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Under Containment: Preempting State Ebola Quarantine Regulations

Eang L. Ngov
Barry University

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UNDER CONTAINMENT: PREEMPTING STATE EBOLA QUARANTINE REGULATIONS

Eang L. Ngov*

The outbreak of Ebola in Africa and its recent emergence in America has brought to light that the ambit of state sovereignty in the face of federal policy is unsettled in the public health field. Quarantine laws have historically been recognized as an exercise of state police powers and, absent discriminatory uses, courts have afforded much deference to states when the federal government is dormant.

This Article explores federalism implications when federal and state sovereigns contest the purview of regulating Ebola, other epidemics, and quarantines. This Article examines how the federal government could assert supremacy to regulate the treatment of epidemics and quarantine through preemption, in light of traditionally recognized state police powers over health and safety, and evaluates the value of federal and state sovereignty over such matters. It argues that the anti-preemption clause of the Public Health Service Act, which

* Associate Professor, Barry University Dwayne O. Andreas School of Law. J.D., University of California at Berkeley School of Law; B.A., University of Florida. For Jade, I am indebted to Donna Barbisch, Kristi L. Koenig, Seema Mohapatra, Karin Moore, Daniel P. O’Gorman, Mark A. Rothstein, and Alan Untereiner for their insightful comments. I am grateful for excellent research assistance and editing provided by Mary Arias, Gracie Gamez, Christopher Joseph, Brittany Sonnier, Jesse Stern, and Kristen Trucco; help from law reference librarians Diana Botluk and Louis Rosen; assistance from PC Support Specialist Owen Gregory; support from Faculty Assistant Fran Ruhl; and financial support through the Barry University School of Law Summer Research Grant.

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governs federal authority over quarantines and communicable diseases, and the Supreme Court’s general presumption against preemption would not save state quarantine regulations from preemption. It concludes that preemption doctrines, particularly obstacle and field preemption, could override state quarantine regulations because state law arguably threatens national security by frustrating federal efforts to contain Ebola in West Africa and impeding the Executive’s exercise of his foreign affairs power.

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INTRODUCTION

Ebola emerged\(^1\) on U.S. soil when the Centers for Disease Control and Prevention (CDC) confirmed on September 30, 2014 that Thomas Eric Duncan was the first person to be diagnosed with Ebola in the United States.\(^2\) Ebola is a


2. Cases of Ebola Diagnosed in the United States, CRS. DISEASE CONTROL & PREVENTION, http://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/united-states-imported-case.html (last visited Nov. 1, 2015). Before Duncan, there were patients who contracted Ebola and were flown to the
hemorrhagic fever\textsuperscript{3} with a high mortality rate, particularly in Third World
countries.\textsuperscript{4} While West Africa struggled to control the quickly rising death toll
caused by the virus,\textsuperscript{5} fears in America\textsuperscript{6} mounted when two nurses who cared for
Duncan\textsuperscript{7} and aid workers returning from Africa were diagnosed with Ebola.\textsuperscript{8}

In reaction to the Ebola cases, states began to devise quarantine measures.
Quarantine\textsuperscript{9} refers to separation of individuals who have been exposed to an
infection, but who are not sick, from those who have not been exposed.\textsuperscript{10}
Quarantine, by definition, focuses on persons showing no symptoms of
infection.\textsuperscript{11} Isolation, on the other hand, involves separating infected persons
from the noninfected population.\textsuperscript{12} New York Governor Andrew Cuomo
announced plans to implement a mandatory twenty-one-day quarantine on all
persons arriving in the United States who had contact with anyone infected with
Ebola.\textsuperscript{13} The twenty-one-day quarantine period related to Ebola’s incubation
period of two to twenty-one days.\textsuperscript{14} Florida,\textsuperscript{15} New Jersey, and Illinois followed

\footnotesize
United States to receive treatment. See Sydney Lupkin, \textit{Ebola in America: Timeline of the Deadly
Virus}, ABC NEWS (Nov. 27, 2014, 11:01 AM), http://abcnews.go.com/Health/ebola-america-
timeline/story?id=26159719.
(last visited Nov. 1, 2015).
4. The CDC reports that “[t]he 2014 Ebola epidemic is the largest in history, affecting multiple
countries in West Africa.” 2014 Ebola Outbreak in West Africa, CTRS. DISEASE CONTROL &
of October 7, 2015, there were 28,465 total cases (suspected, probable, and confirmed) of Ebola,
resulting in 11,312 deaths. Id.
5. See Lupkin, supra note 2.
6. Media Matters released a report tracking the number of Ebola-related stories, finding that
“CNN ran 146 stories on Ebola the week of October 14, when panic was peaking.” Jonathan Cohn,
7. See JAMES JAY CARAFANO, CHARLOTTE FLORANCE & DANIEL J. KANIEWSKI, HERITAGE
and the infection of two of his nurses galvanized public fears of Ebola.”).
8. See Lupkin, supra note 2.
9. For a history of quarantine, see Mark A. Rothstein, \textit{From SARS to Ebola: Legal and Ethical
Rothstein, \textit{From SARS to Ebola}].
10. Quarantine and Isolation, CTRS. DISEASE CONTROL & PREVENTION,
11. See id.
12. Id.
About 95 per cent of cases fall within this incubation period but 98 per cent of cases fall
with[in] an incubation period of one to 42 days, hence the World Health Organisation’s
requirement of 42 days Ebola-free to declare an outbreak contained. Mean incubation times
in the west Africa outbreak appear to be nine to 11 days.

Casey, supra note 1, at 23 (footnote omitted).
Louisiana banned attendance to the annual American Society of Tropical Medicine and Hygiene meeting for all researchers who visited West Africa within a three-week span from the meeting, threatening a twenty-one-day mandatory hotel room quarantine for any noncomplying attendees. In total, twenty-one states imposed mandatory quarantines.

The CDC formulated guidelines for monitoring symptoms and controlling movement based on the level of risk posed by persons exposed to Ebola. These guidelines were less stringent than state guidelines and did not recommend mandatory quarantine for noncontagious, asymptomatic individuals. The controversy surrounding mandatory Ebola quarantines lies in the fact that asymptomatic persons are not contagious because Ebola is not airborne but is contracted through contact with bodily fluids, infected animals, and


17. Bruzek, supra note 1. Ironically, this meeting would have been relevant for infectious disease researchers. The New York Times reports,

Dr. Alan J. Magill, the president of the American Society of Tropical Medicine and Hygiene, said the move by Louisiana to block doctors who had treated Ebola patients from its conference this weekend would harm crucial sessions where scientists, doctors and administrators who had been in the region were going to teach others.


19. Rothstein, From SARS to Ebola, supra note 9, at 255.

20. The CDC’s responsibilities include the prevention of “international and interstate spread of diseases.” Mark A. Rothstein, Ebola, Quarantine, and the Law, HASTINGS CTR. REP., Jan.–Feb. 2015, at 5, 5 [hereinafter Rothstein, Ebola, Quarantine, and the Law]. It operates twenty quarantine stations and assists states with “technical assistance, research, guidance, laboratory services, data collection, and other support.” Id.

21. Ebola symptoms can initially include “high fever, chills, malaise[, ] and myalgia,” but “prostration, anorexia, vomiting, nausea, abdominal pain, diarrhea, shortness of breath, sore throat, edema, confusion[,] and coma” can later develop. Geisbert & Jahrling, supra note 14, at 777.


23. McKay et al., supra note 22.


25. Professor Mark Rothstein explains that the risk of infection does not result merely from contact with any bodily fluid, but
or contaminated objects.\textsuperscript{26}  

The federal authority to impose quarantines is specified in 42 U.S.C. § 264, the section of the Public Health Service Act that governs quarantines and communicable diseases.\textsuperscript{27}  The Act gives the Secretary of the Department of Health and Human Services (HHS) responsibility for preventing the introduction, transmission, and spread of communicable diseases from foreign countries into the United States and within the United States and its territories/possessions. . . . Under its delegated authority, CDC, through the Division of Global Migration and Quarantine, is empowered to detain, medically examine, or conditionally release persons suspected of carrying a communicable disease.\textsuperscript{28}

President Ronald Regan, by Executive Order 12,452, added Ebola and other hemorrhagic fevers to the list of diseases over which federal quarantine could be imposed.\textsuperscript{29}  The CDC rarely uses its quarantine powers but instead defers to state and local health authorities.\textsuperscript{30}  The interplay between the Commerce Clause’s grant of federal authority to regulate foreign and interstate commerce\textsuperscript{31} and the Tenth Amendment’s reservation of police powers to the states\textsuperscript{32} has resulted in placing the control of diseases within state borders with state and local governments, and the control of disease abroad and among the

\[\text{[In fact, contact must be with the highly infectious bodily fluid (i.e., vomit, diarrhea, or blood) of a seriously ill patient. . . . [T]here is no evidence of anyone becoming infected with Ebola in this epidemic without direct contact with the bodily fluid of an individual whose condition has progressed at least to the gastrointestinal phase of the illness. This phase occurs between three and ten days after the onset of symptoms.}\\]
Rothstein, \textit{From SARS to Ebola}, supra note 9, at 259.


\textsuperscript{27} 42 U.S.C. § 264 (2012).


\textsuperscript{30} \textit{Questions and Answers on Legal Authorities for Isolation and Quarantine, supra} note 28 (“In general, HHS defers to state and local health authorities in the primary use of their separate quarantine powers. Based on long experience and collaborative working relationships with our state and local partners, CDC anticipates that the need to use this federal authority to actually quarantine a person will occur only in rare situations, such as in events at ports of entry or other time-sensitive settings.”).

\textsuperscript{31} U.S. CONST. art. I, § 8, cl. 3 (“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .”).

\textsuperscript{32} U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); \textit{see also} Raich v. Gonzales, 506 F.3d 850, 867 (9th Cir. 2007) (“Police power is unquestionably an area of traditional state control.”).
states with the federal government. Following Governor Cuomo’s announcement, the White House conceded that it had “limit[ed] . . . power” to enforce the CDC guidelines against the states, and tension with the White House ensued as presidential aids sought to persuade states to reconsider their mandatory bans. Governor Chris Christie later modified New Jersey’s mandatory quarantine requirement to allow Kaci Hickox, a nurse who had contact with Ebola-infected persons through her voluntary aid work in Africa, to spend the remainder of the quarantine period in her home. Contrary to numerous news media reports, Governor Christie denied insinuations that his actions were the result of pressure from the White House.

These events bring to the forefront an important question: Who should regulate quarantines? Further, what if Governor Christie had not relented? Recent scholarship on Ebola has focused on the civil rights of those affected by quarantine, particularly liberty and due process interests, all of which are important inquiries. But the issue of proper allocation of power between the states and the federal government to regulate Ebola quarantine has received little attention.

