (1988) (holding that federal common law preempts state law in military procurement context because of closeness to federal interests).

77. 529 U.S. 89, 116 (2000).

78. 535 U.S. 635 (2002).

79. *Id.* at 639.

80. *Id.* at 640.

81. The *Ex parte Young* doctrine allows for suits against state officials for injunctive relief where the Eleventh Amendment would otherwise bar suits against the state itself. See *Ex parte Young*, 209 U.S. 123, 159–60 (1908) ("[T]he [state] officer . . . [is] stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."). *Ex parte Young* itself involved a suit against the Attorney General of Minnesota to enjoin him from enforcing a newly passed state statute setting railroad rates, under the theory that the statute violated the Fourteenth Amendment. The Court held that federal courts can entertain suits against state officers, charged with the enforcement of state laws, who "threaten and are about to commence proceedings" that would result in an "unconstitutional act, violating the Federal Constitution" against a party. *Id.* at 156. The suit does not offend the Eleventh Amendment because it is directed at the officer of the state, not the state itself. This is because if the act is unconstitutional, then "the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the state in its sovereign or governmental capacity." *Id.* at 159. In the preemption context, *Ex parte Young* serves as an avenue for federal jurisdiction for efforts to enjoin state officials from enforcing a policy that is in conflict with a federal regime.

vention of controlling federal law” creates the requisite “ongoing violation of federal law” necessary for injunctive relief.⁸²

The Court’s treatment of an adjudicative order as an ongoing violation, for *Ex parte Young* purposes, is significant.⁸³ The adjudication was a one-time decision, which had already occurred. One possibility is that it was “ongoing” only in that its judgment affected a contract that parties still had to perform. Thus, the state commission committed an “ongoing” violation in the sense that it was ready in the background to coerce Verizon into obeying its duties.⁸⁴ But *Verizon* might also have turned on the Court’s finding that the agency’s action was “law,” which is typically viewed as something carrying prospective effect for future, unrelated parties. Seen from this perspective, the Court was confirming that a single administrative adjudication can create norms for future behavior by other parties, and thus that adjudicative action does create “ongoing” potential for future conflicts between state and federal law.

Beyond rules and orders, even interpretations which are not legally binding are subject to preemption. In *Morales v. Trans World Airlines*, the Court found that the express preemption clause in the Federal Aviation Act preempted a set of guidelines explaining how a group of state attorneys general would be applying state laws on deceptive advertising and trade practices.⁸⁵ The guidelines were framed explicitly to not “create any new laws or regulations,” though they contained comprehensive standards for regulating airfare advertising and frequent flier programs.⁸⁶ Though most of the Court’s reasoning depended on its broad reading of the words “relating to” in the statutory language, it had to answer a contention from the states that the statute only preempted laws “specifically addressed” to the airline industry, and not laws of general applicability, such as laws on deceptive advertising.⁸⁷ The Court rejected this argument out of hand as “creating an utterly irrational loophole,” explaining that “there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute.”⁸⁸ In so doing, the Court looked past the state’s transparent attempt to distinguish an interpretive policy

82. *Verizon*, 535 U.S. at 645 (internal citation omitted).

83. See Sloss, *supra* note 5, at 359 (arguing that *Verizon* marks key point in Court’s jurisprudence on preemption).

84. This is probably the best reading of the *Verizon* Court’s reasoning that under *Ex parte Young*, it is “a ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.’ . . . The prayer for injunctive relief—that state officials be restrained from enforcing an order in contravention of controlling federal law—clearly satisfies our ‘straightforward inquiry.’” *Verizon*, 535 U.S. at 645 (quoting *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (alteration in original)).

85. 504 U.S. 374 (1992).

86. *Id.* at 379.

87. *Id.* at 386.

88. *Id.*

from a binding policy and granted injunctive relief via *Ex parte Young* against the state attorneys general's enforcement of that policy.⁸⁹

2. *Local Ordinances.* — Municipal ordinances are analyzed in the same way as statewide laws.⁹⁰ Though in sheer degree a single municipality cannot wreak as much havoc with federal regulatory regimes as a state law can, the Court has justified preemption on the same policy grounds that it refers to when preempting state action, and has stated that inconsistencies between municipalities might create fractionalized regulation just like inconsistent state regimes.⁹¹ The Court has not drawn any distinctions between regulation at the state and at the local or municipal levels.⁹²

3. *Common Law Causes of Action.* — Perhaps the most contentious application of federal preemption to a form of state action is the application of preemption to state law causes of action. This typically occurs when a federal law has set standards of some type, and an action is brought pursuant to a state law that sets out a different or higher standard. In such cases, the defendant will assert that its compliance with the federal standards should immunize it from state law tort claims, and thus, by effect, preempt those claims.

The Court recognized the preemption defense against state common law actions in the 1992 decision *Cipollone v. Liggett Group, Inc.*⁹³ The son of a woman who died from smoking tobacco brought a variety of false advertising claims against cigarette companies.⁹⁴ The tobacco companies raised two federal statutes, both mandating certain labeling requirements for cigarettes, as a preemption defense to the state tort claims.⁹⁵ The Court ruled for the defendants, taking a statutory interpretation ap-

89. *Id.* at 391.

90. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (“[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.”); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 640 (1973) (invalidating local noise ordinance restricting time of airplane takeoffs); see also *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 429 (2002) (“Absent a clear statement to the contrary, Congress’ reference to the ‘regulatory authority of a State’ should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts.”).

91. *Burbank*, 411 U.S. at 639 (“If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of FAA in controlling air traffic flow.”).

92. *Id.* at 633 (referencing, in case about city ordinance, deference to “historic police powers of the States” rather than municipalities).

93. 505 U.S. 504 (1992).

94. *Id.* at 509. The Court grouped the claims under five categories: design defect, failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud. *Id.* at 509–10.

95. *Id.* at 510. The statutes at issue were the Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331–1340 (2006)), and its successor, the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (codified as amended at 15 U.S.C. §§ 1331–1340).

proach that seemed, though textually plausible, somewhat strained.⁹⁶ Interpreting language from the 1965 Act—“No *statement* relating to smoking and health . . . shall be required”⁹⁷—the Court held that it preempted “only positive enactments by legislatures and administrative agencies that mandated particular warning labels,” not common law claims.⁹⁸ But interpreting language from the 1969 Act—“No *requirement or prohibition* based on smoking and health shall be imposed under State law”⁹⁹—the Court found that it could reach certain state tort claims as well.¹⁰⁰

Though controversial,¹⁰¹ the Court’s reading does put into relief the distinction between so-called “positive enactments” and common law.¹⁰² When justifying similar treatment, the Court looked to the fact that both could create rights and duties: “[I]t is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions.”¹⁰³ When emphasizing the differences, the Court leaned heavily on the fact that common law tort claims do not require any “particular statement”¹⁰⁴ and thus, unlike positive law, do not legislate to the requisite specificity. It is unclear whether this distinction would have held if there already were a state court opinion imposing a heightened requirement in cigarette advertising and mandating a particular statement that the judge considered applicable. In any case, the Court considered the threat of additional requirements to be incompatible, despite

96. See *Cipollone*, 505 U.S. at 534 (Blackmun, J., concurring in part) (claiming that no clear or manifest congressional purpose exists in the language).

97. Federal Cigarette Labeling and Advertising Act § 5(a), 79 Stat. at 283 (codified as amended at 15 U.S.C. § 1334(a)) (emphasis added). The full provision read: “No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.” *Id.*

98. *Cipollone*, 505 U.S. at 518–19 (majority opinion).

99. Public Health Cigarette Smoking Act of 1969 § 5(b), 84 Stat. at 88 (codified as amended at 15 U.S.C. § 1334(b)) (emphasis added). The full provision read: “No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.” *Id.*

100. *Cipollone*, 505 U.S. at 520.

101. The Court split three ways: the majority as described above, three Justices (Blackmun, Kennedy, and Souter) demanding consistency and no preemption under either Act, and two Justices (Scalia and Thomas) demanding consistency and preemption under both Acts. The split reflected a strong philosophical disagreement about the scope to give to preemption doctrine, with the Blackmun concurrence advocating a narrow reading of the express preemption clause, *id.* at 533 (Blackmun, J., concurring in part and dissenting in part), and the Scalia concurrence arguing against any presumption against preemption at all when there is explicit language, *id.* at 545 (Scalia, J., concurring in part and dissenting in part).

102. See *id.* at 535–36 (Blackmun, J., concurring in part and dissenting in part) (arguing that there are key differences between common law and positive enactments, notably that any effect on behavior is “necessarily indirect”).

103. *Id.* at 522 (majority opinion).

104. *Id.* at 519 n.16.

prior cases suggesting that common law claims serve different ends than federal regulatory regimes.¹⁰⁵

In its treatment of the preemptive status of the various claims, the Court seemed to find preemption only where the state tort theory would unavoidably force the cigarette maker to change its label, and no preemption where the cigarette maker might have conveyed the necessary message in some other fashion.¹⁰⁶ Despite the controversy over its statutory interpretation, *Cipollone* is oft cited to establish the authority of Congress—and by implication the federal courts—to preempt state causes of action, where maintenance of such actions would impose heightened or different requirements than a federal regime.¹⁰⁷

This brief look at the Court's expansion of the preemption doctrine indicates that the Court has been willing to expand the reach of the doctrine where doing so would remove conflicts with state law. The Court's primary concern, as seen in both *Morales* and *Cipollone*, is with the existence of inconsistent obligations and requirements from federal and state law. This expansion has raised concerns, as evident in Justice Blackmun's partial concurrence in *Cipollone*, about the possible infringement on state sovereignty.¹⁰⁸ However, those federalism concerns have not been a bar where there are strong countervailing federal interests. Part II will argue that those interests should also permit the Court to look at unwritten practices as a category of state action that can be preempted.

II. SHOULD THE PREEMPTION DOCTRINE COVER UNWRITTEN PRACTICES?

Part I has argued that the ambit of the preemption doctrine is wide. Should it be widened even further to cover discretionary acts not commanded by any written policy? Unwritten practices potentially cover a wide range of actions: Any repeated behavior by an individual or a group

105. See *supra* note 72 and accompanying text.

106. See *Cipollone*, 505 U.S. at 531 (holding failure to warn and false advertising claims preempted, but express warranty, intentional fraud and misrepresentation, or conspiracy claims not preempted).

