Imagine for a moment, that you work as a design engineer for an ambulance manufacturing company. The year is 1970, and your industry is in chaos. Companies are using old vans, station wagons, hearses and many other inefficient, dangerous vehicles as ambulances. And why not? No standards or mandatory design requirements exist specifically for ambulances. Many companies can outfit an old, used station wagon with minimal hospital gear, then advertise and sell the vehicle as an ambulance, and make off with a substantial profit. Of course communities are enraged, and patient’s rights groups are screaming for some uniform requirements, but the legislators refuse to act. Are the ambulance manufacturer lobbyists too powerful? Is it not in a legislator’s best interest to take up the fight? Does it really matter why no uniformity exists, or is it just important that your industry has avoided such uniformity? Product liability law suits abound, and juries all over the country make decisions that stretch across the spectrum. Some manufacturers are liable in Illinois, but not liable for the same vehicle in Wisconsin. Verdicts range from hundreds of dollars to hundreds of thousands of dollars. Just when you have designed an ambulance you think is safe, a jury in California or Georgia or South Carolina finds the exact design to be defective. And while your company is busy jumping from one foot to the other, Congress does nothing. The chaos continues.

Fast forward to the year 1995. You are now the CEO of the ambulance manufacturer and you are enjoying successful profits and a great safety record. Congress passed Federal Specification KKK-A-1822 in the early 1970s, and since the adoption of the ambulance manufacturing specification, the industry has finally settled on a uniform design benchmark. Why? Federal Specifications are purchasing guidelines; if your vehicle fails to meet the specification, the United States of America will not purchase your ambulance. As a result, no domestic ambulance manufacturer builds an ambulance that does not meet the specification, for the United States is a major customer. KKK-A-1822 is now in its fifth

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edition (KKK-A-1822D), revised to increase safety and coincide with technological advances in medicine and vehicle manufacture. However, yesterday a jury in Texas awarded a verdict in a lawsuit for the plaintiff, who claimed that defective ambulance manufacture caused her injuries. You look up the blueprints of the ambulance and find that the vehicle was designed and built according to the federal specifications. Has a state common law claim just rendered KKK-A-1822D obsolete? The verdict threatens the uniformity of the industry, and you wonder if the chaos you experienced at the beginning of your career may haunt you again at the end of it. But should a state court be able to nullify a federal specification like that? Is it not true that federal laws supercede conflicting state laws? Can federal specifications pre-empt state common law claims? Perhaps.

INTRODUCTION

This article seeks to apply the pre-emption test to federal specifications. The basic question is whether Federal Specification KKK-A-1822D can pre-empt state tort claims. Part I of the comment seeks to introduce the reader to the basics of pre-emption and provide a framework and foundation from which the reader can build as the analysis progresses. Part II summarizes a chronological history of important Supreme Court cases that have changed, further developed, or questioned contemporary pre-emption analysis.1 In Part III, the reader is introduced to the federal specification relating to ambulance manufacture, and provided with a legislative history and regulatory analysis of the specification. The specification is hypothetically tested in Part IV with respect to its pre-emptive reach, and conclusions are subsequently drawn. As the Supreme Court decides the parameters of federal pre-emption of state laws and claims, arguments such as that which follows will become more common.

I. PRE-EMPTION

The doctrine of federal pre-emption finds its origins in the Constitution of the United States of America, specifically, in Article VI, Section 2, also known as the Supremacy Clause. Under the Supremacy Clause, state laws that "interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution" are invalid. The United States Supreme Court has summarized the doctrine of pre-emption in recent cases, providing a seemingly basic set of rules for determining when federal regulation displaces state law or action. The Court has stated that the "ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the [federal] statute as a whole." It has further held that the "purpose of Congress is the ultimate touchstone" in pre-emption analysis. Arguably, these principles provide the requisite structure on which courts can rule with respect to pre-emption. In reality, however, the analysis is more complex.

The Supreme Court has described three ways that federal laws or regulations can pre-empt state law. The first is through express pre-emption, where Congress explicitly defines "the extent to which its enactments pre-empt state law." Since pre-emption is essentially a question of congressional intent, where Congress has clearly stated its intentions with respect to pre-emption in the statute, courts have a relatively "easy" task.

However, where express pre-emptive intent is missing, "state law is pre-empted where it regulates conduct in a field that Congress intended the

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2. The Supremacy Clause reads:

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

U.S. CONST. art. VI, § 2.


7. English, 496 U.S. at 78-79.
Federal Government to occupy exclusively. This doctrine of implied intent finds foundation in Rice v. Santa Fe Elevator Corp., a Supreme Court case from 1947. The Court stated that intent could be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." The inference is also appropriate where an act of Congress touches "a field in which the federal interest is so dominant" that the federal regulatory scheme tacitly precludes application or "enforcement of state laws on the same subject." This is known as "field pre-emption."