This Article explores whether federal standards could preempt state Ebola regulations. There are political concerns that the federal government might consider in deciding whether it wants federal law to preempt state law. This Article does not suggest that such political constraints should be disregarded or that preemption can be achieved easily, but rather, the purpose of the Article is to provide legal arguments for preemption, if the federal government chooses to

34. McKay et al., supra note 22. Ironically, the media reported that Governor Cuomo “cast decisions on screening procedures as ‘a federal issue.’” Flegenheimer et al., supra note 15.
35. Flegenheimer et al., supra note 15.
38. E.g., Prince, supra note 36 (reporting that “amid suggestions that the White House also opposed the quarantining of health workers who did not have symptoms, for fear it would put others off volunteering, Mr[.] Christie changed tack”).
39. Flegenheimer et al., supra note 15.
40. For an excellent discussion of the liberty interest and ethical concerns raised by Ebola quarantine, see Rothstein, From SARS to Ebola, supra note 9.
41. Preemption is also applicable to local government regulations. See, e.g., Wis. Pub. Intervenor v. Morrier, 501 U.S. 597, 613 (1991) (deciding whether the Federal Insecticide, Fungicide, and Rodenticide Act preempted a town’s regulation of pesticide use). The term “state law” is used throughout this Article to encompass the constitutions, regulations, rules, and ordinances of states, municipalities, etc.
pursue that strategy. Additionally, a discussion of what quarantine measures are appropriate and how they can be implemented is beyond the scope of this Article. This Article does not presuppose that implementation of quarantines is efficacious or advisable\(^\text{42}\) but aims to resolve the legal quandary over Ebola quarantines—how may the federal government regulate Ebola within state borders? While this Article focuses on Ebola quarantine regulations, the thrust of it is also applicable to state quarantine regulations over other illnesses, such as Severe Acute Respiratory Syndrome (SARS)\(^\text{43}\) and the like.

This Article begins, in Section I, by briefly connecting the relationship among federalism, preemption, and supremacy to quarantine regulations. Section I also defines the types of preemption: express, obstacle, impossibility, and field preemption. Preemption allows federal law to trump state laws in a number of ways. A state law can conflict with federal law by making it impossible to meet both federal and state laws, which is known as impossibility preemption, or by impeding a federal objective, which is known as obstacle preemption. When this occurs, conflict preemption allows the federal law to override state law. A state law can also be displaced when it intrudes into a field exclusively reserved for the federal government or where there is a dominant federal interest. In these circumstances, field preemption also ousts state law.

As discussed in Sections II and III respectively, the states’ two strongest arguments against federal displacement rest on their traditional police powers, particularly in the areas of health and safety, and the anti-preemption clause in the Federal Public Health Service Act.\(^\text{44}\) Although the Federal Act contains an anti-preemption clause that declines to preempt state law, the Supreme Court has previously allowed federal law to preempt other types of state law even in the face of anti-preemption clauses.\(^\text{45}\)

It is uncontested that quarantine laws fall within state police powers to

\(^{42}\) Public health experts, such as Donna Barbisch, Kristi L. Koenig, and Fuh-Yuan Shih, have noted that quarantines are difficult to implement and enforce. They have observed,

While backed by legal authority, the public and even the health care worker community’s understanding of the term is murky at best and scientific evidence to support the use of quarantine is frequently lacking. The multiple interpretations and references to quarantine, the inconsistent application of public health quarantine laws across jurisdictional boundaries, and reports of ineffectiveness, are further complicated by associated infringement of civil liberties and human rights abuses.


\(^{44}\) 42 U.S.C. § 264(e) (2012).

\(^{45}\) See infra Part III.A for a discussion of anti-preemption clauses.
regulate health, safety, and welfare.46 The Court generally operates with a presumption against preemption when federal law touches on traditional state powers.47 However, even in traditional areas of state power, the Court has found preemption of state laws. Thus, neither the presumption against preemption, invoked when the federal law implicates state police powers, nor the anti-preemption clause would necessarily safeguard state Ebola quarantine regulations from preemption.

This Article argues, in Sections IV and V respectively, that state Ebola quarantine regulations can be preempted under obstacle preemption and field preemption doctrines. Obstacle preemption allows for the overriding of state laws when they impede a federal objective.48 The federal government could employ obstacle preemption to argue that state Ebola quarantine laws impede the federal government's desire for uniform approaches to Ebola, national security via domestic efforts to contain Ebola, and federal commitment to combat Ebola abroad.49 State quarantine regulations frustrate federal efforts to contain Ebola in West Africa because they decrease the amount of healthcare workers available by discouraging volunteers and making travel impossible while under quarantine. Consequently, the inability to contain Ebola in West Africa threatens national security.

Field preemption is concerned with state laws that intrude on an area of exclusive federal domain and can invalidate state law if states regulate in an area where there is a pervasive federal scheme or a dominant federal interest.50 At least one species of field preemption is applicable to preempt state Ebola regulations. Although it is unlikely that the Federal Public Health Service Act has sufficient breadth to support field preemption based on a pervasive federal scheme, state Ebola regulations could be preempted because of a dominant federal purpose. The dominant federal purposes are national security and control over foreign affairs, which would be affected by the spread of Ebola in the United States and abroad. Relatedly, the President's independent foreign affairs power could also support preempting state Ebola quarantine laws. Thus,
federal preemption of state Ebola quarantine laws would protect the United States as well as countries abroad.

I. FRAMING THE QUARANTINE ISSUE

A. The Intersection of Federalism, Supremacy, and Preemption

“Today’s legal debates about federalism, as it applies to issues of health and safety . . . are often debates about statutory preemption.” Federalism involves determining the proper allocation of power between the federal and state governments and encompasses the recognition that “both the National and State Governments have elements of sovereignty the other is bound to respect.” Federalism includes the balance of Congress’s exercise of its powers, as granted in Article I of the Constitution, with the reservation of power to the states, as articulated in the Tenth Amendment.

At times, maintaining that balance necessitates the utilization of preemption, one mechanism of distributing power between the federal and state governments. Preemption commands that state law yield in the face of conflicting federal law and owes its origins to the Supremacy Clause, the source of congressional power to preempt state law. Preemption functions by

52. Id. at 2.
54. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).
55. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 405 (4th ed. 2011) (“Ultimately, preemption doctrines are about allocating governing authority between the federal and state governments.”).
56. The Court has used the terms “conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference” to describe some of its considerations in determining the validity of state laws in light of federal law. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
57. U.S. CONST. art. VI, cl. 2 (declaring that federal law “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”).
overriding existing valid state law. As will be discussed later in greater detail, some instances of preemption void the particular state law at issue, leaving other nonconflicting state law in tact; in other instances, preemption results in banning states from regulating in an entire area of law.

B. Values of Federalism

Whether preemption should be applied rests on a value judgment about the benefits of federalism: (1) protection against federal tyranny, (2) states’ ability to tailor policies reflecting local concerns, and (3) states as laboratories. The following provides a brief discussion of these benefits, but an exhaustive exploration is beyond the scope of this Article.

The first justification for protecting state sovereignty is that it is a bulwark against federal tyranny. This justification depends on the vertical separation of powers between the levels of government as a means to “avoid the undue concentration of power in the federal government and preserve essential individual liberties.” But “there has been a major shift over time as to how abusive government is best controlled. . . . Judicial review is seen as an important check against tyrannical government actions.”

Yet, some scholars observe that the Court’s recent use of preemption has hampered civil rights and protection of individuals. Dean Erwin Chemerinsky criticizes the Court’s preemption jurisprudence as “wrong in invalidating desirable state and local laws creating liability for injured consumers, protecting

Some scholars, however, argue that the Supremacy Clause is not the proper source of authority to support preemption doctrines. Professor Gardbaum theorizes that preemption should be grounded in the Necessary and Proper Clause. Gardbaum, supra note 58, at 782. He points out that there are distinctions between preemption and supremacy, and that “[s]upremacy does not presuppose preemption.” Id. at 769. Supremacy and preemption involve circumstances when state and federal governments share concurrent power. Id. at 770. Professor Gardbaum delineates the different roles of supremacy and preemption: supremacy regulates concurrency by allowing for state and federal laws to coexist and elevating federal law when a conflict occurs, while preemption ends state powers completely. Id. at 771. As he posits, supremacy arises when valid federal law overrides conflicting valid state laws, but because states have power to legislate in the area, they may amend their laws to avoid the conflict. Id. at 770–71. On the other hand, preemption removes a state’s power to legislate in the area, which in effect obviates the need to resolve the conflict between valid state and federal law. Id. at 771. Thus, according to Professor Gardbaum, supremacy involves a case-by-case analysis and cannot eliminate state legislative powers over an entire field. Id. at 772–73. Consequently, Professor Gardbaum argues that preemption is a greater power, not derived from supremacy—a lesser power. Id. at 774.

Other scholars argue that the Supremacy Clause is the source of authority for some types of preemption. See, e.g., S. Candice Hoke, Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause, 24 CONN. L. REV. 829 (1992).


61. Verchick & Mendelson, supra note 60, at 16.

62. CHEMERINSKY, supra note 55, at 321.

children from tobacco advertisements, and requiring insurance companies to disclose their Holocaust-era policies.”

On the other hand, some scholars find that preemption can lead to beneficial results for the people.65 Professor Hiroshi Motomura shows the value of preemption as an alternative method of vindicating individual rights, particularly in discrimination cases, when the pursuit of other principles like equal protection have not been fruitful.66 He observes, “Given the obstacles to equal protection claims by unauthorized migrants, preemption has become the challenge of choice, and thus the focus of judicial opinions.”67 The value of preemption, as Professor Motomura points out, is that it “avoids serious constitutional questions about the efficacy of arguments based on an individual right like equal protection by enabling an institutional competence argument, which in turn forces government decisionmaking into a federal forum that makes a constitutionally doubtful statute less likely.”68 Granted, a victory founded on a preemption argument may sidestep pronouncing a moral judgment,69 thereby failing to vindicate a litigant’s moral sensibilities, but such preemption victories establish boundaries that states must respect.