107. Among *Cipollone's* progeny are *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (preempting common law design-defect cause of action); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) (holding common law actions to be preempted by provision of the Federal Insecticide, Fungicide, and Rodenticide Act); and *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008) (finding state law claims against medical device preempted where FDA has given premarket approval, under the Medical Device Amendments of 1976). The Supreme Court on November 3, 2008 heard oral arguments on the latest preemption case, *Wyeth v. Levine*, concerning the question of whether federal law preempts state torts claims imposing liability on drug labeling that the Federal Drug Administration had previously approved. See Alicia Mundy & Shirley S. Wang, In Drug Case, Justices to Weigh Right to Sue, *Wall St. J.*, Oct. 27, 2008, at B1.

108. Justice Blackmun argues that, “[t]he principles of federalism and respect for state sovereignty that underlie the Court’s reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously.” *Cipollone*, 505 U.S. at 533 (Blackmun, J., concurring in part and dissenting in part).

could be characterized as an unwritten practice, so long as there are no written mandates commanding that action.¹⁰⁹ Whether and when to recognize them for purposes of preemption is a line drawing exercise: Courts could conceivably preempt single state actions, or any “ongoing” state actions, or only those rising to a level of law, or none at all.¹¹⁰ When a party asserts that an unwritten practice is the unarticulated basis of a decision, it is equally possible, though perhaps increasingly improbable, to characterize each individual decision as a distinct choice.¹¹¹ Answering the question of whether federal courts should intervene requires thinking about the functions that the preemption doctrine serves and whether those favor preemption. This Part will argue that the preemption doctrine should extend to unwritten practices. Part II.A will illustrate how the Court’s prior preemption jurisprudence has already laid the doctrinal framework for this move. Part II.B will outline the policy reasons why such an expansion of the doctrine is desirable. Part II.C will address the counterarguments to such an expansion.

A. *Applicability of Prior Jurisprudence*

The Court’s doctrinal expansion of the preemption doctrine makes for a very strong case that unwritten policies should be preemptable. Part I has already illustrated the expansive and functionalist nature of the analysis. To begin, in addressing the Supremacy Clause’s wording that federal law would trump the “Laws of any State,” it should be noted that at least some unwritten practices are indeed considered “Laws”:

It would be a narrow conception of jurisprudence to confine the notion of “laws” to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text.¹¹²

Under even the narrowest possible reading of preemption, one where the doctrine only applies when federal and state laws directly con-

109. Most human behaviors, in fact, are unwritten practices, so long as they contain some degree of repetition and predictability. Getting coffee every morning and eating it with a bagel, for instance, is an unwritten practice, though hopefully not a preemptable one.

110. See Sloss, *supra* note 5, at 431–33 (comparing value of a doctrine that “effectively preclude[s] use of a Supremacy Clause remedy to address ad hoc violations” against one that “expand[s] the concept of preemption to encompass claims challenging legal rules promulgated by state executive officials”).

111. That is to say, it is always possible to characterize similar outcomes in repeated decisions as the product of chance. If one flips a coin fifty times, there is still a statistical probability—however slight—that all fifty flips will end up heads, purely as a result of random chance.

112. *Nashville, Chattanooga & St. Louis R.R. Co. v. Browning*, 310 U.S. 362, 369 (1940), cited with approval in *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978).

flict such that it is impossible to follow both,¹¹³ “custom” can be recognized as a source of law and, as such, can present a competing rule of decision for courts. A “custom” is an ancient common law concept that refers to an unwritten practice that is so “general, notorious, universal and well-established”¹¹⁴ that it can serve as an independent source of legal rules. If a party who acted contrary to federal law argues in court that she acted pursuant to a local customary rule, clearly that custom would be subject to preemption. In such a hypothetical case, federal law—or any statutory law for that matter—would preempt an affirmative assertion of custom.¹¹⁵ Doing so would confirm that there is no conceptual difficulty with using federal law to preempt a type of unwritten practice.

When using preemption affirmatively to strike down offending state laws, courts look at what Congress wrote, or absent that, what Congress intended and would have written. Thus, express preemption clauses are good indicators of Congress’s desired preemptive scope for its statutes. And examining those, it is clear that Congress frequently gives a broad definition to the types of state actions that may be preempted. In the Airline Deregulation Act of 1978, the language used is that states “may not enact or enforce a law, regulation, or other *provision having the force and effect of law.*”¹¹⁶ In the Medical Device Amendments of 1976, the language is that a State shall not “establish or continue in effect . . . any *requirement.*”¹¹⁷ In the National Traffic and Motor Vehicle Safety Act of 1966 (the “Motor Act”), examined in *Geier*, the language provided that no state “shall have any authority either to establish, or to continue in effect . . . any safety *standard.*”¹¹⁸ Though the wording differs from statute to statute, it seems clear that Congress’s emphasis is on the creation of dueling obligations or requirements, not on the technical form of the state rule. For instance, applying statutory interpretation to the Motor Act’s word “standard,” if a state department of motor vehicles had an unwritten policy of not granting registrations to any cars without side airbags, that would likely be a “standard” that could conflict with the Department of Transportation’s provenance. Nothing in that provision’s language suggests that the “standard” must be written. There, the more relevant inquiry is when courts should treat something as a “standard.”

113. See *supra* note 40 and accompanying text.

114. 25 C.J.S. Customs and Usages § 7 (2005).

115. Custom cannot even trump state law, so it seems clear that it would not stand against a federal law. See 12 Williston on Contracts § 34:10 (4th ed. 1999) (listing cases where statutes have trumped customs and usages).

116. 49 U.S.C. § 41713(b)(1) (2000) (emphasis added).

117. 21 U.S.C. § 360k(a) (2006) (emphasis added); see *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008–09 (2008) (finding language to cover tort claims).

118. Pub. L. No. 89-563, § 103(d), 80 Stat. 718, 719 (1966) (repealed 1994) (emphasis added); see *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868 (2000) (“[I]t is possible to read the pre-emption provision, standing alone, as applying to standards imposed in common-law tort actions, as well as standards contained in state legislation or regulations.”).

The wording in these statutes, though confined to their contexts, does suggest how the court should view the scope of preemption when there is no preemption provision and the court must infer the will of Congress.

In implied preemption, the Court has repeatedly stated that its “primary function is to determine whether, under the circumstances of this particular case, [a state’s] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹¹⁹ A “law” can stand as an obstacle, in that it creates conflicting obligations. However, the enforcement of a law can also create the obstacle. Mirroring Congress’s language of “may not enact or enforce” in the Airline Deregulation Act, the Court has recognized that in general, under the preemption doctrine, it is not only the promulgation of the policy, but the enforcement or threat of enforcement of that policy, that can distort federal law.¹²⁰ In the classic case *Hines v. Davidowitz*, concerning a set of registration requirements Pennsylvania imposed on immigrants, the Court found objectionable that the “[l]egal imposition of distinct, unusual and extraordinary burdens and obligations” would “subject [] [aliens] . . . to indiscriminate and repeated interception and interrogation by public officials.”¹²¹ Further, in suits based on preemption, plaintiffs nearly always seek an injunction against the enforcement of a law, along with a declaration that the law is invalid.¹²² Both those observations reflect that laws are only what are written in books; it is enforcement, or the threat thereof, by human agents that create the burdens upon individuals. While, in the unwritten practices context, there is not a textual document that can induce individuals to perform, there are past instances of enforcement that already have imposed such burdens.

The Court has recognized that the threat of enforcement, even absent legally binding obligations, can alter behavior. The best example of this is *Morales v. Trans World Airlines*, a case involving state attorneys general issuing guidelines for airline advertising.¹²³ Arguably, the Court was not concerned with the policy interpretation issued by the attorneys general, as that interpretation had no legally binding effect. It did not oblige

119. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The *Hines* formulation is frequently repeated in describing obstacle preemption, see *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000), but, in *Hines* itself, the Court was dealing with a field preemption issue, and the statement can be read more generally as a policy of when the Court should intervene in any implied preemption context.

120. In *Morales*, the state attorneys general sent “advisory memorandums” to airlines that did not comply with the guidelines warning of enforcement actions and expressing hope that “protracted litigation over this issue will not be necessary and that airlines will discontinue the practice . . . immediately.” *Morales v. Trans World Airlines*, 504 U.S. 374, 383–84 (1992); see also *supra* notes 85–89 and accompanying text (discussing *Morales*).

121. *Hines*, 312 U.S. at 65–66 (emphasis added).

122. See, e.g., *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 716 (1984) (holding that where state regulation is preempted, “enforcement of the state statute is barred by the Supremacy Clause”).

123. 504 U.S. at 379; see also *supra* notes 85–89 and accompanying text (discussing *Morales*).

the attorneys general to enforce the law in a particular way, leaving it within their discretion. And further, the attorneys general certainly could have brought misrepresentation claims against the airlines even in the absence of these guidelines. However, the Court recognized that the purpose of the guidelines was to create de facto legal obligations, in the form of advertising restrictions, upon the airlines that would be backed by the threat of sanctions, thereby creating incentives for altering airlines' behavior. Without a single suit being filed, the airlines might have altered their practices.

Cipollone v. Liggett Group, Inc.'s exploration of a positive law versus a common law action reinforces this point about enforcement.¹²⁴ In describing the legal effects of a common law suit, the Court notes that "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."¹²⁵ The deterrent effects of law do not depend on the particular form of the policy: Civil damage awards can condition behavior as well as statutory commands. It is the enforcement of the civil judgments that creates the sanctions to alter behavior.¹²⁶ With unwritten practices, the regulation is merely pushed back one step into the background and made nontransparent: The enforcement patterns that can alter behavior still remain.

B. Policy Rationales for Preempting Unwritten Practices

It is in light of the policy considerations of these prior cases that preemption against unwritten practices should be upheld, at least in certain circumstances. Unwritten practices bear strong similarities to the interpretive guidelines in *Morales*.¹²⁷ They are by definition a predictable pattern of behavior, much as interpretive guidelines are attempts to cabin discretion by articulating predictable but nonbinding patterns for the benefit of employees and the public.¹²⁸ Neither needs to have the force of law behind it to be effective. And repeated practices may even be more disruptive than the interpretive guidelines in *Morales*, as there is by definition already a trail of past practices, rather than just the specter of enforcement in the case of interpretive guidelines. By creating a pattern

124. 505 U.S. 504, 522 (1992); see also *supra* notes 93–106 and accompanying text.