The third and final approach to pre-emption, termed "conflict pre-emption," is a second form of implied pre-emption. This doctrine provides that where an actual conflict between state law and federal law exists, the federal law pre-empts the conflicting state law. Examples of conflict pre-emption exist where it is impossible to comply with both the federal and state laws, or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." It is this last form of pre-emption that this article seeks to analyze. Can the boundaries of pre-emption reach state common law claims that disrupt the purpose and objectives of federal purchasing specifications? Before one applies the current pre-emption analysis to this question, a history of how the Court has come to define the pre-emption doctrine is necessary.

8. Id. at 79.
10. Id. at 230.
11. Id.
12. See English, 496 U.S. at 78-80.
14. Id. at 654.
II. PRE-EMPTION: FROM SAVAGE TO GEIER

A. SAVAGE V. JONES

The evolution of the Supreme Court's modern-day examination of pre-emption began in Savage v. Jones.17 There, the Court distinguished for the first time between express and implied pre-emption, and consequently proposed general guidelines for pre-emption. In that case, the Court considered whether the Federal Food and Drug Act overrode a state statute requiring the publication of certain information on animal food labels.18 The Court identified implied pre-emption when, after establishing that no express denial of the state's right to regulate existed, it wrote:

Is, then, a denial to the State of the exercise of its power for the purposes in question necessarily implied in the Federal statute? For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished . . . the state law must yield to the regulation of Congress . . . .19

The Court further cautioned against finding implied pre-emption where no actual conflict between the laws exists, ordering that "such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."20 This "actual conflict" standard has survived to remain a part of implied pre-emption analysis today.21

B. HINES V. DAVIDOWITZ22

Almost thirty years later the Court decided Hines, which considered whether a Pennsylvania law that required aliens to carry an identification card at all times was pre-empted by the Federal Alien Registration Act,
which made no such requirement.\textsuperscript{23} Challengers of the law argued that the Federal Alien Registration Act comprehensively regulated alien registration in the United States and therefore pre-empted any state regulation that attempted to infringe on that comprehensive scheme.\textsuperscript{24} The federal statute, however, did not include a statement declaring its intent to pre-empt state law, which forced the Court to look to implied pre-emption:

\begin{quote}
[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.\textsuperscript{25}
\end{quote}

The Court, deserting the opportunity to define one uniform, universal constitutional test for pre-emption resolved the issue as follows:

\begin{quote}
In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of [a] particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.\textsuperscript{26}
\end{quote}

Under this analysis, the court determined that the state law disrupted the federal regulatory system and therefore could not stand in the face of such a regulatory scheme.\textsuperscript{27}

\textbf{C. RICE V. SANTA FE ELEVATOR CORP.}\textsuperscript{28}

\textit{Rice}, decided shortly after \textit{Hines}, used the same structure the Court laid out in \textit{Hines}, but in contrast to \textit{Hines} the statute in \textit{Rice} included

\begin{itemize}
\item \textsuperscript{23} \textit{Id.} at 59-61.
\item \textsuperscript{24} \textit{Id.} at 61.
\item \textsuperscript{25} \textit{Id.} at 66-67.
\item \textsuperscript{26} \textit{Id.} at 67.
\item \textsuperscript{27} \textit{Hines}, 312 U.S. at 74.
\item \textsuperscript{28} 331 U.S. 218 (1947).
\end{itemize}
express pre-emptive statutory language. The Court further emphasized that "the question in each case is what the purpose of Congress was." Rice also expanded the discussion about implied pre-emption:

>[P]urpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject . . . . Or the state policy may produce a result inconsistent with the objective of the federal statute

In the last sentence of the above quote, the Court briefly mentions the possibilities that state laws and claims that frustrate the purpose of federal legislation may be pre-empted. Basically, the Court reinforced its contention that Congress’ purpose to displace state law could be “clear and manifest” even absent explicit language. Rice is the case that truly established the Court’s love affair with the congressional purpose analysis.

D. FLORIDA LIME AND AVOCADO GROWERS, INC. V. PAUL

In 1963, however, the Warren Court seemingly yanked back the reins on pre-emption in favor of the states when it decided the Florida Lime and Avocado Growers case. California had in effect a statute that prohibited the sale or transportation in California of avocados that contained “less than 8 per cent oil, by weight . . . excluding the skin and seed.” In contrast, the federal regulations did not gauge avocados by oil content, so theoretically, many Florida avocados would qualify under the federal standard but fail California’s oil content test. The issue was whether the California oil

29. The statutes in Rice concerned warehousing. Both Illinois and the Federal government had applicable statutes. Id. at 220.
30. Id.
31. Id. at 230 (citations omitted).
32. Id.
33. See Raeker-Jordan, supra note 1, at 1389-91.
35. Id. at 134.
36. Id. The actual intent of California’s oil content statute may be slightly less
content requirement could stand in the face of such federal legislation. Justice Brennan, writing for the Court, explained why the Court held the state statute to be valid. Most importantly, the Court realized that the federal statute explicitly stated that the regulations sought to establish minimum specifications. "[The federal statute established] minimum standards of quality and maturity . . . . That language cannot be said, without more, to reveal a design that federal marketing orders should displace all state regulations. By its very terms, in fact, the statute purports only to establish minimum standards." The Court concluded that the best inference from the legislative scheme was that Congress intended to allow the states to retain the power to enact the type of regulation here challenged.