The second argument in favor of preserving state authority to regulate is that states are closer to the people and can better devise policies that address local concerns.70 “[O]ne of the stronger arguments for a decentralized political structure is that, to the extent the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government is brought closer to the people, and democratic ideals are more fully realized.”71 But, of course, empowering government can lead to “pernicious objectives.”72

A third benefit of federalism is that states may function as laboratories to “try novel social and economic experiments without risk to the rest of the country.”73 But “[t]he key question is when is it worth experimenting, and when is experimentation to be rejected because of a need to impose a national

64. Id.
66. Id.
67. Id.
68. Id. at 1745.
69. See Harold Hongju Koh, Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens, 8 HAMLINE L. REV. 51, 99 (1985) (“prefer[ring] an equal protection approach . . . because it answers, in a way that preemption reasoning does not, the moral and philosophical claims that resident aliens make against their state governments”).
70. CHEMERINSKY, supra note 55, at 321; Verchick & Mendelson, supra note 60, at 16–17.
71. Chemerinsky, supra note 63, at 1324 (alteration in original) (quoting DAVID SHAPIRO, FEDERALISM: A DIALOGUE 91–92 (1995)).
72. Id. at 1333.
mandate?”. Relatedly, state-centered approaches might lead to negative externalities that harm people out of state.

Ultimately, federalism should be justified on the basis of the people. “States’ rights are not an end in themselves. They are a means to the crucial objectives of advancing freedom and enriching the lives of those in the United States.” Thus, it should not be presumed that state sovereignty best effectuates the values underlying federalism. Preemption might be the more effective vehicle in the case of Ebola. Generally, those who support state sovereignty and individual rights would argue against preempting state law. In the case of Ebola, however, preempting state quarantine laws would advance individual rights, such as those of Kaci Hickox and others subjected to mandatory quarantine.

C. Types of Preemption

In addition to consideration of the value of federalism, the other consideration in applying preemption rests on a determination of congressional intent to exclude state regulation, for, as the Court has stated, congressional intent is the “ultimate touchstone.” The most explicit manifestation of congressional intent is express preemption, by which Congress, through the text of legislation, withdraws specified powers from the states. When a statute lacks an express preemption clause, congressional intent to prohibit state intrusion can also be inferred through two forms of implied preemption: field or conflict preemption.

Field preemption results when states legislate in a field over which Congress has exclusive governance. Field preemption exists when federal legislation in a particular area is so extensive and “pervasive” as to signal the federal government’s implied intent to occupy the field and exclude states from legislating in that field. The Court has described field preemption as involving

74. Chemerinsky, supra note 55, at 322.
75. Verchick & Mendelson, supra note 60, at 18.
76. Chemerinsky, supra note 63, at 1316.
79. Id. at 2500–01 (majority opinion); see also Gade v. Nat’l Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 98 (1992) (describing the types of preemption).
80. See Arizona, 132 S. Ct. at 2501. Professor Gardbaum argues that the term “conflict preemption” is contradictory because when a valid state law yields to federal law, it is not due to preemption but to supremacy. Gardbaum, supra note 58, at 809.
82. Id. (“The intent to displace state law altogether can be inferred from a framework of regulation ‘so pervasive . . . that Congress left no room for the States to supplement it’ or where there is a ‘federal interest . . . so dominant that the federal system will be assumed to preclude enforcement
federal legislation that is intended to be a “single integrated and all-embracing system,” 83 “complete scheme,” 84 “harmonious whole,” 85 or “comprehensive and unified system.” 86 A dominant federal interest in a field might also lead to an assumption that Congress intended to exclude state legislation in the area. 87

Conflict preemption occurs when the laws are mutually exclusive, in other words, when it is “physically impossible” to comply with federal and state law. 88 Another form of conflict preemption is obstacle preemption, which overrides a state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” 89 The Court has, in some instances, treated obstacle preemption as a subset of conflict preemption. 90

of state laws on the same subject.”” (omissions in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

83. Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 74 (1941)).
84. Id. (quoting Hines, 312 U.S. at 66–67).
85. Id. at 2502 (quoting Hines, 312 U.S. at 72).
86. Id.
87. See Rice, 331 U.S. at 230; Hines, 312 U.S. at 70.
89. Hines, 312 U.S. at 67; see also Arizona, 132 S. Ct. at 2501. Obstacle preemption is controversial. First, the problem in attacking a state law under obstacle preemption lies in the difficulty of ascertaining the “full purposes and objectives” of federal law. Caleb Nelson, Preemption, 86 VA. L. REV. 225, 228 (2000). Because each member of Congress has her own reason(s) for passing legislation and the process of lawmaking entails compromises, it is difficult to attribute a collective purpose to a federal statute. Id. at 280.

Second, scholars have argued that obstacle preemption conflicts with a textual approach. Justice Thomas criticizes the Court’s use of obstacle preemption for straying from the federal statute’s text. Wyeth v. Levine, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in the judgment); see also Note, Preemption as Purposivism’s Last Refuge, 126 HARV. L. REV. 1056, 1058 (2013) (arguing that implied preemption conflicts with a textualist approach). Consistent with a textual approach, Professor S. Candice Hoke recommends that preemption be circumscribed to include only situations of conflict between state and federal actions. Hoke, supra note 59, at 886. Professor John Ohlendorf, however, questions the assumption that obstacle preemption and textualism are irreconcilable. John David Ohlendorf, Textualism and Obstacle Preemption, 47 GA. L. REV. 369, 373 (2013). Professor Daniel Meltzer offers another defense of obstacle preemption, arguing that it is too “difficult[ly] and burden[some]” for Congress to write laws directly addressing preemption issues, as Congress would need to be familiar with the endless number of state and local laws and foresee how federal legislation would impact them. Daniel J. Meltzer, The Supreme Court’s Judicial Passivity, 2002 SUP. CT. REV. 343, 377.

Finally, Professor Caleb Nelson points out that obstacle preemption can result in unnecessary invalidation of state laws: “The mere fact that Congress enacts a statute to serve certain purposes, then, does not automatically imply that Congress wants to displace all state law that gets in the way of those purposes.” Nelson, supra, at 281. Professor Susan Raeker-Jordan also contends that obstacle preemption undercuts the presumption against preemption because a frustration of federal objectives can be easily found. Susan Raeker-Jordan, The Pre-emption Presumption that Never Was: Pre-emption Doctrine Swallows the Rule, 40 ARIZ. L. REV. 1379, 1385 (1998). Similarly, describing the Court’s general preemption practice as overzealous, Professor Patricia Donze fears the Court’s use of preemption when Congress truly did not intend to displace state law. Donze, supra note 77, at 255.

90. See, e.g., Arizona, 132 S. Ct. at 2501 (referring to conflict preemption as including “cases ‘where compliance with both federal and state regulations is a physical impossibility,’ and . . . instances
but state laws that impede a federal objective can be preempted even if state and federal laws are not mutually exclusive.91

The categories at times overlap,92 and their application has not always been clear.93 The confusion is worsened by the Justices’ disagreement as to what type of preemption arises in a given situation. For example, Justice Blackmun suggested that “field pre-emption may be understood as a species of conflict pre-emption,” explaining that a state’s legislation in a particular field can conflict with congressional intent to preclude state legislation.94 Justice O’Connor later subscribed to the same view in Gade v. National Solid Wastes Management Ass’n, a case that engendered a different debate about the distinctions between express and implied preemption.95 In Gade, however, Justice Kennedy contended that the case raised an express preemption issue, rather than implied preemption.96 Additionally, in another case, Justice Souter acknowledged an unsettled question as to whether field or conflict preemption should be applied to the executive

where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (quoting Florida Lime, 373 U.S. at 143; then quoting Hines, 312 U.S. at 67)).

91. CHEMERINSKY, supra note 55, at 404.
93. Scholars alike have described the Court’s preemption jurisprudence as a “muddle,” “chaos,” an “awful mess,” and “wildly confused.” Nelson, supra note 89, at 232–33 (collecting scholarly criticisms of the Court’s treatment of the preemption doctrines); see Jack Goldsmith, Statutory Foreign Affairs Preemption, 2000 Sup. Ct. Rev. 175, 178 (“The Supreme Court’s preemption jurisprudence is famous for its incoherence.”). Professor Hoke has remarked,

One searches the Court’s preemption cases in vain to uncover a unitary structure for preemption analysis; indeed, inconsistency persists even among the opinions authored by any single Justice. Scholars and commentators on various preemption issues also vary their inventory of preemption types or categories and fail to agree on their interrelation.

S. Candice Hoke, Preemption Pathologies and Civic Republican Values, 71 B.U. L. Rev. 685, 733 (1991) (footnotes omitted). Professor Ernest Young explains that the Court’s diverging approaches result from “the fact that any overarching framework of preemption principles must be applied to interpret a range of quite diverse statutory regimes, including many in which courts must share interpretive duties with federal agencies.” Ernest A. Young, “The Ordinary Diet of the Law”: The Presumption Against Preemption in the Roberts Court, 2011 Sup. Ct. Rev. 253, 255 [hereinafter Young, The Ordinary Diet of the Law].

94. Gen. Elec. Co., 496 U.S. at 79 n.5 (1990). Professor Nelson suggests that field and conflict preemption should not be confined to the subset of implied preemption, but that both types of preemption may arise in the context of an express statement or by implication. Nelson, supra note 89, at 263.
96. Gade, 505 U.S. at 109 (Kennedy, J., concurring in part and concurring in the judgment).
foreign relations power. Ultimately, the Court has noted the lack of “an infallible constitutional test or an exclusive constitutional yardstick” and resolved that “[i]n the final analysis, there can be no one crystal clear distinctly marked formula.”

This Article seeks to apply these preemption doctrines to state quarantine regulations, but as a result of the preemption categories’ fluidity, the analysis discussed in one section of this Article may also be applicable to other sections.