125. *Cipollone*, 505 U.S. at 521 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

126. Similarly, an underenforced statute may create no incentives for altering behavior. See *infra* notes 145–147 and accompanying text.

127. See *supra* notes 85–89 and accompanying text.

128. See Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 *Admin. L. Rev.* 159, 168 (2000) ("[G]uidance documents 'are not legally binding on the public or the agency. Rather, they explain how the agency believes the statutes and regulations apply to certain regulated activities.'" (quoting *The FDA's Development, Issuance, and Use of Guidance Documents*, 62 *Fed. Reg.* 8961, 8967 (1997))).

of past enforcement and the threat of future enforcement, unwritten practices can condition the behaviors of both agency officials and the general public.

A detour into sociology can illustrate why, even without formal legal enforcement, unwritten practices can be determinative of future behavior as the practices solidify and acquire normative force. As a sociological concept, norms are “culturally defined rules of conduct . . . tell[ing] us what is proper or necessary behavior within particular roles, groups, organizations, and institutions.”¹²⁹ In one study, Robert Sugden described a norm within a Yorkshire village that gave the first person to arrive on the beach after high tide the right to collect the driftwood.¹³⁰ All that person had to do was place two stones on top of his pile of driftwood, and she could leave it on the beach with the expectation that no one else would take it.¹³¹ Such a practice may initially emerge among a group of people out of convenience, perhaps because of the practical difficulty of having to carry a massive bundle of driftwood home.¹³² It is held together because everyone benefits from having its predictability, and no one has an incentive to see it abolished.¹³³ Over time, as the practice becomes well established, participants develop a sense of right associated with the practice, and anyone who violates the rule is met with social disapproval.¹³⁴ Even without a court to uphold the gatherer’s “property rights” in that driftwood, social expectations give that gatherer an “entitlement” to his wood,¹³⁵ fully backed up by societal sanctions.¹³⁶

129. David M. Newman, *Sociology* 31 (4th ed. 2002). Sociologists have not agreed on any one particular definition of norms. Newman’s definition, for instance, leaves open the crucial question of what “culturally defined” means, a question that should concern sociologists, but probably not lawyers. Alternatively, Axelrod defines norms as “exist[ing] in a given social setting to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in this way.” Robert Axelrod, *An Evolutionary Approach to Norms*, 80 *Am. Pol. Sci. Rev.* 1095, 1097 (1986). Such a positivist definition again leaves out any mention of why it is people believe it is necessary to act in such a manner. Still, the definition serves this Note’s purposes insofar as it emphasizes the primary concern of legal regulation: the observable behavior of social actors.

130. Robert Sugden, *Spontaneous Order*, *J. Econ. Persp.*, Autumn 1989, at 85, 85–86.

131. *Id.* at 85.

132. *Id.* at 86. Sugden suggests that it may not be the “best” rule for the circumstances, but may nonetheless come to being because it spreads the fastest. *Id.* at 93.

133. *Id.* at 91. To clarify in terms of economic game theory, it might be that each individual at each instant has some incentive to break with practice and take extra benefits for himself. But, each also realizes that the rule, over time, will benefit him, and so will refrain from breaking the rule in that particular instant. Kaushik Basu, *Social Norms and the Law*, in 3 *The New Palgrave Dictionary of Economics and the Law* 476, 479 (Peter Newman ed., 1998).

134. Sugden, *supra* note 130, at 95.

135. See Newman, *supra* note 129, at 89 (“When a particular pattern of behavior becomes widely accepted and taken for granted in society, sociologists say that it has become an institutionalized norm.”).

136. *Id.* at 90 (“A sanction is a direct social response to some behavior; a negative sanction is one that punishes or otherwise discourages violations of social norms and symbolically reinforces the culture’s values and morals.”).

This account reflects how, even before normative rules are codified into statute books and court decisions, they already order human relationships through exercising a normative force. It is often observed that customary law, based on these social norms, precedes and/or coexists with written law.¹³⁷ Thinking about custom recalls H.L.A. Hart's distinction between legal obligations, with which a citizen feels some expectation to act in accordance, and "laws," which are those obligations crystallized in some written form.¹³⁸ This extralegal aspect of custom can be demonstrated by the emergence and persistence of behavior-shaping norms in primitive societies,¹³⁹ in specific industries,¹⁴⁰ and in societies where the custom outlives the positive law.¹⁴¹

When applied to state or municipal agencies, the existence of a practice that is contrary to a federal regime has two effects in shaping social behavior. The first-order effect is that a practice—as a persistent norm—may cause state employees to act systematically in ways inconsistent with the federal statutory regime.¹⁴² Though each act itself may be within the state's discretion, and does not alone violate the federal regime, the repetition suggests that, at a certain point, state actors have begun treating it internally as a matter of policy and practice. They feel themselves "obligated," perhaps out of deference to their coworkers and perhaps due to internal sanctions, to act according to an unspoken or unwritten ru-

137. See Sally Falk Moore, *Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949–1999*, 7 *J. Royal Anthropological Inst.* 95, 96 (2001) (discussing one interpretation of law as culture).

138. H.L.A. Hart, *The Concept of Law* 86 (2d ed. 1994). Hart argues that:

Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. Such rules may be wholly customary in origin Conversely, when physical sanctions are prominent or usual among the forms of pressure . . . we shall be inclined to classify the rules as a primitive or rudimentary form of law.

Id.; see also Benjamin C. Zipursky, *Legal Obligations and the Internal Aspect of Rules*, 75 *Fordham L. Rev.* 1229, 1230 (2006) (analyzing Hart's conception of legal obligation).

139. See generally Max Gluckman, *The Judicial Process Among the Barotse of Northern Rhodesia (Zambia)* (2d ed. 1967) (exploring custom-based legal system of Lozi people of Barotseland).

140. Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 *J. Legal Stud.* 115, 135 (1992) (examining how diamond industry has created own system of punishment and monitoring due to inefficiencies in common law system).

141. Basu, *supra* note 133, at 478–79 (citing caste system in India as one that might have once been mandated by law, but is now enforced through persistent social customs); Rutherglen, *supra* note 25, at 928 ("This role of custom is nowhere more evident than in the continuing influence of the law of slavery, even after its explicit abolition during and after the Civil War.").

142. Sloss, *supra* note 5, at 430 ("Consistent implementation of a state policy that is preempted by a federal statute yields systemic violations of federal law by state officers.").

bric.¹⁴³ From the perspective of any individual employee, there are multiple reasons for acting according to departmental custom: a sense of acknowledged obligation, deference to prior experience, or habit. These repeated practices, left untreated, may systematically skew a state agency's decisions out of alignment with federal policies.

The second-order effect of these systematic practices is that, much like the threat of lawsuits in *Morales* and *Cipollone*, they begin to condition and affect the behavior of the public.¹⁴⁴ News of how an agency enforces a policy extends beyond the agency to those who deal with the agency on a repeated basis. Being able to predict agency behavior in discretionary decisions means that outside actors have incentives to alter their own behavior, either to win benefits or to avoid sanctions from the agency.¹⁴⁵ In *Blessing v. Freestone*, for instance, the plaintiff argued that Arizona had an unwritten policy of systematically underenforcing its spousal contribution requirements.¹⁴⁶ If such an unwritten policy existed, a deadbeat spouse who knew of the policy would be much more likely not to contribute.¹⁴⁷ People may learn of these patterns either from the experiences of others—if the practices are widespread—or from their own repeat experiences with the agency. In either case, systemic deviations from the congressionally desired outcome will result, with magnitudes even greater than the first-order failure of the agency itself.

Nor are these distortions likely to be remedied by the state's own political system. In sociological terms, norms, formed out of an evolutionary process, are oftentimes reasonable and well adapted for the situation.¹⁴⁸ Because such norms evolve out of persistent practices, from an evolutionary standpoint, those rules of practice that do not benefit the participants will be abandoned. There must be some amount of "evolutionary stability," because there must be constant incentives to cheat, for

143. See, e.g., Newman, *supra* note 129, at 89 ("The fact that other employees accept these expectations as legitimate reinforces the idea that organizational norms shouldn't be questioned.").

144. Eric Posner, *Laws and Social Norms* 33 (2000) (arguing that when laws change, it affects both action that people take and beliefs that people have); Amartya Sen, *Normative Evaluation and Legal Analogues*, in *Norms and the Law* 247, 264 (John Drobak ed., 2006) (arguing that what is established as law has effects on society's normative values).

145. For instance, in the criminal law context, underenforcement by police results in higher levels of criminal activity, indicating in part that the deterrence function of police enforcement fails in these circumstances. See Alexandra Natapoff, *Underenforcement*, 75 *Fordham L. Rev.* 1715, 1749 (2006) (describing deleterious effects of official underenforcement practices).

146. 520 U.S. 329, 337 (1997).

147. From an economics of crime perspective, the "decision to engage in criminal activity depends on the magnitude of the expected gain from committing the act relative to the expected punishment." Stephen D. Levitt & Thomas J. Miles, *Empirical Study of Criminal Punishment*, in *Handbook of Law and Economics* 455, 458–59 (A. Mitchell Polinsky & Steven Shavell eds., 2007). An individual who knows he will not face sanctions for not contributing, in this civil context, will presumably be much less likely to do so.

148. Sugden, *supra* note 130, at 90–91 (urging "think[ing] of conventions as the products of the evolutionary processes"); see also *supra* notes 130–134.

example, by stealing the driftwood, and the informal enforcement mechanism can only do so much.

This reasonableness suggests that once a norm has emerged, it may be extremely durable, perhaps problematically so. The enduring nature of norms may suggest that the courts should not intervene to end them, in that they are beneficial norms. However, a particular norm may benefit the interests of one group and hurt those of another.¹⁴⁹ In tort law, the primary critique of using custom as the standard for negligence is that it allows industry insiders to pass the social costs of their activities to outsiders that are uninvolved with formulating the custom.¹⁵⁰ Consider a hypothetical code among police officers not to report each other for violations.¹⁵¹ Such a code would be extremely durable among officers who practice it, because it benefits them as a class, but it would be equally harmful for those injured by police misconduct.