E. JONES V. RATH PACKING CO.

If the Rice Court clarified the frustration of purpose analysis, the Jones Court crystallized the role of objective frustration in pre-emption analysis. It was clear that the Court was willing to recognize two distinct forms of pre-emption: express and implied. The Jones Court considered the Federal Acts that regulated net-weight labeling of food in contrast to a California statute that did the same. The California statute required "the average weight or measure of the packages or containers in a lot of any . . . commodity sampled shall not be less, at the time of sale or offer for sale, than the net weight or measure stated upon the package." The statute allowed for no variance for moisture loss during the manufacturing and storage process. The federal statute, however, allows for such deviations

honorable than protection of its citizens under its police powers. California avocados are mostly of Mexican ancestry and usually contain at least 8% oil content when mature. In contrast, the several Florida varieties find their ancestry in West Indian avocados and actually contain less than 8% oil content when mature. In fact, the Florida avocados are past their prime ripeness when they measure 8% oil content. Perhaps the statute does not prohibit unsafe avocados, merely those that are grown in Florida. However, evidence also suggests that because of short shelf-lives and inefficient shipping methods, very few if any Florida avocados are ever sold in California, so the plaintiff may have slightly more than a frivolous claim. Id. at 140.

38. Id. at 152.
40. Id. at 522.
41. Id. at 526.
42. Id.
in its labeling requirements. The Court, as it should when at issue are statutes normally reserved to the state’s police powers, began with an assumption against pre-emption, only to be overcome by a clear and manifest intent by Congress to pre-empt that regulation.

The Court began its ruling with an interesting caveat, "[t]his [pre-emption] inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." This statement evidences the Court’s conviction and confidence in the obstruction of purposes test, for it does not matter whether the pre-emptive language is explicit. The Court will look beyond any words to the interpretation and application of the statute for obstruction of purposes. In Jones, the Court determined that compliance with both the federal and state regulations was not impossible, but did find that the state statute obstructed the purposes of the federal legislation, and therefore, could not stand. The Court, therefore, created somewhat of a paradox. That is, no actual conflict between the laws was established, yet the Court found pre-emption through the obstruction of purposes test.

F. PACIFIC GAS AND ELECTRIC CO. V. STATE ENERGY COMMISSION

In Pacific Gas, the California legislature prohibited certification of nuclear power plants until the State Energy Commission made a finding that demonstrated that the federal government had approved technology for permanent disposal of high-level nuclear waste. The plaintiff, Pacific Gas, challenged the law on a pre-emption basis, claiming that the Nuclear Regulatory Commission (NRC) had federal authority to regulate the use of nuclear energy. The Supreme Court disagreed. The NRC regulates safety, not economics, therefore a state regulation based on safety may be pre-empted, but one based on economics (as was the case) could not be pre-empted.

44. Jones, 430 U.S. at 525.
45. Id. at 526.
46. Id. at 540, 543.
47. Chief Justice Rehnquist dissented to the idea of finding pre-emption where compliance with both federal and state law was possible. For more information regarding the Jones decision’s threat to federalism principles, see Raeker-Jordan, supra note 1, at 1393.
49. Id. at 197.
50. Id. at 194.
51. Id. at 222. The dissent argues that any state ban on nuclear power would be
This case, at first glance, seems to lessen the importance of purpose analysis, or at least detract from the influence given it through *Jones* and *Rice*. Notice in the Court's summary of the pre-emption analysis in *Pacific Gas*, obstruction of purpose is given little more than mention as a piece of conflict pre-emption:

It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms. Absent explicit pre-emptive language, Congress' intent to supercede state law altogether may be found from a "scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."52

However, despite the unimportance of obstruction of purposes hinted at in *Pacific Gas*, the opinion in *Gade*3 reaffirms that while the Court may label its analysis something different, the foundation is still congressional purpose.