II. PRESUMPTION AGAINST PREEMPTION

One shield that states could deploy to protect their quarantine regulations is the presumption against preemption. The Court has devised a presumption against preemption,99 based on the fact that because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has “legislated . . . in a field which the States have traditionally occupied,” we “start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”100

The presumption against preemption has been applied in a number of contexts: (1) as only a mere “assumption that Congress did not intend to displace state law,”101 (2) when federal acts touch only “historic police powers of the State[],”102 or (3) when accompanied with a requirement of a statement indicating Congress’s clear and manifest purpose.103

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99. Some scholars question the presumption against preemption. Professor Nelson, for example, offers a theory that the Supremacy Clause is a non obstante provision, and as such, it undermines the presumption against preemption. Nelson, supra note 89, at 232. He explains that non obstante clauses have been used to obviate the need to harmonize a new law with prior ones by allowing the new law to displace any prior contradictory law. Id. Thus, the natural operation of the Supremacy Clause’s non obstante provision rebuts the need for a residual presumption against the invalidation of state laws. Id. at 293. For different reasons, Professor Jack Goldsmith advocates for abandoning the presumption against preemption, as well as the presumption in favor of foreign affairs. Goldsmith, supra note 93, at 177. Professor Viet D. Dinh argues that when Congress legislates within its enumerated power, no presumption for or against preemption should be applied. Viet D. Dinh, Reassessing the Law of Preemption, 88 GEO. L.J. 2085, 2092 (2000).
102. Rice, 331 U.S. at 230.
States could argue that Ebola quarantine regulations are strictly within their purview because health and safety are established areas of traditional state power, and consequently, the presumption against preemption should apply. *Morgan’s Steamship Co. v. Louisiana Board of Health* is one of the earliest Supreme Court cases to review quarantine regulations. The case’s central issue involved the constitutionality of the fee New Orleans imposed for each vessel passing a quarantine station. The Court upheld the fee against allegations that the fee was in fact a tonnage tax, a tax prohibited by the Constitution. In so doing, it recognized quarantine as a police power. In another case, *Compagnie Francaise de Navigation a Vapeur v. Louisiana Board of Health*, the Court upheld, on the basis of state police powers, a quarantine resolution that prohibited vessels from landing in parishes under quarantine. In *Jacobson v. Massachusetts*, by upholding state compulsory smallpox vaccination laws, the Court also affirmed state police powers to regulate health and safety: “According to settled principles the police power of a State must be held to embrace, at least such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.” Thus, that quarantine regulation falls within state police powers is not controversial.

All these cases, however, acknowledged the ability of the federal government to displace state quarantine laws. In the *Morgan’s Louisiana* case, the Court stated,

> [F]or while it may be a police power in the sense that all provisions for health, comfort, and security of the citizens are police regulations, and an exercise of the police power, even where such powers are so exercised as to come within the domain of federal authority as defined in the constitution, the latter must prevail.\(^{111}\)

In *Compagnie Francaise*, the Court recognized that “quarantine laws belong to that class of state legislation which . . . [is] valid until displaced . . . by Congress.”\(^{112}\) Similarly, the *Jacobson* Court conceded, “A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures.”\(^{113}\) A state might argue that these statements merely

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104. See *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) ("According to settled principles the police power of a State must be held to embrace, at least such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.").


106. 118 U.S. 455 (1886).

107. *Id.* at 461–63.

108. *Id.* at 464.


110. 197 U.S. 11, 25 (1905).


reflect the principle embodied in the Supremacy Clause and that, without more, the states’ exercise of police powers to regulate Ebola quarantine should be presumed not preempted.

But the presumption against preemption, as some scholars observe, has been whittled down, so much so as to transform the presumption into one in favor of preemption.114 Professor Susan Raeker-Jordan describes the courts’ approaches to preemption as “free-wheeling” and undermining the presumption against preemption by allowing “relatively easy” displacement of state law.115 Similarly, Professor Mary Davis concludes the Supreme Court’s preemption jurisprudence has shown a trend away from preserving state authority to respecting federal authority and the need for uniformity.116 Additionally, some members of the Court have argued that a presumption against preemption is entirely unnecessary when the federal law at issue contains an express preemption clause.117

The Court’s move in the direction of a presumption in favor of preemption is evident from its decisions in family law cases. In *Egelhoff v. Egelhoff*, in examining a Washington state statute where “designation of a spouse as the beneficiary of a nonprobate asset [wa]s revoked automatically upon divorce,”118 the Court acknowledged that family and probate law are areas of traditional state powers.119 Notwithstanding that acknowledgement, the Court invalidated the law as preempted by the Employee Retirement Income Security Act (ERISA): “[W]e have not hesitated to find state family law pre-empted when it conflicts with ERISA or relates to ERISA plans.”120 Similarly, the long history of state community property laws did not shield state laws from obstacle preemption in *Boggs v. Boggs*.121 Likewise, that a state regulation concerned family law did not prevent its preemption in *McCarty v. McCarty*,122 *Ridgway v.*

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116. Davis, supra note 77, at 1013.


120. Id. at 151–52.


Property law is another traditional area of state power that is not immune to preemption. In Fidelity Federal Savings & Loan Ass’n v. de la Cuesta, property owners challenged the due-on-sale provision in a trust deed held by a federally chartered savings and loan association. The Court conceded that “real property law is a matter of special concern to the States,” but asserted that “[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.” Accordingly, the Court found the state’s due-on-sale law preempted on the basis of obstacle preemption.

Even in the state’s traditional field of health and safety, the Court has found preemption, despite any presumption against preemption. In Gade, the Court recognized a state’s “compelling interest” to protect health and safety and to regulate licensing and professions. But it reiterated “any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield [to federal law],” and invalidated the state’s regulation of the training, testing, and licensing of hazardous waste workers.

The Court has insisted on a showing of “clear and substantial” federal interests before preempting laws within traditional state powers, but the Court, “even in those area[s], has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights.” Thus, to preserve their Ebola quarantine regulations, states should not rest solely on the presumption against preemption but must be prepared to defend against the various forms of preemption.

III. EXPRESS PREEMPTION

Usually, federal law containing preemption provisions can pose a serious threat to state laws because congressional intent to supersede state law is unambiguous. Because express preemption is obvious from its text, it obviates any controversy in determining whether preemption exists but shifts the focus to


124. 439 U.S. 572 (1979) (invalidating the state court’s division of community property and its award of the husband’s expected retirement benefits to his wife in a divorce proceeding, pursuant to the Federal Railroad Retirement Act).


127. Id. at 156.


determining the scope of the preemption.  

In the present situation, the relevant federal statute, the Public Health Service Act, does not contain an express preemption clause, and, therefore, states need not fear this form of preemption. Better yet, states could make use of the Public Health Service Act’s anti-preemption clause. Anti-preemption clauses are an express declination to override state law. Relatedly, saving clauses, provisions within a statute that contain express intent to leave some aspect of state law intact, function like anti-preemption clauses. Because the Court has sometimes used these terms interchangeably, both types of clauses will be analyzed.

A. Anti-Preemption Clauses

States might argue that the anti-preemption clause of the Federal Public Health Service Act affords them protection against preemption and ensures that states may regulate quarantines. Section 264 of the Public Health Service Act, regulating quarantine and communicable diseases, contains the following anti-preemption clause:

Nothing in this section or section 266 of this title, or the regulations promulgated under such sections, may be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States), except to the extent that such a provision conflicts with an exercise of Federal authority under this section or section 266 of this title.

California Coastal Commission v. Granite Rock Co. is one example of an
effective congressional disclaimer against preempting state law.\textsuperscript{136} Granite Rock, a company that held unpatented mining claims on federally owned land in California, challenged California’s permit requirement for mining within the state.\textsuperscript{137} Granite Rock relied upon the following provision of the Federal Coastal Zone Management Act of 1972 (CZMA):

\begin{quote}
Nothing in this chapter shall be construed—
\begin{itemize}
\item (1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters; nor to displace, supersede, limit, or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government; nor to limit the authority of Congress to authorize and fund projects . . . \textsuperscript{138}
\end{itemize}
\end{quote}

The legislative history of the CZMA included the Senate report revealing the CZMA’s purpose: “There is no attempt to diminish state authority through federal preemption. The intent of this legislation [the CZMA] is to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones.”\textsuperscript{139} The Court concluded that the CZMA did not preempt state permit requirements because of the CZMA’s legislative history and language.\textsuperscript{140}

State Ebola regulations are still vulnerable because the Court has not hesitated to overrule state law, even in the face of an anti-preemption clause. For example, the McCarran-Ferguson Act, which regulates insurance, contains an express anti-preemption clause: “No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .”\textsuperscript{141} Whether a state law is preempted hinges on an important qualifier—“relates to”—in the McCarran-Ferguson Act’s anti-preemption clause\textsuperscript{142}: “[A] federal statute will not pre-empt a state statute enacted ‘for the purpose of regulating the business of insurance’—unless the federal statute ‘specifically relates to the

\begin{footnotes}
\item[137] Granite Rock, 480 U.S. at 576–77.
\item[139] Granite Rock, 480 U.S. at 592 (quoting S. REP. 92-753, at 1 (1972)).
\item[140] Id. at 593.
\item[142] Barnett Bank, 517 U.S. at 38.
\end{footnotes}
business of insurance.”143 In *Barnett Bank of Marion County, N.A. v. Nelson*, the issue arose out of the tension between a federal law authorizing national banks to sell insurance and a state law prohibiting such banks to sell insurance.144 The anti-preemption clause was not applied to protect state law in *Barnett Bank* because the federal authorization to sell insurance specifically related to the business of insurance.145

As *Barnett Bank* and *Granite Rock* demonstrate, whether states would prevail in asserting the Public Health Service Act’s anti-preemption clause to prevent displacement of state quarantine laws depends on an examination of the Act’s language and legislative history. A search of section 264 of the Public Health Service Act’s legislative history yields no statement similar to that in *Granite Rock* that sheds light on the anti-preemption clause. Textually, the Public Health Service Act’s anti-preemption clause does not safeguard against all preemption; it allows for preemption if state legislation conflicts with the Federal Act. Therefore, it is necessary to examine whether state quarantine regulations conflict with federal law.

B. Saving Clauses

If the provision in the Public Health Service Act is construed as a saving clause, it might still preserve state law.146 *Freightliner Corp. v. Myrick* provides an example of an effective saving clause.147 In that case, the National Traffic and Motor Vehicle Safety Act encompassed a saving clause, which provided that “[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.”148 That saving clause protected state regulation from preemption because the Court found that states were free to regulate aspects of vehicle performance, such as stopping distances and vehicle stability that were not covered by federal regulation.149

In *International Paper Co. v. Ouellette*, however, a saving clause provided limited relief from preemption.150 In that case, Vermont regulated effluent discharges into Lake Champlain, which a paper company challenged as preempted by the Federal Clean Water Act.151 The Clean Water Act contained

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143. Id. 27–28 (quoting 15 U.S.C. § 1012(b)).
144. Id. at 28–29.
145. Id. at 38.
149. Id. at 286.
151. Ouellette, 479 U.S. at 484.
provisions that acted as a saving clause. The first provision provided that, “[e]xcept as expressly provided[,] . . . nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.” 152

The second provision stated, “Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . .” 153

The Clean Water Act, notwithstanding the saving clause, overrode Vermont’s law because allowing states affected by discharge to regulate individually would impede federal objectives. 154

Casting aside the saving clause, the Court stated, “[W]e do not believe Congress intended to undermine this carefully drawn statute through a general saving clause . . . .” 155

Similarly, a saving clause failed to prevent federal law from eclipsing state law in Gade. 156 In Gade, the Occupational Safety and Health Act (OSH Act) contained two saving clauses. Section 4(b)(4) of the OSH Act provided the following:

Nothing in this chapter shall be construed to supersede or in any manner affect any workmen’s compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment. 157

Additionally, section 18(a) of the OSH Act provided that no “State agency or court [shall be prevented] from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.” 158

Despite the saving clause, the Court held that the OSH Act preempted state laws establishing training for hazardous waste workers. The Court explained, “Although this is a saving clause, not a pre-emption clause, the natural implication of this provision is that state laws regulating the same issue as federal laws are not saved, even if they merely supplement the federal standard.” 159

Other examples of when the Court concluded that saving clauses were inadequate to salvage state law can be found in rulings discussing ERISA and the Death on the High Seas Act. 160

In Pilot Life Insurance Co. v. Dedeaux, the Court held that an employee’s common law breach of contract and tort suit

153. Id. § 1365(a).
155. Id. at 494.
160. See, e.g., Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) (holding that a state suit alleging improper processing of claims for benefits was preempted by ERISA).
against the insurance company that issued his insurance policy\textsuperscript{161} was not covered within the saving clause and thus was preempted by ERISA.\textsuperscript{162} In Offshore Logistics, Inc. v. Tallentire, the Court interpreted a saving clause narrowly as a jurisdictional saving clause, which did not preclude imposition of federal substantive law to preempt conflicting state wrongful death statutes.\textsuperscript{163}

State law may also be preempted if the Court narrowly construes a saving clause.\textsuperscript{164} For example, in United States v. Locke, the Court interpreted a saving clause in the Federal Oil Pollution Act to allow state regulation of “liability rules and financial requirements relating to oil spills,” but not of a vessel’s conduct.\textsuperscript{165} The Court reasoned, “We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.”\textsuperscript{166}

In Geier v. American Honda Motor Co., the Court interpreted two provisions in the National Traffic and Motor Vehicle Safety Act: an express preemption clause and a saving clause.\textsuperscript{167} The preemption provision prohibited states from establishing “any safety standard applicable to the same aspect of performance of” motor vehicles “which is not identical to the Federal standard,”\textsuperscript{168} while the saving clause expressed that compliance with federal law “does not exempt any person from any liability under common law.”\textsuperscript{169} The Court declined to find that the saving clause immunized state tort claims beyond the express preemption provision—leaving those claims vulnerable to conflict preemption.\textsuperscript{170}

Therefore, regardless of whether the provision in the Public Health Service Act is construed as an anti-preemption or a saving clause, it might be inadequate to guard against nullification of state quarantine laws. Under either construction, the provision will be interpreted narrowly, making state legislation susceptible to field and conflict preemption.

\textsuperscript{161} Id. at 43.

\textsuperscript{162} Id. at 57.

\textsuperscript{163} 477 U.S. 207, 227 (1986) (holding that the Outer Continental Shelf Lands Act and the Death on the High Seas Act preempted a wrongful death suit over the deaths of offshore drilling platform workers killed in a helicopter crash off of Louisiana’s coast).

\textsuperscript{164} See, e.g., United States v. Locke, 529 U.S. 89, 105-07 (2000).

\textsuperscript{165} Id. at 105.

\textsuperscript{166} Id. at 106.

\textsuperscript{167} 529 U.S. 861, 868 (2000).


\textsuperscript{169} Id. at 868 (quoting 15 U.S.C. § 1397(k) (1988) (repealed 1994)).

\textsuperscript{170} Id. at 874; see also Williamson v. Mazda Motor of Am., Inc., 562 U.S. 323, 329 (2011) (explaining that the existence of a saving clause “makes clear that Congress intended state tort suits to fall outside the scope of the express pre-emption clause”).
IV. CONFLICT PREEMPTION

A. Physical Impossibility

State Ebola quarantine regulations are least likely to be superseded through conflict preemption that is based on a physical impossibility. Because this type of preemption requires a showing that state and federal laws are mutually exclusive, it is a rare form of preemption.171 In fact, Florida Lime & Avocado Growers, Inc. v. Paul,172 the oft-cited case for preemption due to a physical impossibility, actually illustrates when the requirements for this type of preemption are not satisfied. In this case, avocado growers challenged a California law measuring maturity of avocados by oil content as preempted by a federal regulation, which provides for certification of avocado maturity without reference to oil content.173 Because growers could simply allow the avocados to mature longer on the trees to meet California’s standard, it was not impossible for growers to comply with California and federal standards. Consequently, the Court upheld the state law.174

In the Ebola situation, there is a strong argument against finding conflict preemption based on a physical impossibility because state quarantine regulations are not mutually exclusive of federal law. The state regulations require asymptomatic persons who recently had contact with Ebola-infected persons to submit to mandatory quarantine. In contrast, federal regulation is less intrusive because it recommends mandatory monitoring of only a person’s symptoms and movements.175 States could argue that, like in Florida Lime, a state can impose a higher standard for quarantine regulations and not conflict with federal regulations because the state regulations are simply more expansive.

B. Obstacle Preemption: Impeding a Federal Objective

Although the states’ Ebola quarantine regulations might survive a challenge based on physical impossibility, state laws that complement federal law might nevertheless be preempted on the basis of obstacle preemption.176 In Locke, the

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171. See Kerry Abrams, Plenary Power Preemption, 99 Va. L. Rev. 601, 608 (2013) (“It will rarely be ‘impossible’ to conform to both federal and state law . . . .”); Nelson, supra note 89, at 228 n.15 (noting the Court’s infrequent use of the physical impossibility test); Young, The Ordinary Diet of the Law, supra note 93, at 289 (describing the impossibility doctrine as “little-used”).


174. Id. at 142–43 (explaining that an impossibility would have existed if the federal law prohibited picking avocados with more than seven percent oil and the California law required a minimum of eight percent oil).

175. Factsheet on Updated CDC Guidance: Monitoring Symptoms and Controlling Movement to Stop the Spread of Ebola, supra note 22.

176. Professor Nelson criticizes the obstacle preemption doctrine as “misplaced” because “the mere fact that federal law serves certain purposes does not automatically mean that it contradicts everything that might get in the way of those purposes.” Nelson, supra note 89, at 231–32.

For examples of decisions upholding state laws against an obstacle preemption challenge, see Wyeth v. Levine, 555 U.S. 555, 581 (2009), in which the Court concluded that no obstacle preemption
state of Washington responded to the Exxon Valdez oil spill in 1989 by regulating oil tankers “regarding general navigation and watch procedures, English language skills, training, and casualty reporting.”177 Because of the similarity of its laws to federal law, the state of Washington argued that federal law did not preempt its regulation.178 The Court disagreed:

It is not always a sufficient answer to a claim of pre-emption to say that state rules supplement, or even mirror, federal requirements. . . . The appropriate inquiry still remains whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are consistent with concurrent state regulation.179

Additionally, in Hines v. Davidowitz, Pennsylvania had passed legislation requiring aliens to carry their alien identification cards before Congress passed the Alien Registration Act.180 In deciding the validity of Pennsylvania’s Alien Registration Act, the Court recognized congressional need for uniformity and held that federal law preempted the state law, notwithstanding that the state law

For examples of state laws invalidated under obstacle preemption, see Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Board, 467 U.S. 461, 477–78 (1984), in which the Court found that the state law was consistent with the purpose of the Federal Agricultural Fair Practices Act; Edgar v. MITE Corp., 457 U.S. 624, 635 (1982), in which the Court determined that the Illinois Business Takeover Act frustrated the objectives of the Federal Williams Act; Fidelity Federal Savings & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 156 (1982), in which the Court concluded that a state’s due-on-sale laws frustrated objectives of the Federal Home Loan Bank Board’s regulations by depriving the lender of the flexibility the Board intended to afford; McCarty v. McCarty, 453 U.S. 210, 234–35 (1981), in which the Court pointed out that the division of retired pay as community property would disrupt the federal government’s management of military personnel and its encouragement of orderly promotion and maintenance of youthful military; Hisquierdo v. Hisquierdo, 439 U.S. 572, 589–90 (1979), in which the Court decided that allowing the division of expected retirement payments in divorce proceedings would undermine the purposes of the Railroad Retirement Act; Ray v. Atlantic Richfield Co., 435 U.S. 151, 165 (1978), in which the Court found parts of a state law regulating oil tankers preempted because those sections frustrated the congressional objective to have uniform standards for tanker design; and Perez v. Campbell, 402 U.S. 637, 641, 656 (1971), in which the Court held that because the Federal Bankruptcy Act governs discharges of judgments after bankruptcy, a state law that allows for suspension of a driver’s license for unpaid motor vehicle-related judgments previously discharged through bankruptcy conflicts with the Federal Act.

178. Locke, 529 U.S. at 115.
179. Id.
180. 312 U.S. 52, 59–60 (1941).
complemented federal law.\textsuperscript{181}

In \textit{Crosby v. National Foreign Trade Council}, Massachusetts restricted state entities from purchasing goods and services from companies having a commercial relationship with Burma.\textsuperscript{182} Subsequently, Congress enacted legislation imposing sanctions on Burma, authorizing the President to set additional sanctions, and instructing the President to develop “a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.”\textsuperscript{183} Although the state law did not directly conflict with federal law and shared common goals with its federal counterpart, the state law was preempted.\textsuperscript{184} The Court explained,

> The fact of a common end hardly neutralizes conflicting means, and the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ.\textsuperscript{185}

In \textit{Crosby}, by restraining the President’s flexibility and discretion, the state law interfered with the President’s authority over economic sanctions against Burma.\textsuperscript{186} The Court reasoned,

> The President has been given this authority not merely to make a political statement but to achieve a political result, and the fullness of his authority shows the importance in the congressional mind of reaching that result. It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.\textsuperscript{187}

Finally, the state law in \textit{Crosby} “compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments.”\textsuperscript{188} The state law prompted several nations to directly protest the United States and some nations to file formal complaints against the United States with the World Trade Organization.\textsuperscript{189} The Court deferred to the executive branch in its assessment of how the state law complicated the congressional goal for a comprehensive multilateral strategy and concluded that

\begin{itemize}
  \item \textsuperscript{181} \textit{Hines}, 312 U.S. at 73 (“And whether or not registration of aliens is of such a nature that the Constitution permits only of one uniform national system, it cannot be denied that the Congress might validly conclude that such uniformity is desirable.”).
  \item \textsuperscript{182} 530 U.S. 363, 366 (2000).
  \item \textsuperscript{183} \textit{Crosby}, 530 U.S. at 369.
  \item \textsuperscript{184} \textit{Id.} at 379.
  \item \textsuperscript{185} \textit{Id.} at 379–80 (internal citation omitted).
  \item \textsuperscript{186} \textit{Id.} at 373–74.
  \item \textsuperscript{187} \textit{Id.} at 376.
  \item \textsuperscript{188} \textit{Id.} at 381.
  \item \textsuperscript{189} \textit{Id.} at 382–83.
\end{itemize}
the state law impeded congressional diplomatic objectives.190

1. Uniformity

In the present case, the United States announced its four-point strategy in combating Ebola as “[c]ontrolling the epidemic; [m]anaging the secondary consequences of the outbreak; [b]uilding coherent leadership and operations; and, [e]nsuring global health security.”191 State Ebola regulations could be preempted for interfering with a federal need to establish uniformity, maintain national security against the domestic spread of Ebola, and provide support to contain Ebola abroad.