Two realities reinforce the need to intervene. First, from the perspective of federalism, it has been noted that state actors, at least state courts, may not give the same weight to federal interests as federal actors do.¹⁵² Given separate levels of government, it is natural that state actors would seek to preserve their own authority vis-à-vis federal prerogatives.¹⁵³ Second, practically speaking, the widespread nature of these practices suggests that state policymakers have already made the decision not to act. In the § 1983 *Monell* context, courts frequently find that the policymakers have “acquiesced” in the custom or policy.¹⁵⁴ If state actors can “acquiesce” in customs which directly conflict with federal rights, they are all the more likely to do so in weaker cases of preemption where the custom merely obstructs federal interests. The persistence of the practice is itself reason to believe that it will not be corrected on its own.

149. See, e.g., Basu, *supra* note 133, at 479 (describing case of Miriam Wilngal, who sued her clan after they agreed to give her away to another clan as part of tribal contract).

150. See, e.g., *Mayhew v. Sullivan Mining Co.*, 76 Me. 100, 112 (1884) (holding that proceeding according to custom is no defense against lack of reasonable care).

151. For instance, in *Sorlucco v. New York City Police Department*, one former officer testified that the rarity of complaints against fellow officers was due to “the reprisals commonly associated with ‘breaking ranks.’” 971 F.2d 864, 872 (2d Cir. 1992); see also Anthony N. Bouza, *The Police Mystique 70–71* (1990) (describing how cops are “admitted into a secret society where a code of loyalty, silence, secretiveness, and isolation reigns”).

152. Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105, 1105–06 (1977) (noting that state courts do not vindicate federal constitutional interests with same vigor as federal courts).

153. See Jason Mazzone, *The Commandeerer in Chief*, 83 Notre Dame L. Rev. 265, 271 (noting that mechanisms of “federalism actively resist[] seamless implementation of federal programs by state and local governments”); see also *infra* notes 226–228 and accompanying text for description of the *Monell* doctrine.

154. See, e.g., *Reynolds v. Giuliani*, 506 F.3d 183, 192 (2d Cir. 2007) (“*Monell’s* policy or custom requirement is satisfied where a local government is faced with a pattern of misconduct and does nothing, compelling the conclusion that the local government has acquiesced in or tacitly authorized its subordinates’ unlawful actions.”).

C. *Federalism Interests Against Extension of Preemption*

Countervailing these federal interests in preemption are the state interests against preemption, as inheres in any federalism question. This section evaluates some possible critiques: (1) that preemption would stifle state innovation, (2) that the preemption doctrine gives too much room for judicial discretion, (3) that relief may be difficult to apply, and (4) that cases like *Gonzaga v. Doe* have already signaled a judicial turn away from intervention into state practices.

1. *Stifling State Innovation.* — From a federalism perspective, the most troubling charge against preemption is that the expansion in federal power comes at the expense of that of the states.¹⁵⁵ Besides the actually preempted laws, even the threat of preemption inhibits states from attempting to fill gaps in the federal regimes, to adapt rules for their own conditions, and to innovate by experimenting with new policies.¹⁵⁶ As applied to unwritten practices, the concern is that preemption would be reaching down into even the daily practices of state agencies, preventing them from informally trying out new approaches to problems for fear that courts will declare their policies invalid.¹⁵⁷ As it stands, courts are deferential to the discretion of state actors in areas where such discretion is permitted.¹⁵⁸ Given the complexity of federal regimes, and the potential expansiveness of obstacle preemption, allowing injunctions against mere practices may threaten the entire range of agency actions. Further, federal regimes may explicitly contemplate a cooperative relationship with states, one that would encourage state discretion and innovation.¹⁵⁹ To the extent that state autonomy and agency discretion are valuable,¹⁶⁰

155. See McGreal, *supra* note 74, at 823–24 (identifying preemption of state law as primary action affecting federal-state power balance).

156. See, e.g., Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. Rev. 1, 56 (2007) (arguing *Chevron*-style presumption against preemption would allow states to better fulfill gap-filling function); Ernest A. Young, *Federal Preemption and State Autonomy*, in *Federal Preemption* 249, 251 (Richard A. Epstein & Michael S. Greves eds., 2007) [hereinafter Young, *Preemption and Autonomy*] (“[W]here states are allowed to adopt different regulatory regimes, they are likely in many instances to satisfy a greater proportion of diverse citizen preferences, and they may achieve *better* policies through experimentation and competition among states.”).

157. See Timothy Zick, *Active Sovereignty*, 21 St. John’s J. Legal Comment. 541, 563 (2007) (arguing that federal preemption has two systemic effects: (1) displacing state innovations and (2) inducing timidity on states in regard to future reforms).

158. Prosecutorial discretion, for instance, is mostly unreviewable. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“[T]he decision whether or not to prosecute . . . generally rests entirely in [the prosecutor’s] discretion.” (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978))).

159. See *supra* notes 66–67 and accompanying text (explaining how Congress can regulate field without preempting states choosing not to participate in federal regulatory program).

160. See Buzbee, *supra* note 58, at 1576 (claiming that problem with broad federal preemption is that “it displaces multilayered institutional arrangements offering different actors, venues, and modalities for addressing a social problem”).

which they surely are, allowing preemption to reach into discretionary decisions proves troublesome.

This being said, courts have already made the policy choice that some degree of intrusion into the operation of state affairs through preemption doctrine is acceptable. The question, rather, is whether to draw the line at one particular type of state action. As Part III will argue, the line should be drawn based on the degree of interference, rather than the technical form of the policy. The chilling effect concern is minimized by the limited remedies available: The only forms of relief available in preemption are declaratory and injunctive.¹⁶¹ With no possibility of monetary damages, state actors do not have to concern themselves with financial liability.¹⁶² Accordingly, there are not the same concerns with frivolous lawsuits that might exist in the § 1983 context.¹⁶³ In addition, attorneys' fees are not available, unlike in § 1983 claims, which further limits the doctrine's usage.¹⁶⁴ Nonmonetary relief means that losing an action will not create any additional financial burdens on local governments in the way of compensatory or punitive damages, nor can preemption suits burden any particular official like § 1983 claims can.¹⁶⁵ There will still be costs in defending suits and in complying with any relief mandated by the courts, but such costs are unavoidable in the daily life of any municipal entity.¹⁶⁶

Such suits will also be limited by justiciability doctrines. In general, plaintiffs will not be able to sue merely to obtain declarations or injunc-

161. Saunders, *supra* note 3, at 712.

162. See *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (granting qualified immunity against § 1983 suits for monetary damages because "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967))); see also Barbara Kritchevsky, *Is There a Cost Defense? Budgetary Constraints as a Defense in Civil Rights Litigation*, 35 Rutgers L.J. 483, 498 (2004) ("The Supreme Court has established limits on the [§ 1983] liability of individual and government actors in response to concerns that subjecting defendants to unlimited financial liability would unduly hamper their ability to function effectively."); *The Supreme Court, 2001 Term—Leading Cases*, 116 Harv. L. Rev. 372, 381 (2002) ("The fear of burdening states and municipalities with excessive financial liability influences the Court's construal of federal statutory remedies.").

163. See, e.g., *Dawes v. Walker*, 239 F.3d 489, 497 (2d Cir. 2001) (noting that punitive damages pose incentive for prisoners to file frivolous § 1983 claims based on "concocted or imagined emotional injuries").

164. Saunders, *supra* note 3, at 712.

165. See *Harlow*, 457 U.S. at 806 (providing qualified immunity to state officials from § 1983 claims "to shield them from undue interference with their duties and from potentially disabling threats of liability").

166. To give one extreme example, the New York City Law Department had an active caseload of 90,000 lawsuits and legal matters in 2006. Office of the Corp. Counsel, N.Y. City Law Dep't, *Annual Report 3* (2006), available at http://www.nyc.gov/html/law/downloads/pdf/annual_report-2006.pdf (on file with the *Columbia Law Review*).

tions for governmental actors to obey federal law.¹⁶⁷ Rather, they must demonstrate concrete injuries.¹⁶⁸ The mootness doctrine will prevent suits in cases where the governmental action is completed and no further equitable remedy is possible.¹⁶⁹ The doctrine of *Ex parte Young*, the theory of federal jurisdiction for most preemption suits, offers a similar constraint because it only allows injunctive relief to be granted for ongoing violations of federal law.¹⁷⁰ The ripeness doctrine will also prevent plaintiffs from suing if they have only a generalized fear that the practice will apply to them.¹⁷¹ Taken in combination, these justiciability doctrines ensure that only suits against ongoing and recurring practices, causing concrete injuries to specifically affected groups of plaintiffs, will be permitted, and that permitting such suits will not result in any free-roving intervention into the daily practices of state agencies. The combination of fewer incentives to sue and more hurdles to get through should prevent state and local governments from drowning under any waves of preemption suits.

2. *The Democracy Deficit*. — The second charge against preemption is that it affords too much discretion to judges.¹⁷² Despite the presumption against preemption, the central focus on congressional intent means that courts must perform some amount of statutory interpretation in determining whether or not to find preemption.¹⁷³ Commentators have been particularly skeptical of obstacle preemption as affording judges an unchecked discretion to look into the policy justifications behind a congressional statute and preempt state policies based on their judgment of a supposed conflict.¹⁷⁴

167. *Allen v. Wright*, 468 U.S. 737, 754 (1984) (finding no standing where sole claim is to have government act in accordance with law).

168. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (holding that past exposure to harm is insufficient for standing because plaintiff cannot show likelihood of future harm by same policy).

169. See *Powell v. McCormack*, 395 U.S. 486, 496 (1969) (“[A] case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.”).

170. *Jordon v. Norfolk State Univ. (In re Jordon)*, 275 B.R. 755, 760 (Bankr. W.D. Va. 2002) (“In order to preserve the balance of federal and state interests, the *Ex parte Young* exception is limited to cases in which there is an ongoing violation of federal law by a state official.”).

171. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (“The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy ‘ripe’ for judicial resolution.”).

172. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 894 (2000) (Stevens J., dissenting) (protesting that “it is equally clear that the Supremacy Clause does not give unelected federal judges *carte blanche* to use federal law as a means of imposing their own ideas of tort reform on the States”).

173. *Young*, Two Federalisms, *supra* note 38, at 132 (“[T]he central aspects of preemption doctrine rely on process *mechanisms*—in this case, soft rules of statutory construction—to do their work.”); see also *supra* Part I.B.

174. See *supra* note 44 and accompanying text.

When talking about unwritten practices, the concern of judicial activism is doubled. In addition to using their discretion to decide the scope of the federal statute's preemptive effect, judges and juries must use their discretion to decide whether the unwritten practice exists and to determine the content of the practice.¹⁷⁵ Allowing for an open-ended analysis into repeated practices would remove the inquiry from any grounding in any policy text.¹⁷⁶ This may be problematic because, by nature, there is no bright-line rule for determining when an unwritten practice exists.¹⁷⁷ Even in traditional legal analysis of custom in contracts, courts recognized that unwritten practices might take several forms, from private understandings to common usages to binding customs.¹⁷⁸ Which practices are mere habits, and which others represent unarticulated customs, may be a hard line to police.

However, to turn the argument on its head, unwritten practices are themselves fundamentally undemocratic. Unlike a state statute or regulation, unwritten practices are not formulated via any democratically accountable means.¹⁷⁹ Rather, their unwritten nature makes them non-transparent, and hard for voters or even elected officials to evaluate. Shining light on them via the judicial process, particularly during the discovery process, may be healthy: It would force state officials to articulate their policies and their rationales, and in turn help define the policy in the public's eye. According to Judith Resnik, one historical function of the judicial process has been to expose the grievances of parties to a wider audience and, in adjudicating the truthfulness of those claims, to serve as an institution "to gather, to record, and to disseminate information."¹⁸⁰ This function of the judicial process is particularly relevant in the unwritten practices context because the lack of transparency concern-

175. In § 1983 cases, some courts have imposed pleading requirements on plaintiffs requiring them to allege what the policy being challenged is, and to demonstrate how the policy was a proximate cause of their injury. See Colleen R. Courtade, Annotation, What Constitutes Policy or Custom for Purposes of Determining Liability of Local Government Unit Under 24 U.S.C.S. § 1983—Modern Cases, 81 A.L.R. Fed. 549, 559–61 (1987) (discussing court-created pleading standards for § 1983 claims against municipalities). By analogy, the existence and context of the practice will probably also be an issue of litigation in the preemption context.

176. See Saunders, *supra* note 3, at 711 (“[A]dvocates should shy away from asserting preemption challenges based on *unwritten* policies unless, as in *Livadas*, there is clear written evidence of the policy.”).

177. See 25 C.J.S. Customs and Usages § 46 (2005) (discussing standards of proof for existence of custom).

178. See, e.g., *Eames v. H.B. Clafflin Co.*, 239 F. 631, 634 (2d Cir. 1917) (distinguishing between usages and customs based on their duration and notoriety).

179. See Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 Admin. L. Rev. 1071, 1128 (2005) (“Flexible regulatory relations that are articulated, formalized, and designed with clear risk calculations in mind can be more effective, transparent, and legitimate than using flexibility as an informal and unwritten practice.”).

180. Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 Chi.-Kent L. Rev. 521, 528–29 (2006).

ing the practices poses a significant barrier to evaluating their legality. If the unwritten policy is one that is ultimately desirable, having it struck down still leaves state actors the opportunity to act via the formal legislative or administrative processes to craft an alternative policy that would be compatible with the federal regime. And even where the unwritten practice survives the judicial process, its articulation in the public's eye may lead to efforts for reform.

3. *The Problem of Crafting Relief.* — The third objection is the difficulty of crafting injunctive relief.¹⁸¹ With preemption of written policies, courts may simply invalidate the policy and prohibit state agents from enforcing actions based on it.¹⁸² With unwritten policies, however, there is nothing to invalidate. The practices are at least partly habitual, so simply declaring the policy preempted may not be enough. Especially in decisions where the state agent inherently has discretion to act, it may be difficult to tell when any given decision in the future is made with the impermissible policy considerations in mind.¹⁸³ This might be an especially serious issue in cases where the state actors deliberately left the policy in unwritten form to avoid judicial scrutiny. Injunctive relief in such situations will involve more judicial involvement than ordinary preemption cases and might subject the court to continuous monitoring of a state's compliance.¹⁸⁴

Even without the availability of injunctive relief, however, suits against unwritten practices have value as a means to force information from and shine light on state agencies.¹⁸⁵ A preemption suit in the first instance would only present a clear statement of what conduct is impermissible, giving guidance to the agencies. In most instances, that should be enough. Compared to § 1983 claims, preemption claims target policy choices rather than individual decisions, so most cases will only require there to be a corrective, probably written, policy to be promulgated. No punitive or compensatory measures are available. In the rare instance where state or city agencies are entrenched in their practices, preemption-type litigation is still necessary to highlight the issue. Litigation serves as what Sabel and Simon call “destabilizing rights”—claims against institutions that “chronically fail[] to meet their obligations and that are substantially insulated from the normal processes of political accountabil-

181. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281, 1292 (1976) (articulating differences between injunctive and monetary relief, including that injunctive relief is more constrictive, involves continuous monitoring, may change over time, and requires court to take “public responsibility” for its decrees).

182. *Cippollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (“[S]tate law that conflicts with federal law is ‘without effect.’”).

183. See *supra* notes 14–23 and accompanying text.

184. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *Harv. L. Rev.* 1015, 1024 (2004) (noting that court-ordered injunctions in institutional reform cases often took form of “highly detailed regulatory codes embracing vast provinces of administration”).

185. See *supra* note 180 and accompanying text.

ity.”¹⁸⁶ Court intervention in such cases is desirable as a means of triggering reform of institutional practices that otherwise would not occur.¹⁸⁷ It is not always necessary for courts to mandate courses of action. It may be enough for the courts to spell out clearly what the federal law requires and force the state actors to examine their own practices in light of those requirements.¹⁸⁸ Litigation serves to highlight issues requiring redress and provides a spur toward reform.¹⁸⁹

As a last resort, where the institution refuses to provide its own solutions and requires active judicial monitoring and intervention,¹⁹⁰ the courts can rely on the injunctive tools they have developed in their extensive experience with institutional reform litigation.¹⁹¹ The issues presented in a potential preemption case with a recalcitrant defendant agency are the same ones of monitoring and compliance that exist in any institutional reform case.¹⁹² And, with regard to methods, as Malcolm Feeley and Edward Rubin describe in the prison reform context,¹⁹³ courts might begin by setting out doctrinal standards, and then translate those standards into detailed instructions, produced either by negotiation

186. Sabel & Simon, *supra* note 184, at 1020

187. *Id.* at 1062.

188. For instance, in *Osterback v. McDonough*, 549 F. Supp. 2d 1337 (M.D. Fla. 2008), prisoners at Florida’s Everglades Correctional Institution sued, claiming that the state’s closed management system for prisoners unable to live in the general population violated the Eighth Amendment. Rather than litigate, the prison system proposed a set of institutional reforms that the court found were superior to what the court would have ordered had the plaintiffs prevailed at trial. *Id.* at 1340–41.

189. See Sabel & Simon, *supra* note 184, at 1064 (“Public law norms play a role analogous to antitrust law in disrupting institutions that have become steeled to political pressures.”); see also Carrie Menkel-Meadow, Getting to “Let’s Talk”: Comments on Collaborative Environmental Dispute Resolution Processes, 8 Nev. L.J. 835, 842 (2008) (arguing that collaborative problem solving between various stakeholders in dispute has become valuable tool for institutional reform).

190. These will be exceedingly rare cases: Cases concerning blatant injury, especially constitutional injury, will be litigated under § 1983 or the statutory regime’s own private right of action. Preemption cases will tend to involve more technical issues of statutory interpretation, meaning that there is less incentive for defiance or conscious noncompliance with judicial decrees.

191. See David Zaring, National Rulemaking Through Trial Courts: The Big Case and Institutional Reform, 51 UCLA L. Rev. 1015, 1020–21 (2004) (noting, as result of wave of consent decrees in 1990s, that public housing authorities and school districts throughout country either face suits, have reformed their practices, or are under court decrees); see also *Freeman v. Pitts*, 503 U.S. 467, 472–74, 485 (1992) (filing of class action seeking desegregation of a Georgia school system resulted in judicial oversight of the school system for over twenty years).

192. Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons* 322 (1998) (arguing that judges function well as administrators, drawing upon well-established administrative methods and their personal experiences).

193. Again, prison reform presents many more intractable issues than preemption is likely to, because preemption deals with particularized conflicts of law, most likely on technical issues rather than broad swaths of institutional change. The example only indicates the tools available to the courts in the last resort.

between parties or by judicial decree.¹⁹⁴ These standards then could be imposed and monitored by either the existing administrative staff, or, in the most intractable cases, by appointing outside supervisory staff to monitor progress. There are admittedly no simple solutions in such cases; the appropriate solution will depend much on the circumstances of the case and may indeed require continuous intervention.¹⁹⁵ While such cases will undeniably create these heavier burdens on an already burdened judiciary, they are also precisely the cases where intervention is most desirable because the practice is most entrenched.

4. *Gonzaga and the Problem of "Rights."* — In the § 1983 context, the Court has shown that it is very concerned with federalism issues in private actions. This concern might counsel against expanding preemption actions against unwritten state policies. In *Gonzaga*, the Court took a step toward restricting the availability of § 1983 actions by requiring that there be an “unambiguous” [congressional] intent to confer individual rights” for there to be a private right of action under § 1983.¹⁹⁶ There, the Court’s concern was partly federalism, requiring Congress to speak clearly before “alter[ing] the ‘usual constitutional balance between the States and the Federal Government.’”¹⁹⁷ Its analysis emphasized that, at least in Spending Clause regulations, the responsibility for ensuring states’ compliance lay with the federal government, not the beneficiaries of the regulatory scheme.¹⁹⁸ Because § 1983 and preemption actions do overlap, and because both have the same concerns with private parties seeking federal intervention into state practices, it is possible that this type of concern may carry over into preemption actions.