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53. *See* case cited infra note 54.
G. GADE V. NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION

In *Gade*, it appears that the Court began to struggle with how to apply the pre-emption principles that had developed in the past eighty years. The issue was whether the Occupational Safety and Health Act (OSHA) and the regulations passed under the Act pre-empted two similar Illinois statutes that attempted to regulate occupational safety and health and public safety.55 A divided Court decided that the Illinois statutes were inconsistent with the overall federal statutory scheme.56 What begs analysis, however, is how the plurality seemingly skipped over the express language authorizing pre-emption in the statute. The Court instead immediately began searching for implied pre-emption in order to apply the frustrated purpose analysis.57 A dissent by Justice Souter delivered a cautionary theme, warning the plurality that in a pre-emption analysis, the presumption is supposed to be against pre-emption of state law, not in favor of it.58 However, as one continues to analyze contemporary pre-emption jurisprudence, it becomes clear that the Supreme Court has refused to heed Souter’s warning.

H. CIPOLLINE V. LIGGETT GROUP, INC.

The *Cipollone* Court seemed to adopt a more intuitive, common sense approach to pre-emption analysis. The petitioner, Cipollone, brought suit against three of the big tobacco producers on behalf of his mother who died of lung cancer allegedly caused by smoking the respondents’ cigarettes.60 The claim involved common law tort theories such as strict liability, negligence, fraudulent misrepresentation, and conspiracy to defraud, and under contract law, an express warranty claim.61 The cigarette manufacturers argued that the claims were pre-empted by two federal acts, the 1965 Federal Cigarette Labeling and Advertising Act and its successor,

55. Id. at 91.
56. Id. at 107-09.
58. Id. at 114-22 (Souter, J., dissenting).
60. Id. at 509. Rose Cipollone initially brought suit against the cigarette manufacturers, but died before trial. Id. Her husband continued in her stead, but also died, after the trial. Id. The couple’s son then maintained the action. Id.
61. Id. at 509-10.
the 1969 Public Health Cigarette Smoking Act.\textsuperscript{62} The Court held some, but not all, of the state law claims for damages to be pre-empted.\textsuperscript{63} Where the Court seemed to change its position on pre-emption is with respect to its analysis of express pre-emptive language:

In our opinion, the pre-emptive scope of [the statutes] is governed entirely by the express language in ... each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when the provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation . . . . Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.\textsuperscript{64}

This seems a healthy departure from the confusion created in Rice, Jones, and Pacific Gas. However, the Court still used implied pre-emption to reach its conclusion. Justice Thomas acknowledged in the Freightliner opinion that, in Cipollone, the Court "engaged in a conflict pre-emption analysis."\textsuperscript{65} In so doing, the Supreme Court, despite the rule the Court itself laid out, went beyond the express provision in the statute to scrutinize congressional purpose and hunt down pre-emption. This confusion is echoed by Justices Blackmun and Scalia in the dissenting opinion, where Justice Scalia commented, "I can only speculate as to the difficulty lower courts will encounter in attempting to implement [today's] decision."\textsuperscript{66}

\begin{itemize}
\item \textsuperscript{62} Id. at 510.
\item \textsuperscript{63} Cipollone, 505 U.S. at 530-31.
\item \textsuperscript{64} Id. at 517 (quoting Malone v. White Motor Corp., 435 U.S. 497, 505 (1978) and Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 282 (1987) (opinion of Marshall, J.)).
\item \textsuperscript{65} Freightliner Corp. v. Myrick, 514 U.S. 280, 289 (1995).
\item \textsuperscript{66} Cipollone, 505 U.S. at 555 (Scalia, J., concurring in the judgment in part and dissenting in part) (quoting Cipollone, 505 U.S. 543-44 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part)).
\end{itemize}
I. FREIGHTLINER CORPORATION V. MYRICK

This case looked at the pre-emptive effect of the National Traffic and Motor Vehicle Safety Act of 1966 and again tried to clarify the rules of pre-emption. The plaintiffs brought suit in state court for injuries allegedly caused by the negligent design of defendant's products. The defendants claimed that a federal standard pre-empted the common law, even though a federal court had suspended the standard. The defendants argued that the suspension is regulation itself, or that, because the appropriate federal agency refused to regulate, such absence implicitly meant that regulation was inappropriate, and any state regulation should be invalid. The Court held that the absence of regulation does not displace a state common law action. Important to the development of pre-emption, however, was the Court's explanation of the mutual exclusivity of implied and express pre-emption, or lack thereof:

\[\text{The fact that an express definition of the pre-emptive reach of a statute "implies" - i.e. supports a reasonable inference that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption . . . . At best, Cipollone supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule.}\]

The Court's clarification of Cipollone seemed not to clarify, but instead detracted from or weakened Cipollone. In Cipollone, great power was given to any express pre-emption clause, but the Court in Freightliner checked that power. Implied pre-emption thus found new life in pre-emption jurisprudence.