The need for uniformity is a central justification for preemption.192 In addition to the CDC, a public health emergency involves numerous federal agencies and departments, including the Department of Homeland Security, the Department of Transportation, Customs and Border Protection, the Food and Drug Administration, the National Institutes of Health, and the Department of Defense.193 The multitude and many levels of government—over 87,500 local governmental units in the United States—make uniformity essential in federal governance.194

This multiplicity of government actors below the federal level virtually ensures that, in the absence of federal preemption, businesses with national operations that serve national markets will be subject to

190. Id. at 385–86. Professor Young criticizes the Court’s premature preemption holding in Crosby because it allowed the “mere delegation of authority to the President to preempt state trade sanctions [to] signal[] that such sanctions were in conflict with federal policy, even though the President had not actually exercised his preemptive authority.” Ernst A. Young, Executive Preemption, 102 NW. U. L. REV. 869, 899–900 (2008). He finds Crosby troubling because “[t]o say that the mere delegation of authority to act can have preemptive effect, without requiring a political decision to act for which the Executive may be held accountable, is to disembowel the notion of process federalism entirely.” Id. at 900.


192. See Davis, supra note 77, at 1016 (“The perceived need for uniformity of standards is, and has always been, a critical factor to the Court in evaluating whether a state law stands as an obstacle to the accomplishment of federal objectives.”); Gardbaum, supra note 58, at 782 (discussing the need for uniformity as a compelling justification for preemption).

193. Rothstein, Ebola, Quarantine, and the Law, supra note 20, at 5. For a detailed account of the involvement of various agencies in containing Ebola, see Memorandum from the Majority Staff, Comm. on Energy and Commerce, to the Subcomm. on Oversight and Investigations, supra note 24, at 4–8.

complicated, overlapping, and sometimes even conflicting legal regimes. These overlapping regulations have the potential to impose onerous burdens on interstate commerce and to disrupt and undermine federal regulatory programs.195

Uniformity provides predictability and efficiency for those being regulated, as well as for the regulators. For example, for ERISA, uniformity provides “a set standard” by which claims and disbursements may be processed.196 “A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.”197 For occupational health and safety issues, Congress intended that employers and employees be subject to only one set of regulations, be it state or federal.198 In Ouellette, the Court pointed out that predictability and efficiency in the EPA’s permit system would have been impaired by the affected state passing their own regulations, which would lead to a “chaotic confrontation between sovereign states.”199

For state Ebola quarantine regulations, uniformity would ensure many benefits. “As far back as 1851 the lack of a uniform system of quarantine laws was keenly felt.”200 Reacting to a cholera epidemic in 1892, New York assembled investigators to study New York’s quarantine.201 These investigators articulated the following reasons in support of a uniform federal quarantine system:

1. As the federal government is an indispensable factor in every quarantine crisis, it is only by giving to the federal government complete control that conflicts of authority and the weakening effects of official jealousy can be avoided.
2. The federal government has at command the trained men who have to be summoned to the help of the state in time of peril. It is better to have the federal government directly instead of indirectly responsible.
3. The federal government in every crisis, through the various arms of the public service, is able to command an amount of expert

195. Id.
201. Id.
cooperation entirely beyond the reach of a state.\footnote{202}{Id.}

As to the first justification articulated above, recent events illustrate the potential for conflicting authority—not only between the federal and state governments, but also among individual states. Governor Christie released Kaci Hickox from her mandatory quarantine, which she spent in a tent on hospital grounds in New Jersey.\footnote{203}{Id.} When she was released to return to her home in Maine, she was placed under quarantine in her home.\footnote{204}{Id.} Public health experts have cautioned that multiple quarantine policies among the states could confuse the public and healthcare workers, as well as lead to inconsistencies that negatively impact disease control.\footnote{205}{Id.} “Furthermore, governors and other elected officials who intercede in technical public health matters undermine public confidence in the CDC and state public health agencies.”\footnote{206}{Id.} Consequently, the need to reconcile the conflict between the federal and state governments over the allocation of authority over public health has led some policy experts to recommend “federalizing the rules for pandemic response, much as the recognition of the far-reaching and adverse effects of pollution led to federal environmental legislation.”\footnote{207}{Id.}

As to the second and third justifications, the federal government indeed has trained persons who can provide the necessary expertise to combat Ebola. When nurse Nina Pham contracted Ebola through her care for Thomas Eric Duncan, she was later moved to the National Institutes of Health’s hospital, a state of the art facility,\footnote{208}{Id.} where she was under the medical supervision of the nation’s

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202. \textit{Id.} The investigators also noted that foreign consuls would be more likely to cooperate with federal quarantine officials, and that “recent experiences” indicated a trend toward “international supervision of infectious diseases.” \textit{Id.}

203. \textit{Gostin \& Friedman, supra note 37; Prince, supra note 36.}


205. \textit{CARAFANO ET AL., supra note 7, at 21 (“State leaders exacerbated the problem by providing conflicting guidance. For example, the governors of New York and New Jersey issued quarantine orders, but others did not, leading to confusion about quarantine rules and standards.”); Barbisch et al., supra note 42, at 3; Bidgood \& Zernike, supra note 17 (“In response, governors of both parties are struggling to define public health policies on the virus, leaving a confusing patchwork of rules regarding monitoring, restricting and quarantining health care workers who have treated Ebola patients, whether domestically or abroad.”).}

206. \textit{Rothstein, Ebola, Quarantine, and the Law, supra note 20, at 5; Rothstein, From SARS to Ebola, supra note 9, at 256 (stating that “[o]ther important reasons for questioning these ad hoc state policies include possibly undermining the CDC’s credibility and confusing the public by having different quarantine policies in each state.”).}


experts who later cured her. Additionally, the federal government’s expertise makes it better equipped and informed to formulate national guidelines for fighting Ebola. The CDC guidelines, which do not include mandatory quarantining of asymptomatic persons, have been described as “sensible, . . . based on science . . . [and] crafted in consultation with the people who are actually going there [to Africa] to do the work.” Thus, for the reasons articulated by the New York Assembly, the federal government could desire uniform standards for Ebola quarantine regulations, and therefore state quarantine laws could be preempted for thwarting national uniformity.

2. National Security and Global Response to Contain Ebola

In addition to the need for uniformity, state Ebola quarantines could interfere with other federal objectives—particularly the President’s plan to fight Ebola. The United States has taken the lead in initiating a global response against Ebola, and President Obama has prioritized Ebola as a national security concern, as evidenced by his announcement: “We have to work together at every level—federal, state and local. And we have to keep leading the global response, because the best way to stop this disease, the best way to keep Americans safe, is to stop it at its source—in West Africa.”

State-mandated quarantines could interfere with the United States’ national security and global response in a number of ways. First, national security would be compromised if Ebola spreads. Mandatory quarantines risk deterring others from reporting symptoms or information about their recent contact with

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210. Factsheet on Updated CDC Guidance: Monitoring Symptoms and Controlling Movement to Stop the Spread of Ebola, supra note 22.


212. Statement of Heather Higginbottom, supra note 191 (“The U.S. has taken a lead role in managing the global response in Liberia. We are working with the UK and France as they assume larger roles in Sierra Leone and Guinea, respectively.”).

213. Rose Gottemoeller, Under Sec’y for Arms Control and Int’l Security, Remarks at University of Virginia, Jefferson Literary and Debating Society: Biosecurity in the Time of Ebola (Feb. 13, 2015), http://www.state.gov/t/us/2015/237560.htm (“President Obama has made it clear that ‘fighting this [Ebola] epidemic is a national security priority for the United States’ and that world leaders needed to increase efforts to counter a wide range of biological threats, ‘from infections that are resistant to antibiotics to terrorists that seek to develop and use biological weapons.’”).


215. Statement of Heather Higginbottom, supra note 191 (“As President Obama said, ‘If we don’t make that effort now, and this spreads not just through Africa but other parts of the world[,] . . . it could be a serious danger to the United States.’” (omission in original)).
someone infected with Ebola. If such persons fail to report this information, their conditions would not be monitored, and they risk infecting others. Moreover, mandatory quarantines could lead to the negative unintended consequence of spreading the disease in yet another way.

Another risk associated with quarantine is the unintended impact on patients admitted to the hospital for other medical problems. Patients with acute coronary syndromes, strokes, cancer, and traumatic injuries were all subjected to confinement. In addition, the perceived benefit of confining medical personnel to the hospital did not guarantee that patients would be provided with timely and quality medical care.

In the case of SARS, patients with multiple diagnoses were cross contaminated within the crowded hospital, adding to their health risks. In the case of Ebola, patients with malaria and dengue fever may be confined with Ebola patients. Given the risk, the benefit of this strategy may not outweigh the health risk to the large number of individuals affected.