At least one circuit has already rejected this effort to import *Gonzaga*’s restrictions to preemption.¹⁹⁹ The Supreme Court has also distinguished between preemption and § 1983 cases. In *Golden State Transit*, a case most well known for holding that the Supremacy Clause creates no rights enforceable under § 1983, the Court noted that “[g]iven the variety of situations in which preemption claims may be asserted, in state court and in federal court, it would obviously be incorrect to assume that a federal right of action pursuant to § 1983 exists every time a federal rule of law pre-empts state regulatory authority.”²⁰⁰ This is a recognition that

194. Feeley & Rubin, *supra* note 192, at 303–11.

195. Chayes, *supra* note 181, at 1298–302 (describing process of creating decrees in public interest litigation as negotiated process, with judge as arbiter, heavy involvement by outside advisors, and ongoing remedial regime).

196. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

197. *Id.* at 286 (quoting *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989)).

198. *Id.* at 287–90.

199. *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 335 (5th Cir. 2005) (“[W]e note that *Gonzaga*, by its terms, applies only to § 1983 claims The Supremacy Clause claim advanced here by Appellees is not based on a claim of right under [the federal statute], nor is it a claim for damages; it is a preemption claim.”).

200. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107–08 (1989).

preemption does cover a greater variety of situations: ones where federal and state laws conflict, or where state regulation is impermissible, even if no actual right has been violated.

In contrast to § 1983 claims, preemption does not depend on the violation of a private “right.” Rather, the private individual’s suit is to vindicate both his own interest and those of the federal regime against inconsistent state actions.²⁰¹ *Gonzaga* itself distinguishes “institutional policy and practice,” which have an “aggregate” focus, as the types of state actions that do not create private rights.²⁰² Yet institutional policies are the heartland of the preemption doctrine. While § 1983 is concerned with compensation for violations, preemption is concerned with remedying inconsistent regulations.²⁰³ So on a doctrinal level, it seems preemption can survive *Gonzaga*’s analysis.

Finding the correct balance is difficult. Supporting the case for preemption are the federal interests embodied in the statutes and the course of prior preemption jurisprudence. The federal courts have shown that the central determination of whether the state policy conflicts with federal interests trumps the form that such a policy takes. *Morales* and *Cipollone* both support the extension of the preemption doctrine beyond legislatively or administratively promulgated positive law. Countervailing interests do caution against the liberal expansion of the doctrine. The nature of the doctrine means that federal law will be intruding further into states’ autonomous decisionmaking processes. Moreover, the decision to characterize the practice and to preempt will be made by judges, possibly creating accountability issues. The decisions may require active judicial intervention, as courts need to monitor the progress of the injunctions. And finally, it is an expansion that goes against the Court’s recent contraction of the judicial enforceability of federal statutory entitlements in the § 1983 context.

III. HOW COURTS SHOULD TREAT UNWRITTEN PRACTICES

From the discussion in Part II.A, it seems clear that at least some unwritten practices have sufficient potential to interfere with federal regimes such that preemption should be triggered. However, Part II.B suggests that courts seeking to do so should exercise great caution, lest they intrude too much into the autonomy of local actors and upset the delicate balance of federalism. Thus the question becomes one of line drawing: Which types of practices pose sufficient harm to justify the federal intervention into local agencies? This Part argues that individual violations should not be actionable, because that would pose too much of an

201. See *supra* Part I.B.

202. *Gonzaga*, 536 U.S. at 288 (quoting *Blessing v. Freestone*, 520 U.S. 329, 343 (1997)).

203. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992) (holding state law causes of action preempted to extent they impose additional requirements beyond those in federal law).

intrusion into state discretion, but systemic interferences should be, if the integrity of the federal regime is to be preserved. It then proposes using the § 1983 definition of custom, that of practices “persistent and widespread” enough to acquire the “force of law,” as the standard of analysis. This accords with the Court’s own thinking in *Monell* and subsequent municipal liability cases,²⁰⁴ and provides a sufficient barrier against excessive intrusion into federalism and administrative inconvenience.

A. *The Broadness of the Preemption Analysis Requires a High Threshold*

Courts should allow unwritten policies to be preempted in some circumstances. Doctrinally, the Court has rarely distinguished in preemption analysis among the different forms of state policy: statutes, regulations, ordinances, administrative orders, and guidance statements.²⁰⁵ That indicates that the concern is with the strength of the federal interest and the degree of conflict, not with the form that the policy takes. The Court has even entertained arguments in *Idaho v. Coeur d’Alene Tribe of Idaho* that state “statutes, ordinances, regulations, customs, or usages which purport to regulate, authorize, use, or affect” certain lands of Indian reservations should be declared invalid, without drawing any distinction between “statutes, ordinances, regulations” on the one hand and “customs, or usages” on the other.²⁰⁶ From a policy perspective, the same concerns animating the preemption doctrine, like conflicting obligations on citizens and inconsistent application of laws, exist whether the rule is written or unwritten.²⁰⁷

The fact that unwritten or unspoken practices have, in other settings, been recognized is itself a strong argument for recognizing them in the preemption context. There are simply too many behavioral patterns that do not emanate from written policies, but which nonetheless have substantial real world effects. Unwritten but observed practices play an important role in supplementing positive law in common law subjects like contracts²⁰⁸ and property;²⁰⁹ in constitutional and statutory settings

204. See *infra* notes 227–229 and accompanying text.

205. See *supra* Part I.C.

206. 521 U.S. 261, 265 (1997).

207. Sloss, *supra* note 5, at 432 (“Systemic violations of federal law by state officers threaten the supremacy of federal law, and undermine the goal of keeping government within the bounds of law . . .”).

208. See, e.g., *Eames v. H.B. Claffin Co.*, 231 F. 693 (2d Cir. 1916) (noting importance of custom in giving meaning to contracts).

209. See, e.g., *Ghen v. Rich*, 8 F. 159, 161 (D. Mass. 1881) (“[A]lthough local usages of a particular port ought not to be allowed to set aside the general maritime law, this objection did not apply to a custom which embraced an entire business, and had been concurred in for a long time by every one engaged in the trade.”); *Oregon ex rel. Thornton v. Hay*, 462 P.2d 671, 678 (Or. 1969) (“It seems particularly appropriate in the case at bar to look to an ancient and accepted custom in this state as the source of a rule of law.”).

through § 1983; and in international law.²¹⁰ To disallow a preemption suit against an unwritten practice would create an illogical loophole, one that would incentivize state agencies to leave their policies unwritten. Rather than a *per se* disallowance, the sounder approach is to create a judicial test that can reconcile the conflicting desires for federal uniformity and state autonomy.

In attempting to draw such a line, David Sloss presented two possibilities for when to preempt practices: either preempt any executive action so long as it is “ongoing,” or do so only if it is equivalent to the promulgation of a “legal rule.”²¹¹ Though Sloss argues for a broader reach for preemption, one that reaches any “ongoing” practices, requiring the equivalence of a legal rule is healthier for maintaining the balance of federalism. Sloss himself acknowledges that preempting any ongoing action would risk a fair degree of “federal judicial interference with state executive action.”²¹² As a doctrine, preemption has the potential to cover a much broader range of state actions than § 1983 or any other form of relief available in federal courts, as it extends beyond violations of federal law to any state action that is even inconsistent, or obstructive, of federal purposes.²¹³ Though there is a presumption against preemption, the inquiry nonetheless unavoidably remains a policy-driven analysis balancing federal and state interests.²¹⁴ An approach that made all “ongoing” actions vulnerable would subject almost any executive action, no matter how informal, to potential preemption so long as it could be characterized as somehow obstructing the purpose of a federal law and likely to occur again on an “ongoing” basis.

The alternative approach would only preempt executive actions if they rise to the level of *de facto* laws, akin to a “custom.” Requiring there to be a *de facto* legal rule, rather than merely an ongoing practice, is desirable because of the expansive nature of the preemption inquiry. Such a threshold ensures that the entity has made a deliberate or conscious choice and that the practice will likely not change absent judicial intervention. And particular to preemption, it ensures that it is a practice capable of being characterized as a “law” that is being preempted, which is important because the Supremacy Clause requires the hook of the “Laws of any State.” Though admittedly restrictive in contrast to Sloss’s proposal, this standard serves several purposes.

First, it ensures that the court is dealing with systemic issues, rather than individual violations. Preemption doctrine is primarily used as a

210. See, e.g., *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 41 (Feb. 20) (recognizing possibility of customary international law developing from unwritten norms); see also Jeffrey L. Dunoff et al., *International Law: Norms, Actors, Process* 78 (2d ed. 2006) (providing overview of international customary law).

211. Sloss, *supra* note 5, at 431–32.

212. *Id.* at 432.

213. See *supra* Part I.A.

214. See *supra* Part I.B.

structural device to ensure that federal regimes are not being systematically interfered with by state actions (or threat of actions).²¹⁵ In contrast, § 1983 is the preferable mode for bringing claims of violations of individual rights.²¹⁶ A high threshold would target only those practices that rise to the level that they begin to interfere with a state's overall ability to coexist with a federal regime. Such practices not only encourage state actors to change their behavior, but they also create incentives for the public that differ from those created by the federal regime. As a matter of degree, the requirement of a *de facto* law ensures that state practices are interfering with the federal regime in a significant way and on a repeated basis.

Second, forcing parties to prove that a *de facto* law exists creates an evidentiary burden that ensures that courts have some guidance in ascertaining whether a custom, with obligations attached, exists and what its contents are. A customary practice, by nature, is likely one that the participants feel some obligation to follow.²¹⁷ That sense of obligation is necessary to distinguish passing habits from persistent practices that require intervention.²¹⁸ Courts should refrain from intervening prematurely or too frequently, both because some acts may in fact be legitimate exercises of the state officer's discretion,²¹⁹ and because judicial intervention may be both costly and cumbersome. Intervention should be necessary only when that discretion is being cabined by a sense of obligation to some unspoken rule, unarticulated but nonetheless guiding decisions. Exercising this restraint gives courts sufficient evidentiary material to consider the contents of the customary rule in cases where the parties dispute whether such a policy in fact exists, and reduces the possibility of error from the false positives of a few isolated instances appearing to create a pattern. Requiring a *de facto* law would trigger intervention only when courts have evidence that it is indeed the impermissible policy motivating the decisions.