68. Freightliner Corp., 514 U.S. at 282.
69. Id.
70. Id. at 286. The defendant's claim was based on precedence, however. See Ray v. Atl. Richfield Co., 435 U.S. 151, 745-75 (1978).
71. Freightliner Corp., 514 U.S. at 282.
72. Id. at 288-89.
73. See supra text accompanying notes 59-66.
J. MEDTRONIC, INC. V. LOHR

Medtronic considered the pre-emptive potential of the Medical Device Amendments to the Federal Food, Drug and Cosmetics Act, which did contain an express pre-emption clause. In defiance of Freightliner, the Court began its analysis this way:

As in Cipollone . . . we are presented with the task of interpreting a statutory provision that expressly pre-empts state law. While the pre-emptive language of [the statute] means that we need not go beyond that language to determine whether Congress intended the [statute] to pre-empt at least some state law . . . we must nonetheless “identify the domain expressly pre-empted” by that language.

The Court seemed finally to rule that implied pre-emption could be found even if a court did not find certain claims expressly pre-empted: “[w]e see no need to determine whether the statute explicitly pre-empts such a claim. Even then, the issue may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis.” One scholar argues that this gives courts the freedom to exhaust all avenues and search endlessly to find pre-emption.

K. GEIER V. AMERICAN HONDA MOTOR COMPANY, INC.

Geier, decided recently, provides a definite groundwork upon which to build a pre-emption argument. That case considered the pre-emptive reach of the National Traffic and Motor Vehicle Safety Act of 1966 and its pre-emption clause with respect to common law “no-airbag” actions. The Court held that the savings clause in the statute removed tort actions from express pre-emption but continued to use conflict pre-emption principles to

75. Id. at 474-75.
76. Id. at 484 (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992)).
77. Id. at 503.
78. See Raeker-Jordan, supra note 1, at 1422.
invalidate the lawsuit. Justice Breyer, writing for the plurality, made a bold statement: "We now conclude that the saving clause (like the express pre-emption provision) does not bar the ordinary working of conflict pre-emption principles." It appears that the Court is content with recognizing both express and implied pre-emption to exist mutually, thereby leaving open many possibilities for a federal regulatory scheme to displace state law or tort actions.

In summary, the current test for finding implied pre-emption can be stated as follows:

State law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises . . . where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."  

III. FEDERAL SPECIFICATIONS

It is not necessary for the purposes of this comment to discuss express pre-emption, as most federal specification documents contain no such written intent. Implied pre-emption, however, presents an opportunity to study the validity of the pre-emptive effect of federal specifications on state laws or claims. Federal specifications are those guidelines employed by government agencies to mandate the quality, construction, reliability and safety of equipment purchased by those agencies for government usage. Generally, these specifications exist to define commercial goods and those "products that have a high potential for common federal agency use." The General Services Administration (GSA) writes, manages, indexes,
maintains, and approves the specifications, which are eventually published in the Index of Federal Specifications.  

As of 1997, well over six thousand of these specifications existed, ranging from ambulance manufacture specifications to those governing potholders. Because pre-emption analysis turns on congressional intent, each product’s specification must be evaluated individually to determine their potential pre-emptive effect over state laws or claims. In the end, some specifications would surely not conflict with state laws, and some may pre-empt state laws or claims. To be sure, numerous federal specifications may lie somewhere between the absolutes, and it is that type of specification that warrants careful analysis. This comment will focus on one federal specification, that governing ambulance manufacture, in order to sufficiently analyze and verify its pre-emptive effect on certain state laws or claims.

A. CONGRESSIONAL INTENT AND PURPOSE

The Court’s current test for pre-emption concerns the legislature’s intent in passing the regulation, to determine if Congress actually intended to displace and pre-empt state laws and claims. Simply stating the definition of a federal specification probably leaves most legal scholars

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91. "[T]here can be no one crystal clear distinctly marked formula for determining whether a state statute is pre-empted . . ." Hartley Marine Corp. v. Mierke, 474 S.E.2d 599, 604 (W. Va. Ct. of App. 1996) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
92. It is impractical to analyze federal specifications generally to determine whether, as a class, they can pre-empt state law, since the intent in writing and authorizing specifications may be different with each product. However, a similar framework as that which follows may be appropriate as a loose guide to analyzing different specifications for pre-emptive potential.
93. Specifications that do not disrupt the purpose and objective of Congressional actions would not pre-empt state laws or claims. See Pac. Gas and Elec. Co., 461 U.S. at 203-04.
94. Federal Specifications that disrupt the accomplishment of the goals and purposes of Congressional action may pre-empt state laws or claims. See discussion infra Part IV.
95. See supra text accompanying note 8.
96. Federal Specifications are those guidelines employed by government agencies to mandate the quality, construction, reliability and safety of equipment purchased by those agencies for government usage. See supra text accompanying note 85.
wondering why pre-emption is even considered in the same breath as these purchasing specifications, as it seems a far cry from any standard for pre-emption supported by the Supreme Court. In light of current pre-emption jurisprudence, however, a blanket assumption that purchasing specifications can never pre-empt state laws or claims, without first analyzing the history and foundation of a particular specification’s existence, may be a significant oversight.