Second, because the individuals who have recently traveled to an Ebola-infected country are predominantly healthcare workers, state-mandated quarantines risk stigmatizing them. The scientific community agrees that the twenty-one-day quarantine is not grounded in science and could stymie efforts to stop Ebola at its source. Researchers conclude that “[a]symptomatic persons do not spread Ebola, therefore such actions are not scientifically supported.” The Society for Healthcare Epidemiology in America and the Infectious Diseases Society of America, “two authoritative bodies within the United States,” oppose mandatory quarantine of asymptomatic health workers and are concerned that “[t]his approach carries unintended negative consequences without significant additional benefits.” The CDC’s more flexible Ebola quarantine policies have also garnered support from the Council of State and Territorial Epidemiologists, which “represent[s] the nation’s ‘disease detectives’

216. McKay et al., supra note 22 (reporting CDC Director’s concern about healthcare workers’ concealment of prior contact with Ebola patients due to fear of quarantines).
217. See Barbisch et al., supra note 42, at 8.
218. Statement of President Obama, supra note 211 (“Keep in mind that of the seven Americans treated for Ebola so far, most of them while serving in West Africa, all seven have survived.”).
221. E.g., Barbisch et al., supra note 42, at 3.
working on the frontlines to stop Ebola.” 223

Third, the stigma could, in turn, discourage health workers from returning to Africa to provide additional aid and new volunteers from traveling to Africa as part of the relief effort. 224 Researchers conclude, “Hundreds of years of experience show that to stop an epidemic of this type requires controlling it at its source.” 225 In order to stop Ebola at its source, organizations such as Médecins sans Frontières, the World Health Organization, and the U.S. Agency for International Development have estimated that “tens of thousands of additional volunteers” are needed, 226 and World Bank President Jim Yong Kim estimated that as many as 5,000 health workers are needed, a need that has largely gone unmet. 227 To make matters worse, beside the heightened need for health workers, health workers have suffered the greatest casualties, with as many as 443 infected cases and 244 deaths among health workers. 228

The decisions by the states, White House officials and others warned, could hamstring the effort to staff up to 17 Ebola treatment units that American military personnel are building in Liberia. American health officials had already been facing the difficult task of finding volunteers, and have accepted help from foreign nationals, including Cuba, to aid the effort. 229

President Obama expressed his concerns:

[W]e have to keep in mind that if we’re discouraging our health care workers, who are prepared to make these sacrifices, from traveling to these places in need, then we’re not doing our job in terms of looking after our own public health and safety. What we are—what we need right now is these shock troops who are out there leading globally. We can’t discourage that; we’ve got to encourage it and applaud it. 230

A report shows that “[m]isapplication of quarantine guidelines to asymptomatic individuals resulted in fewer volunteers deploying to support the Ebola outbreak

223.  CSTE Urges States to Heed CDC’s Ebola Quarantine Guidance, supra note 219.
224.  Statement of President Obama, supra note 211. The media, such as CNN, have also reported the Executive’s concerns with state quarantines:

After visiting a group of health care workers who’d recently returned from the epicenter of the Ebola outbreak in West Africa—some still within the virus’s 21-day incubation period, but showing no symptoms—Obama said policies like states requiring three-week quarantines of doctors and nurses who treated Ebola patients could harm U.S. efforts to stop its spread.

225.  E.g., Drazen et al., supra note 220, at 2029.
226.  Id.
228.  Id.
229.  Flegenheimer et al., supra note 15.
230.  Statement of President Obama, supra note 211.
owing to concerns about restrictions upon their return.” For example, Ryan Boyko, a student at the Yale University School of Public Health, was quarantined by order of Connecticut’s Governor upon returning from West Africa as a healthcare volunteer, and commented that such quarantines would discourage health workers from volunteering. Beyond discouraging volunteers, the states’ quarantine policies disable health workers because “[i]f everyone who cares for an Ebola patient must be quarantined for a long period of time, we may run out of new workers.” Because there is currently no vaccine for Ebola, the only means of stopping the spread of Ebola is through the provision of health services to the affected, which relies more than ever on the availability of health workers. Therefore, although states might defend their Ebola quarantine regulations as supplementing federal regulations, state law could still be preempted for frustrating federal objectives.

V. FIELD PREEMPTION

A. Pervasive Federal Scheme

Even if state Ebola quarantine regulations were to survive a challenge based on obstacle preemption, they could be preempted through field preemption. States could argue that their quarantine laws are harmonious with federal regulations. But this argument is of no avail when the inquiry concerns field preemption because the Court has consistently construed the field preemption doctrine to override state laws that “curtail or complement” federal law or “enforce additional or auxiliary regulations.” The Court has unequivocally prohibited states from “enter[ing], in any respect, an area the Federal Government has reserved for itself.”


232. Lips, supra note 16.

233. Id. (quoting Zita Lazzarini, University of Connecticut professor).


For examples of circumstances where the Court has upheld state law against a field preemption challenge, see California Federal Savings & Loan Ass’n v. Guerra, 479 U.S. 272 (1987), in which the Court found that state law employment practices favoring pregnant women were not preempted by Title VII, as amended by the Pregnancy Discrimination Act; Silkwood v. Kerr-McGee Corp., 464 U.S.
Arizona v. United States provides the most current example of both species of field preemption. Arizona passed an immigration bill, Arizona Senate Bill 1070, which criminalized noncompliance with federal alien-registration requirements and the seeking of employment by unauthorized aliens. It authorized police officers to arrest anyone, without a warrant but with probable cause, believed to be removable and required officers to verify an arrestee’s immigration status with the federal government. The Court concluded that the “extensive[ness] and complex[ity]” of federal legislation governing immigration carved out immigration law as federal domain. Congress’s dominancy was made clear by its passage of a vast array of immigration legislation, defining lawful entry and federal crimes, registration requirements, public benefits, and sanctions on employers. Congress’s authority to make uniform laws for naturalization, as conferred by Article I, Section 8, clause 4 of the Constitution, further buttressed congressional governance over immigration.

Of course, whether the federal government successfully exerts field preemption depends on how narrowly or broadly the field is defined. Looking broadly, the Court in Arizona defined the field as encompassing “immigration

243. Id. at 2501–02.
245. See id. §§ 1301–1306.
246. See id. § 1622.
247. See id. § 1324(a).
249. See, e.g., Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987) (defining ERISA’s preemption provision narrowly to encompass only state laws relating to employee benefit plans, rather than simply benefits, and consequently upholding state severance pay law); Young, The Ordinary Diet of the Law, supra note 93, at 356 (“In most cases, the relevant ‘field’ can be characterized in multiple ways.”).
and alien status” and concluded that Congress intended to occupy this field. Even when it focused on each of the contested provisions of Arizona’s legislation, narrowing the field from “immigration” to “alien registration,” the Court nonetheless found field preemption.

In the present case, states have a greater likelihood of successfully defending their Ebola quarantine regulations against the type of field preemption that is based on a pervasive federal scheme. Defined narrowly, the Public Health Service Act can be construed as regulating the field of quarantine, which is unlikely to satisfy the Court’s definition of a pervasive scheme. Even construing the Federal Public Health Service Act broadly as regulating communicable diseases, the Act does not have nearly the same breadth as federal immigration legislation.

The federal government might argue that the CDC regulations controlling communicable diseases are comprehensive and demonstrate a pervasive federal scheme. But that argument would be ineffective because the Court looks to the pervasiveness of the federal legislation—not the comprehensiveness of the federal regulation—to identify field preemption. In Hillsborough County v. Automated Medical Laboratories, Inc., the Court explicitly “reject[ed] the argument that an intent to pre-empt [could] be inferred from the comprehensiveness of the FDA’s regulations.” As the Court explained,

We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive.

Therefore, unless an agency is explicit about whether its regulation has preemptive effect, the Court will “pause before” concluding that “the mere volume and complexity of [an agency’s] regulations indicate that the agency did in fact intend to pre-empt.” A subject matter’s complexity will necessarily entail a comprehensive federal scheme and, therefore, cannot be the sole indicator of congressional intent to exclude state laws: “Given the complexity of

250. Arizona, 132 S. Ct. at 2498. Whether immigration is an exclusively federal field is debated. Some scholars point out that there is not an express grant of authority to Congress over immigration. See, e.g., Abrams, supra note 171, at 611.


252. Id. at 2502–03.


255. Hillsborough Cnty., 471 U.S. at 717 (emphasis added).

256. Id. at 718.
the matter addressed by Congress . . . , a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent.” 257 Consequently, state Ebola quarantine regulations are likely protected against the type of field preemption that is based on a pervasive federal scheme.

B. Dominant Federal Interest

Although state Ebola quarantine regulations might withstand an attack based on a claim of a pervasive federal scheme, they are unlikely to do so under a field preemption attack grounded on a dominant federal interest. At first blush, it appears the states would have a strong argument to defend against a claim of a dominant federal interest in quarantine regulation. In Hillsborough County, the Court declined to find that the Public Health Service Act preempted a local ordinance regulating the collection of blood plasma from paid donors simply because of a federal interest. 258 In that instance, the Court discounted the significance of a dominant federal interest:

Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. Neither does the Supremacy Clause require us to rank congressional enactments in order of “importance” and hold that, for those at the top of the scale, federal regulation must be exclusive. 259

Hillsborough County, however, is not analogous because it lacked an element of foreign affairs that is present in the current situation, which would make state Ebola regulations vulnerable.

The area of foreign affairs is uniquely situated among the fields that enjoy exclusive federal control. The Court has given great deference to federal prerogatives in foreign affairs, announcing that “[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.” 260

One of the strongest pronouncements of federal foreign affairs powers appears in United States v. Curtiss-Wright Export Corp. 261 In that case, Congress authorized President Franklin Roosevelt to issue an arms embargo on countries involved in the Chaco conflict, 262 which was challenged as an invalid delegation of power to the executive branch. 263 Curtiss-Wright delineated the scope of foreign affairs as resting exclusively within the federal sphere, tracing the transmission of that power from Great Britain to the national government when

258. 471 U.S. at 719.
259. Id.
261. 299 U.S. 304 (1936).
262. Curtiss-Wright Export Corp., 299 U.S. at 312.
263. Id. at 314.
the colonies ceded from the Crown. As a result, the Court explains, the
individual states never possessed international powers. Moreover, the power
to negotiate with foreign countries lies solely with the President:

"[T]he President alone has the power to speak or listen as a
representative of the nation. . . . Into the field of negotiation the Senate
cannot intrude; and Congress itself is powerless to invade it. . . . "The
President is the sole organ of the nation in its external relations, and its
sole representative with foreign nations.""