215. See *supra* Part I.B.

216. Though the two are not mutually exclusive, the availability of monetary damages and attorneys' fees in § 1983 claims makes it a superior cause of action where an actual violation of a federal right exists. This suggests that the preemption doctrine does not need to expand to cover individual and isolated injuries.

217. See *supra* notes 129–141 and accompanying text.

218. See *Calhoun v. Ramsey*, 408 F.3d 375, 380 (7th Cir. 2005). The court wrote: No government has, or could have, policies about virtually everything that might happen. The absence of a policy might thus mean only that the government sees no need to address the point at all, or that it believes that case-by-case decisions are best, or that it wants to accumulate some experience before selecting a regular course of action. At times, the absence of a policy might reflect a decision to act unconstitutionally, but the Supreme Court has repeatedly told us to be cautious about drawing that inference.

Id.

219. This recalls the observation of the Ninth Circuit from *Livadas v. Aubry*, 987 F.2d 552, 559 (9th Cir. 1991), that no one has a right to a correct application of the law. See *supra* notes 14–24 and accompanying text.

Third, judicial restraint is desirable to prevent courts from forcing policy choices upon the state or city by mandating that they enforce any particular area of law to the exclusion of others.²²⁰ In situations where there is a custom of nonenforcement or selective enforcement, for instance, it may be difficult, though critically important, to be able to distinguish between policy-based underenforcement on one hand and mere lack of funds or of enforcement resources on the other.²²¹ For example, suppose a municipality is shown to never arrest husbands accused of domestic violence. That, by itself, is not evidence of a policy, because it could be that the municipality simply lacks resources to enforce many of its other laws.²²² A court needs evidence of a comparison: what the municipality does in one set of cases versus what it does in another.²²³ Further, some selective enforcement is unavoidable in circumstances requiring an allocation of resources.²²⁴ Preemption should be triggered only where it can be shown that the discretion to enforce is based on a conscious or implicit policy choice, that the policy choice led to selective underenforcement, and that the policy choice is strongly in disaccord with the relevant federal regime. Those three showings would require there to be a compelling record of agency behavior before the courts choose to act.

Finally, there is no need for preemption doctrine to capture individual actions. Section 1983 is the preferred remedy for any individual violations, because it is designed for that purpose and offers ancillary benefits like the availability of monetary damages and attorneys' fees. Preemption in this context is best seen as a complement to § 1983 actions.²²⁵ Section 1983 can capture isolated state actions, but only ones rising to the level of violating a definable federal right. It can not only remedy systemic issues,

220. Cf. *Blessing v. Freestone*, 520 U.S. 329, 343–44 (1997) (indicating Court's view that when looking at systemic institutional results, there will inevitably be those whose needs go unmet).

221. Natapoff, *supra* note 145, at 1719 (“[U]nderenforcement is one way the state participates in social contests over resources, power, and legitimacy by staying its enforcement hand in selective ways.”).

222. Cf. David A. Martin, *On Counterintuitive Consequences and Choosing the Right Control Group: A Defense of Reno v. AADC*, 14 *Geo. Immigr. L.J.* 363, 374 (2000) (“[I]n a system [of immigration] inevitably marked by significant underenforcement, many well-counseled respondents can find a nonfrivolous foundation at least to launch a selective enforcement suit.”).

223. This approach was taken in *Sorlucco v. New York City Police Department*, where the court examined the department's record toward males against its record toward females in disciplinary decisions. 971 F.2d 864, 872 (2d Cir. 1992). Also in the Second Circuit, plaintiffs trying to show an equal protection violation in the domestic violence police enforcement context must “adduce[] evidence sufficient to sustain the inference that there is a policy or a practice of affording less protection to victims of domestic violence than to other victims of violence in comparable circumstances.” *Eagleston v. Guido*, 41 F.3d 865, 878 (2d Cir. 1994).

224. William J. Stuntz, *Self-Defeating Crimes*, 86 *Va. L. Rev.* 1871, 1874–80 (2000) (pointing out that vice laws are inevitably prone to selective enforcement).

225. See *supra* notes 200–203 and accompanying text.

but also compensate a victim, and make her whole. Preemption can capture a broader set of state actions that obstruct or interfere with federal regimes, but should do so only where such actions occur at the systemic level. It cannot give any personal compensation, trading its broader scope for a less invasive remedy.

B. *How the “Persistent and Widespread” Analysis Should Work*

Doctrinally, to determine when a practice has become a de facto law, this approach could borrow the custom analysis from the extensive jurisprudence in § 1983 municipal liability claims, which use “persistent and widespread” as the standard to determine the existence of custom.²²⁶ Like municipal liability, preemption is concerned with policies—repeating or potentially repeating interferences with federal law—rather than with individual instances. Under the § 1983 case *Monell v. Department of Social Services of the City of New York*, plaintiffs can sue municipalities for constitutional injuries if the municipality’s “policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers” caused the municipal officer to violate the plaintiff’s rights.²²⁷ Beyond those official sources, the Court addressed unwritten practices and noted that “such practices of state officials could well be so permanent and well settled as to constitute a ‘custom or usage’ with the force of law.”²²⁸ In the § 1983 context, the existence of a law or custom serves as a method for attribution, limiting municipalities’ liability to those acts for which they had formulated some type of policy.²²⁹ The existence of the policy creates the causal link between the actions of the municipality, its agents, and the harm to the plaintiff. “Persistent and widespread” implies constructive knowledge on the part of the municipal policymakers and assumes that, absent judicial intervention, the municipality would not act to correct the practice itself. Those same limiting principles are, as argued above in Part III.A, similarly desirable in the preemption context.

Drawing lessons from § 1983 jurisprudence, what constitutes “persistent and widespread” sufficient to find a de facto law or custom in a particular case will be a heavily fact-specific analysis, a question best suited for the jury.²³⁰ In cases where the unwritten practice developed as a mat-

226. There are many potential formulations of this test. *Monell* itself refers to it as “permanent and well-settled.” *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978). I borrow “persistent and widespread” from the Second Circuit’s formulation. See *Sorlucco*, 971 F.2d at 870; see also *Gaffney v. Dep’t of Info. Tech. & Telecomms.*, 536 F. Supp. 2d 445, 474 (S.D.N.Y. 2008) (citing *Sorlucco* for same language).

227. 436 U.S. at 690.

228. *Id.* at 691 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167–68 (1970)).

229. This avoids respondeat superior liability, whereby a municipality would be responsible for any act of its employees. *Monell*, 436 U.S. at 691.

230. In municipal liability claims, whether there exists an informal policy or custom is a question of fact for the jury. Cf. *Hickok v. Orange County Cmty. Coll.*, 472 F. Supp. 2d 469, 476 (S.D.N.Y. 2006) (holding plaintiff’s evidence “insufficient to allow a reasonable jury to conclude that Defendant had a policy or custom”).

ter of administrative convenience and the conflict with federal law was simply not considered, state and municipal agencies may be willing to articulate the policy themselves, when prompted to do so by a court. For instance, in *Livadas v. Bradshaw*, the agency itself described its unwritten policy in a letter to the plaintiff.²³¹ Absent any bad faith, the court can in those cases rely on the agency's articulation as the policy, without needing to proceed to the "persistent and widespread" analysis.

In situations where the agency denies that a practice exists, or contests its content, the key factors for the court should be: (1) how many instances, (2) over what period of time, (3) with how much variation, (4) practiced by how many officials, and (5) involving how many, if any, decisionmakers? The first factor, quantity, looks to how many instances of the specific outcome the plaintiffs can identify, through their own knowledge and potentially through discovery.²³² The second, time, looks to how long the practice has endured, and in combination with the first factor, how frequently the practice occurs.²³³ The third, variation, looks to how consistently the particular practice occurs in a given situation and what alternative choices the agency has made during that time.²³⁴ The fourth, number of practitioners, looks to whether the decisions were made by isolated individuals or practiced throughout the agency.²³⁵ Finally, the fifth looks to whether the agency's top decisionmakers explicitly condoned the practice or otherwise could be held to have had constructive knowledge of it.²³⁶ Courts have applied these factors in varying combina-

231. See *supra* notes 14–24 and accompanying text.

232. See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823–24 (1985) (holding that single instance of violation is never sufficient to infer existence of practice); *Calhoun v. Ramsey*, 408 F.3d 375, 381 (7th Cir. 2005) ("Although the Court has therefore left room for this 'narrow range of circumstances' [where a single instance may be enough], it is telling that no court has directly addressed such a case."); *Bissinger v. City of New York*, Nos. 06 Civ. 2325(WHP), 06 Civ. 2326(WHP), 2007 WL 2826756, at *3 (S.D.N.Y. Sept. 24, 2007) (holding allegations of multiple incidents of wrongful policy conduct sufficient to raise inference of municipal policy or custom and defeat summary judgment on issue).

233. See, e.g., *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1530 (D. Conn. 1984) (relying heavily on fact that police department was unresponsive to plaintiff over period of eight months to find inference of custom sufficient to defeat motion to dismiss). Time can cut both ways: It can either show that a practice is longstanding and thus "persistent," or, if the plaintiffs can only show a few instances over a long period of time, it can indicate that the practice is sporadic and infrequent.

234. See *infra* note 240 and accompanying text for an example of how one court performed this analysis.

235. See *Webster v. City of Houston*, 689 F.2d 1220, 1222, 1227 (5th Cir. 1982), vacated en banc, 735 F.2d 838 (5th Cir. 1984) (finding custom where evidence showed that seventy-five to eighty percent of municipality's police officers carried "throw down" guns: "weapon[s] which police officers, having killed (or wounded) an unarmed suspect, [could] put at [the suspect's] side to justify the shooting").