Federal Specification KKK-A-1822D finds its genesis during a time of controversy, disorganization, and confusion in the ambulance manufacturing industry and provides a prime example of a situation in which a federal specification may implicitly pre-empt state laws and claims. The intent behind KKK-A-1822D can be gleaned from researching the context that existed in the industry immediately prior to its inception.

In 1966 and 1967, reports by the Division of Medical Sciences of the National Academy of Sciences, National Research Council (NAS-NRC) included statements concluding there were no acceptable standards for ambulance design. These reports went so far as to say that the majority of ambulances in America were unsuitable, carried inadequate supplies, had incomplete equipment, and were manned by untrained crews. The reports concluded by calling for something to be done to address the state of inadequacy in ambulance design and manufacture. Evidence suggests that numerous professional organizations offered standardized procedures for ambulance manufacturers with respect to crew training, requisite on-board equipment, and the management of life-threatening emergencies. Unfortunately, nearly all ambulance manufacturers ignored these recommendations and most refused to voluntarily adopt the procedures. At the same time, communities were demanding increased and improved ambulance services. Unsuitable station wagons and mortician vehicles

97. Throughout this comment, the federal specification may be referred to as KKK-A-1822 or KKK-A-1822D. Do not be confused, as KKK-A-1822 is the original version of the specification, and KKK-A-1822D is the current, revised version of the specification.
98. COMMITTEE ON TRAUMA AND SHOCK, NATIONAL ACADEMY OF SCIENCES-NATIONAL RESEARCH COUNCIL, THE NEGLECTED DISEASE OF MODERN SOCIETY (1966); COMMITTEE ON TRAUMA, NATIONAL ACADEMY OF SCIENCES-NATIONAL RESEARCH COUNCIL, SUMMARY REPORT OF THE TASK FORCE ON AMBULANCE SERVICES (1967).
99. Id.
100. COMMITTEE ON EMERGENCY MEDICAL SERVICES, NATIONAL ACADEMY OF SCIENCES-NATIONAL RESEARCH COUNCIL, MEDICAL REQUIREMENTS FOR AMBULANCE DESIGN AND EQUIPMENT 5 (1970).
101. Id.
102. Id.
sold off from funeral homes were being used to replace ambulances. The ambulance manufacturing field was in chaos and in dire need of some authoritative standardization. Researchers, ambulance designers, and emergency medical professionals soon became aware that federal intervention was necessary.  

This environment led to the development of KKK-A-1822 in the early 1970s, the first version of the ambulance manufacturing specification from which the current specification evolved. The current specification includes, on the title page, this statement:

The specification has been coordinated with the Ambulance Manufacturers Division (AMD) of the National Truck Equipment Association, the American Ambulance Association (AAA), and the Federal Interagency on Emergency Medical Services (FICEMS). The content is based on performance, function, and design requirements necessary to provide for a safe, reliable, highly functional ambulance while allowing flexibility for purchasers to customize the ambulance for individual needs.  

103. *Id.* at 5.
The statement reveals the extent to which the federal government went to standardize the ambulance construction and design industry. Agencies from the organization responsible for overseeing and representing ambulance manufacturers (AMD),\textsuperscript{105} to the National Academy of Sciences,\textsuperscript{106} to the Federal Interagency on Emergency Medical Services\textsuperscript{107} collaborated to ensure that ambulance construction across the country met some acceptable safety and efficiency standards. The GSA intended to accomplish this standardization by awarding the "Blue Star of Life" (the familiar blue insignia on ambulances) only to those vehicles that met the specification.\textsuperscript{108} Furthermore, as a procurement guide, the specification limited those ambulances purchased by any federal agency to only those that met or exceeded KKK-A-1822.\textsuperscript{109}

\textsuperscript{105} (AMD) Ambulance Manufacturers Division of the National Truck Equipment Association (NTEA). The NTEA has grown to become the exclusive representative of the commercial truck body and equipment industry. Approximately 1,600 distributorships, manufacturing firms, suppliers and various industry-associated companies now belong. The mission of the NTEA is to further the prosperity of its members by providing programs and services that facilitate a thriving commercial truck and transportation equipment marketplace. The Association functions as the hub for all segments of the industry, offering new knowledge and business opportunities that benefit its members as well as their suppliers and customers. See The National Truck Equipment Association, at http://www.ntea.com/aboutntea.asp (last visited Dec. 6, 2001).

\textsuperscript{106} See sources cited supra notes 98, 100.