Although Curtiss-Wright did not involve preemption, subsequent
preemption cases have recognized the President’s plenary power in foreign
affairs as a foundation for preempting state law. In Zschernig v. Miller,
Oregon’s probate law concerning nonresident aliens’ claim to personal or real
property was preempted because it intruded upon federal prerogatives in foreign
policy. Specifically, the state law conditioned inheritance by a nonresident
alien upon a showing that his home country would not confiscate the property
and would provide reciprocal rights of inheritance for Americans. The Court
held that “state action with more than incidental effect on foreign affairs is
preempted, even absent any affirmative federal activity in the subject area of the

264. Id. at 316–17.
265. Id. at 316.
266. Id. at 319 (quoting 10 ANNALS OF CONG. 613 (1800) (statement of Rep. John Marshall)).
267. One criticism that can be lodged against preemption predicated on federal dominance in
foreign affairs is that globalization increases the interconnectivity of foreign and domestic activities,
making it difficult to distinguish between the two. Professor Goldsmith points out,

As the world becomes more interconnected—as international law increasingly regulates
traditional “local” issues, as the category of “foreign affairs” expands to include traditional
domestic “concerns,” as local activities increasingly have foreign effects, and as state and
local governments increasingly participate on the foreign stage in response to the growing
influence of external activities on local communities—this overlap in the canons will only
grow. Goldsmith, supra note 93, at 196 (footnote omitted); see also, Ernest A. Young, Dual Federalism,
Concurrent Jurisdiction, and the Foreign Affairs Exception, 69 GEO. WASH. L. REV. 139, 141 (2001)
(“[I]t is no longer possible in an age of globalization to draw a bright line between ‘foreign’ and
‘domestic’ affairs.”). Professor Goldsmith provides several examples where a matter concerning
foreign affairs can be framed as an intrusion into state traditional police power: Angel Breard’s
execution, rather than viewing it as implicating an alien’s rights, was essentially an exercise of state
police power over criminal punishment for murder; the dispute over unpaid New York parking tickets
by foreign diplomats involved the state’s power over traffic violations, rather than diplomatic
immunity; and California’s method of calculating corporate franchise tax based on a worldwide
combined reporting was a state tax issue, rather than foreign commerce. Goldsmith, supra note 93, at
196–97 (first citing Breard v. Greene, 523 U.S. 371 (1998); then citing Clifford J. Levy, Giuliani May
1997/04/20/nyregion/giuliani-may-again-Trim-Diplomats-parking.html; and then citing Barclays Bank
PLC v. Franchise Tax Bd., 512 U.S. 298 (1994)); see also Young, The Ordinary Diet of the Law, supra
note 93, at 337 (discussing the problem of overlap between traditional state regulation and federal
regulation).
state law, and hence without any showing of conflict.”

In Arizona, the Court was sensitive to the potential effects of Arizona’s law on foreign policy, noting, “It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.” The Court recognized the federal government’s “inherent power as sovereign to control and conduct relations with foreign nations,”

also, the Court in American Insurance Ass’n v. Garamendi relied on the foreign affairs power and a dominant federal interest to preempt state law. In that case, California’s Holocaust Victim Insurance Relief Act required insurers to disclose information regarding policies sold in Europe from 1920 to 1945. The federal government, having established a system for Holocaust-era insurance claims to be processed by the German Foundation in conjunction with the International Commission on Holocaust Era Insurance Claims, grew concerned over the impact of California’s law on the federally negotiated system. The Court concluded that the state law undermined the President’s discretion to use “economic pressure” as a “tool of diplomacy.”

The Court declared, “Although the source of the President’s power to act in

271. Chemerinsky, supra note 63, at 1323.
272. Arizona v. United States, 132 S. Ct. 2492, 2498 (2012); see also Hines v. Davidowitz, 312 U.S. 52, 64 (1941) (“One of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country’s own nationals when those nationals are in another country.” (emphasis added)).
274. Id. (omission in original) (quoting THE FEDERALIST NO. 3, at 39 (John Jay) (Clinton Rossiter ed., 2003)).
277. Id. at 406–07.
278. Id. at 411–12 (discussing statements that California’s actions “have already threatened to damage the cooperative spirit which the [ICHEIC] requires to resolve the important issue for Holocaust survivors”).
279. Id. at 423–24.
280. Id. at 413.
foreign affairs does not enjoy any textual detail, the historical gloss on the
‘executive Power’ vested in Article II of the Constitution has recognized the
President’s ‘vast share of responsibility for the conduct of our foreign
relations.’”281 Additionally, the Court recognized presidential power to make
executive agreements with foreign countries, which are effective without
congressional approval.282 The Court pointed out that had the President issued
an executive agreement that expressly preempted state regulation in Garamendi,
the Court would have straightforwardly applied the general recognition that
executive agreements can preempt state law.283 Due to the lack of an express
preemption provision, the Court relied on interference with foreign affairs as a
basis for invoking field preemption to invalidate California’s law.284

Moreover, even areas of state traditional police powers may implicate
foreign affairs and be susceptible to preemption through a dominant federal
interest. In McCarty v. McCarty, a federal interest prevailed over the state’s
traditional prerogatives in family law.285 In that case, the state community
property law allowed for military retired pay to be divided in a divorce
proceeding. The Court identified a federal interest in maintaining a “youthful
and vigorous” military to preclude application of the state’s community property
law.286 The federal interest dominated in McCarty because federal authority to
maintain a military force is grounded in the Constitution’s grant to Congress287
“[t]o raise and support Armies,” “[t]o provide and maintain a Navy,” and “[t]o
make Rules for the Government and Regulation of the land and naval
Forces.”288

281. Garamendi, 539 U.S. at 414 (Frankfurter, J., concurring) (quoting Youngstown Sheet &
Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952)). The Vesting Clause in Article II provides that “[t]he
executive Power shall be vested in a President of the United States,” U.S. CONST. art. II, § 1, cl. 1,
while Article I provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of
the United States,” id. art. I, § 1, cl. 1. Professors Curtis Bradley and Martin Flaherty have challenged
arguments, premised on historical and textual grounds, that the Article II Vesting Clause implicitly
grants the President broad residual powers, particularly in foreign affairs. Curtis A. Bradley & Martin
S. Flaherty, Executive Power Essentialism and Foreign Affairs, 102 MICH. L. REV. 545 (2004). On the
other hand, some theorize that the textual differences between the two articles support an inference
that the President maintains broad residual powers beyond those stated in Article II. See id. at 546–49
(recounting the scholars who support the Vesting Clause Thesis). See generally Saikrishna B. Prakash
(discussing the source and allocation of foreign affairs power).

has . . . been a longstanding practice of settling . . . claims [of its nationals against foreign countries] by
executive agreement without the advice and consent of the Senate, and this practice continues at the
present time.”).

283. Garamendi, 539 U.S. at 416–17 (“Generally, then, valid executive agreements are fit to
preempt state law, just as treaties are, and if the agreements here had expressly preempted laws like
[California’s] HVIRA, the issue would be straightforward.” (footnote omitted)).

284. Id. at 417.


287. Id. at 232.

Similarly, in United States v. Locke, the Court concluded that the Federal Oil Pollution Act preempted Washington’s law regulating oil tankers.\(^{289}\) Arguably, the state of Washington’s regulations were within its traditional police powers to regulate health and safety, as the regulations endeavored to prevent oil spills by providing “the best achievable protection . . . from damages caused by the discharge of oil.”\(^{290}\) Rather than focusing on state police powers, the Court construed the state of Washington’s regulations as interfering with traditional federal powers—interstate navigation and maritime trade.\(^{291}\)

The above cases demonstrate that “the President possesses extraordinary powers to preempt state law affecting foreign relations on his own constitutional authority and his authority delegated by Congress.”\(^{292}\) In the present situation, the President could assert his foreign affairs powers to preempt state Ebola quarantine regulations because they arguably impair U.S. efforts to provide support to Africa. As previously discussed, the United States has led the fight against Ebola overseas by deploying nearly 3,000 service members to West Africa\(^{293}\) and committing $350 million, with an additional request from the Department of Defense and U.S. Agency for International Development for $2.89 billion from Congress.\(^{294}\) The effect state regulations could have on our domestic and international response to Ebola makes it a dominant federal interest. President Obama made the following statement in his address about fighting Ebola: “I said this at the U.N. General Assembly—when disease or disaster strikes anywhere in the world, the world calls us. And the reason they call us is because of the men and women like the ones who are here today [referring to Ebola healthcare workers].”\(^{295}\) The United States’ leadership role in the fight against Ebola is evident from the White House’s report that it “[g]alvaniz[ed] international support for the response, which has resulted in more than $2 billion in commitments since mid-September.”\(^{296}\) State quarantine regulations could compromise the United States’ position in the international community and its diplomatic relations. If the United States is unable to rally

\(^{289}\) 529 U.S. 89 (2000).

\(^{290}\) Locke, 529 U.S. at 97 (citing WASH. REV. CODE. § 88.46.040(3) (1994)).

\(^{291}\) The Court explained,

The State of Washington has enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic and is now well established. The authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution.

Id. at 99.

\(^{292}\) Goldsmith, supra note 93, at 191.


\(^{295}\) Statement of President Obama, supra note 211.

health workers to volunteer for fear of being quarantined, how can the United States call upon other nations to join the fight against Ebola? Because we lead, and are depended upon by other nations to lead, state Ebola regulations could be voided through field preemption.

Thus far, this Article has argued that an anti-preemption clause, standing alone, is insufficient to immunize state Ebola regulations. And it has argued that the foreign affairs power can preempt state legislation, even when facing state traditional police powers. The final question that remains is which law prevails when an anti-preemption clause or saving clause collides with executive foreign affairs policy? Garamendi provides a clue as to what the answer might be.

In Garamendi, California argued that despite its interference with the Executive’s foreign relations, its law was authorized under the McCarran-Ferguson Act’s anti-preemption clause. The Court interpreted the McCarran-Ferguson Act as Congress’s self-imposed limitation of its commerce power to allow states to regulate insurance within their borders, but it was not necessarily a limit on executive foreign affairs powers: “[A] federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs.” Therefore, the President’s assertion of the foreign affairs power could overcome the anti-preemption provision in the Public Health Service Act and invalidate state Ebola quarantine regulations.

CONCLUSION

The purpose of this Article is not to take a position regarding the implementation of quarantines. But if quarantines are ineffective, then the federal government will want to override state quarantine laws. Public health experts have argued against Ebola quarantines because asymptomatic persons are not contagious. If state quarantines should be superseded, one mechanism to achieve that would be through preemption.

Ordinarily, state laws over health and safety enjoy a presumption against preemption, but the Court has not hesitated to set aside state law when it interferes with or conflicts with federal law or prerogatives. For the same reason, the anti-preemption clause in section 264 of the Public Health Service Act cannot shield state quarantine laws from preemption when there is a conflict with federal law.

Since neither the presumption against preemption nor state police powers are sufficient barriers against preemption, the federal government could employ obstacle and field preemption to override state quarantine regulations, arguing that they frustrate federal objectives and there is a dominant federal interest in containing Ebola. State regulations impede the establishment of uniformity for quarantine regulations, which is essential to the containment of any disease, because multiple regulations can cause confusion and inconsistent responses.

298. Id. at 428.
Imposing a mandatory quarantine on asymptomatic persons who are not contagious deters healthcare workers from volunteering and disables healthcare workers who are under quarantine. The result is that fewer healthcare workers are available to provide aid in West Africa and to prevent the epidemic from spreading to the United States, which in turn threatens national security. State quarantine regulations interfere with the President’s foreign affairs prerogative and commitment to aid West Africa. Preempting state law could protect the lives of those in Ebola-affected countries by removing state laws that stigmatize healthcare workers and discourage them from participating in the battle against Ebola. Thus, the containment of state Ebola quarantine regulations could contribute to the containment of Ebola worldwide.