236. *Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984) (per curiam) ("Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.").

tions, but, for the most part, have refrained from laying down a rigid rule and have proceeded instead in case-by-case analyses.²³⁷

In this multi-factor test, *Sorlucco v. New York City Police Department* illustrates the types of evidence that may be deployed in the analysis.²³⁸ The plaintiff in the case, a probation officer with the New York Police Department, claimed that the police department practiced gender discrimination in the disciplining of officers.²³⁹ The district court entered judgment notwithstanding the verdict for the defendant, ruling that Sorlucco's statistical evidence had too small a sample size²⁴⁰ and that the particulars of each case differed too significantly to be comparable. The circuit court, in reversing, held that even though the sample size was small, the relevant comparison was the percentage that was terminated in each gender, which was sixty-four percent for males and one hundred percent for females. It also examined the particularities of each case in the sample and found them comparable across gender lines. The circuit then held that the statistical data, though perhaps insufficient by itself, could in combination with plaintiff's own anecdotal experience establish the existence of a practice.²⁴¹ Though contexts will vary, taking *Sorlucco* as an example, it is likely that the major types of evidence in determining the existence and content of any practice or custom will be the facts of the case at hand, the testimony of the agency officials, surveys of line-level employees, and statistical analysis.

237. As Chayes argued three decades ago in the impact litigation context,

In public law litigation, then, factfinding is principally concerned with "legislative" rather than "adjudicative" fact. And "fact evaluation" is perhaps a more accurate term than "factfinding." . . . The extended impact of the judgment demands a more visibly reliable and credible procedure for establishing and evaluating the fact elements in the litigation, and one that more explicitly recognizes the complex and continuous interplay between fact evaluation and legal consequence.

Chayes, *supra* note 181, at 1297.

238. 971 F.2d 864 (2d Cir. 1992).

239. Officer Sorlucco filed a complaint against a fellow officer for sexually assaulting her in her apartment. The police department placed her on modified assignment—commonly perceived as a punishment—for failing to safeguard her weapon, but took very few measures against the male officer accused of assaulting her. *Id.* at 865–69.

240. The statistical study documented that between 1980 and 1985, "a total of forty-seven probationary officers were arrested. Of those, twelve resigned leaving thirty-five subject to departmental discipline. Thirty-one of the remaining officers were men; nine were reinstated, and twenty-two were fired. All four of the women probationers who had been arrested, however, were terminated." *Id.* at 871.

241. *Id.* at 872. *Sorlucco* cites to other cases in this vein. See *id.* ("[I]nter alia, evidence showing that in plaintiff's particular case police conduct over a period of time would support a finding of discriminatory police practice." (internal parentheses omitted) (citing *Watson v. Kansas City*, 857 F.2d 690, 696 (10th Cir. 1988))); *id.* ("[S]mall statistical sample, taken in conjunction with other evidence indicative of bias, was sufficient to support an inference of discriminatory practice . . ." (internal parentheses omitted) (citing *Ingram v. Madison Square Garden Ctr., Inc.*, 709 F.2d 807, 810–11 (2d Cir. 1983))).

There is also room in the “persistent and widespread” analysis for the courts to account for other policy points of the preemption doctrine.²⁴² The regulatory context is highly relevant for whether federal uniformity and preemption are desirable.²⁴³ Where there are strong federal interests or where the interference is severe, the evidentiary standard for establishing a “persistent and widespread” custom could be lessened, and vice versa.²⁴⁴ Where state discretion is allowed for in the structure of the statute,²⁴⁵ the evidentiary burden should be especially high to give states the freedom to choose whether to characterize their own acts as discretionary or as policy-driven.

C. *Preemption Analysis as Applied to Gonzaga University v. Doe*

This framework for preemption of unwritten practices would serve as an additional theory for correcting structural problems in federal-state relationships. The fact pattern of *Gonzaga University v. Doe* can illustrate how a preemption case might arise.²⁴⁶ There, a school official overheard a conversation about a potential case of sexual assault by a student, John Doe, against another student.²⁴⁷ John Doe was in the School of Education and required a teaching certification upon graduation. In the course of the subsequent investigation into the matter, the school officials contacted the Office of the Superintendent of Public Instruction (OSPI) six times.²⁴⁸ As developed at trial, Gonzaga University apparently had a policy of disclosure and consultation with OSPI in such investigations for students about whom they had concerns, prior to submitting applications for teaching certification.²⁴⁹ When his teaching application was subsequently rejected, John Doe sued the school.

One of the claims John Doe brought against the university was a § 1983 action for its violation of the Federal Educational Rights and Privacy Act (FERPA).²⁵⁰ The relevant section reads: “No funds shall be

242. See *supra* Part I.B.

243. Young, *Preemption and Autonomy*, *supra* note 156, at 258–64 (distinguishing between how preemption operates in safety standards context from that in environmental protection context).

244. *Carter v. District of Columbia*, 795 F.2d 116, 124 (D.C. Cir. 1986) (noting in dicta that “[e]gregious instances of misconduct, relatively few in number but following a common design, may support an inference that the instances would not occur but for municipal tolerance of the practice in question”); *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984) (“Where the violations are flagrant or severe, the fact finder will likely require a shorter pattern of the conduct to be satisfied that diligent governing body members would necessarily have learned of the objectionable practice and acceded to its continuation.”).

245. See *supra* note 69 and accompanying text.

246. 536 U.S. 273 (2002).

247. *Doe v. Gonzaga Univ.*, 992 P.2d 545, 549 (Wash. Ct. App. 2000), *aff’d in part and rev’d in part*, 24 P.3d 390 (Wash. 2001) (en banc), *rev’d*, 536 U.S. 273.

248. *Id.* at 550.

249. *Doe v. Gonzaga Univ.*, 24 P.3d at 400.

250. *Doe v. Gonzaga Univ.*, 992 P.2d at 551.

made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents”²⁵¹ In rejecting John Doe’s claim, the Supreme Court created the presumption against enforceable rights and held that FERPA did not create any such rights.²⁵²

Though Gonzaga avoided financial liability under § 1983, the university did violate FERPA’s privacy provision through its consultation with OSPI. When such systemic problems occur, preemption offers a corrective mechanism. The evidence in *Gonzaga* was strongly in favor of finding a “persistent and widespread practice”: The testimony of the OSPI officer at trial suggested that this type of disclosure was commonplace prior to the submission of teacher certification applications.²⁵³ This type of informal communication, occurring over the telephone, does have its benefits,²⁵⁴ which accrue to both the school and the state agency, which in turn means that neither side has a real incentive to deviate from it.²⁵⁵

However, against the benefits to these players, there must be weighed the federal interests of protecting the privacy of the individual student, as embodied in FERPA. As the Washington Supreme Court noted, the congressional joint statement in explanation of FERPA articulated one of its two goals as “‘to protect such individuals’ rights to privacy by limiting the transferability of their records without their consent.’”²⁵⁶ When Gonzaga University accepted federal funding, it accepted the restraint that the funding placed upon it for student privacy. That a federal rule comes from Spending Clause legislation does not make it any less binding, once accepted by the state.²⁵⁷ In this case, it is hard to imagine a clearer case where the privacy of a student was violated: A school, without notifying either the student or his parents, released materials from a pending internal investigation, in which no due process safeguards existed, to a state agency that determined the student’s professional future.

Preemption works here because such a violation, assuming the facts were developed more clearly in this direction, was part of a persistent and widespread pattern of behavior that clearly harmed federal interests as embodied in a statute. Further, because of the benefits to the school, it was also likely to go uncorrected absent judicial intervention. Per *Gonzaga*, such a federal interest may not be the sort that gives rise to

251. 20 U.S.C. § 1232g(b) (2000).

252. *Gonzaga Univ. v. Doe*, 536 U.S. at 290.

253. *Doe v. Gonzaga Univ.*, 24 P.3d. at 400.

254. For instance, it allows school officials to confer with the state agency to get advice, to save time from repeat filings, and to alert agency officials of potential problems that might be glossed over in the written application.

255. See *supra* notes 149–151 and accompanying text.

256. *Doe v. Gonzaga Univ.*, 24 P.3d. at 400 (quoting 120 Cong. Rec. 39,862 (1974)).

257. See *supra* notes 66–68 and accompanying text.

individual rights: It may be undesirable to punish the school financially, because of concerns with expanding a school or state's potential liability and diverting resources away from its programs.²⁵⁸ But none of those reasons applies to preemption actions, in which only injunctive and declaratory remedies exist. Preemption would be better able to resolve the systemic problem without unduly burdening the school.

The court here would have to be creative in fashioning a remedy. As in all preemption cases, the ideal remedy would reconcile federal and state interests while avoiding conflict between the two as much as possible. As a pure prohibition, an injunctive order might forbid school officials from communicating on such matters with OSPI at all. Or, in a milder form, Gonzaga might be encouraged to develop a protocol for such communication, in which there were clear terms for what types of information are permissible under FERPA to discuss in informal consultations. Such a plan would then be sent to the court for review of compliance with FERPA. Periodic reviews of the implementation might be ordered, with the school submitting certifications that it is complying with its own protocol. In the best case scenario, with cooperation from the school in crafting and implementing the remedy, the process requires minimal judicial intervention. The resulting remedy would break up the privacy-invasive practices of the university without necessarily punishing it financially or unnecessarily impeding it from its goal of screening and certifying the right individuals.

CONCLUSION

Preemption as a doctrine is as messy as the varied forms of federal-state interactions that it mediates. This Note has argued that federalism concerns should not be a bar for courts from extending preemption analysis into unwritten practices. This is because such unwritten practices, when of a certain prevalence, have the same effect as positive law in conditioning the behavior of state actors. The overriding concern in preemption analysis of the vindication of federal interests should not be treated differently in the positive law and the unwritten practices context. Further, the state autonomy issues implicated when preemption is thus extended are best resolved by shaping the doctrine to fit the custom analysis. By restricting preemption only to scenarios where the state has consistently and persistently acted in a certain way contrary to federal laws, courts ensure that they are not overreaching into the day-to-day administration of state actors, while leaving themselves room to protect federal interests. Through the visibility of litigation, courts can ensure that the

258. See *supra* note 162 and accompanying text.

interaction of federal laws, state agencies, and ordinary citizens does not disintegrate into a muddle “where ignorant armies clash by night.”²⁵⁹

259. Matthew Arnold, *Dover Beach* (1867), reprinted in Antony Easthope, *Poetry and Phantasy* 163 (1989); see also *Reynolds v. Giuliani*, 506 F.3d 183, 186 (2d Cir. 2007) (citing Arnold’s language in contrast to federalism).