\textsuperscript{107} The USFA chairs and administers the Federal Interagency Committee on Emergency Medical Services (FICEMS), which serves as a forum to establish and facilitate effective communication and coordination between and among Federal departments and agencies involved in activities related to EMS. See Federal Interagency Committee on Emergency Medical Services, at http://www.usfa.fema.gov/ems/ficems.htm. (last visited Dec. 6, 2001).

\textsuperscript{108} The "Star of Life" can only be displayed if the ambulance conforms to the federal specification. "The Star of Life is a six-barred cross upon which is superimposed the staff of Aesculapius (es' cu-la’ pi-us) who, in both Greek and Roman mythology, was the god of medicine and healing." Fed. Spec. KKK-A-1822D, Figure 4, p. 86 (G.S.A. 1994). The specification is extremely specific on the size, placement, and usage of the Star of Life, requiring measurements exact to the millimeter on each graphic. Id.

\textsuperscript{109} See discussion supra Part III.
The GSA accomplished its standardization goal: to ensure reliable, safe ambulance service to communities by specifying standards for construction. In fact, twenty-three out of twenty-three ambulance manufacturers surveyed by the Journal of Emergency Medical Services currently build their ambulances in accordance with federal specification KKK-A-1822D.

The GSA wrote these ambulance specifications to provide a standard for manufacturers to meet. When these specifications are met, the Federal Government considers the ambulance safe, reliable, and competently equipped and staffed. However, a certain fundamental inconsistency arises when the intent behind federal specifications in general and the specific intent behind KKK-A-1822D differs. As stated, the intent behind most federal specifications concerns mandating the quality, construction, reliability and safety of equipment purchased by government agencies for the agencies' use. Federal Specification KKK-A-1822D accomplishes that, but has at its heart a different intent: to provide the industry with an authoritative, safe standard. This distinction becomes important because conflict pre-emption depends upon state action that frustrates the purpose or objective of federal policy.

B. CONGRESSIONAL AUTHORITY

Thus far, I have analyzed the intent of the specification and the objective sought to be achieved, but have yet to determine through what authority the GSA derives its power to issue and enforce such specifications. Under the Supremacy Clause, state laws that "interfere with, or are made contrary to the laws of Congress, made in pursuance of the constitution" are invalid.

Under that principle, one must first establish that federal Specifications are "laws of the United States," or that the specifications

111. See supra text accompanying note 85.
113. U.S. CONST. art. VI, § 2.
115. Id.
exist through some congressional authority.\footnote{La. Pub. Serv. Comm. v. FCC, 476 U.S. 355, 369 (1986) (holding that \textquotedblleft pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation\textquotedblright); see also, Carpenter v. Consol. Rail Corp., 631 N.E.2d 607 (Ohio 1990).} Congress authorized the Administrator of the GSA to pass regulations to carry out the act that established the GSA.\footnote{40 U.S.C. § 751 (2000).} Furthermore, Congress specifically vested in the GSA the power to prescribe specifications for the procurement of government property for all government agencies and organizations contracting with the federal government.\footnote{40 U.S.C. § 471 (2000).} More specifically, the GSA enacted a regulatory provision that mandated that all ambulances procured by the GSA for any government agency must conform to Federal Specification KKK-A-1822.\footnote{41 C.F.R. 101.26.501(2) (2000).} Following that chain of analysis, it becomes clear that the GSA, through its congressionally mandated power, formally established the industry standard and instituted procurement requirements for ambulances when it promulgated Federal Specification KKK-A-1822.

C. STATE TORT CLAIMS

Before one can proceed to the pre-emption analysis, one must first establish whether a tort claim or common law action is within the reach of pre-emption.\footnote{See e.g., Pokorny v. Ford Motor Co., 902 F.2d 1116, 1122-23 (3d Cir. 1990).} A few hurdles exist that must be cleared before the analysis can continue, since even federal safety standards generally are not designed to eliminate common law liability for defective products.\footnote{Shipp v. Gen. Motors Corp., 740 F.2d 418, 421 (5th Cir. 1985).} However, even if a federal statute does not expressly prohibit state common law tort actions, such a prohibition may be implied from the purpose of a federal act, in which case the state law must yield to the extent it is incompatible with the federal scheme.\footnote{Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189, 1190-91 (E.D. Tenn. 1985).}

In \textit{Geier}, the Court decided that the plaintiff's product liability claim, if successful, would have the effect of imposing a new, higher duty and standard of care on automobile manufacturers than the federal act required and would have presented an obstacle to the purpose of that particular federal legislation.\footnote{Geier v. Am. Honda Motor Co. 529 U.S. 861, 881 (2000).} The Court then determined that the claim was

\begin{itemize}
\item \footnote{La. Pub. Serv. Comm. v. FCC, 476 U.S. 355, 369 (1986) (holding that \textquotedblleft pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation\textquotedblright); see also, Carpenter v. Consol. Rail Corp., 631 N.E.2d 607 (Ohio 1990).}
\item \footnote{40 U.S.C. § 751 (2000).}
\item \footnote{40 U.S.C. § 471 (2000).}
\item \footnote{41 C.F.R. 101.26.501(2) (2000).}
\item \footnote{See e.g., Pokorny v. Ford Motor Co., 902 F.2d 1116, 1122-23 (3d Cir. 1990).}
\item \footnote{Shipp v. Gen. Motors Corp., 740 F.2d 418, 421 (5th Cir. 1985).}
\item \footnote{Roysdon v. R.J. Reynolds Tobacco Co., 623 F. Supp. 1189, 1190-91 (E.D. Tenn. 1985).}
\item \footnote{Geier v. Am. Honda Motor Co. 529 U.S. 861, 881 (2000).}
\end{itemize}
invalid.\textsuperscript{124} Furthermore, the Supreme Court has agreed with the Third Circuit Court of Appeals, which held that "the duties imposed through state common law damage actions have the effect of requirements that are capable of creating an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."\textsuperscript{125} In addition, pre-emption can be addressed when the effects of product liability claims would have the effect of frustrating the federal regulatory scheme.\textsuperscript{126} Other courts have also recognized that in appropriate cases, state tort claims can be within the pre-emptive reach of federal statutes.\textsuperscript{127} It appears likely that a court will consider state common law claims that frustrate federal objectives to be within the reach of pre-emption by the appropriate federal regulation.\textsuperscript{128}

IV. APPLICATION AND ANALYSIS

Having established that federal specifications are acts of Congress and that the objective of Federal Specification KKK-A-1822 was to provide essential criteria for ambulance design and manufacture in order to provide a practical degree of national standardization, one must determine whether this specification can ever pre-empt state laws or tort claims. Because this theory has yet to be tested,\textsuperscript{129} it is necessary to develop a hypothetical situation for which to apply this theory and test its veracity.

\begin{flushright}
\textsuperscript{124} Id.
\textsuperscript{126} Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987).
\textsuperscript{128} See generally Raeker-Jordan, supra note 1, at 1423.
\textsuperscript{129} The author found no case law that would suggest the pre-emptive possibilities of Federal Specification KKK-A-1822D have been tested.
\end{flushright}
The specification adopts certain standards, incorporating them by reference. One such standard is Ambulance Manufacturing Division (AMD) Standard 004 pertaining to litter retention systems. This standard requires that the retention system withstand a force of at least 1500 pounds applied laterally, longitudinally, and vertically. Suppose a private ambulance that meets the federal specification is involved in an accident during which the litter retention system fails and the patient is seriously injured. Suppose also that this ambulance was tested immediately before the accident according to the specification’s testing procedures and passed, meaning that the litter retention system did withstand at least 1500 pounds of force. Following the accident the patient experiences a great deal of pain, requiring numerous medical procedures to repair the damage suffered in the accident.

After the victim consults his attorney, he files suit against the ambulance manufacturer, alleging strict liability for his injuries and that the manufacturer defectively designed the ambulance. Further, suppose the complaint alleges that the manufacturer should have designed the litter retention system to withstand 1800 pounds of force. The manufacturer consults his attorney, and after some research decides to assert pre-emption as a defense to the plaintiff’s claim, theorizing that because he met the federal specification any judgment that would have the effect of holding the manufacturer to a higher standard of liability is pre-empted by the federal specification. Can the defendant’s pre-emption defense succeed?

130. The specification incorporates by reference portions of other federal specifications, federal standards, military standards, federal legislation and regulations, the California Motor Vehicle Code, the Tire and Rim Association, Inc., Yearbook, the Society of Automotive Engineers (SAE), Inc., Standards and Recommended Practices, AMD Standards, Illumination Engineering Society guides, and policies of the Automotive Manufacturers. KKK-A-1822D § 2.1-2 (G.S.A. 1994). However, according to section 2.3 of the specification, “In the event of a conflict between the text of this specification and the references cited herein, the text of this specification shall take precedence.” KKK-A-1822D § 2.3 (G.S.A. 1994).

131. A litter retention system provides the means for securing a litter to the floor and/or side of an ambulance. A litter is the wheeled cot (gurney) on which patients are strapped during transport. AMD Standard 004 § 3.1-3.2 National Truck Equipment Association (July 1991).


133. We will assume the ambulance was not purchased by the United States government or any state government that has similar procurement requirements. Courts are split on whether this “government contractor defense” should apply to both military and civilian contractors and to what extent it should apply. See generally Carley v. Wheeled Coach, 991 F.2d 1117 (3d Cir. 1993) and Boyle v. United Tech. Corp., 487 U.S. 500 (1988).
Any argument based on express pre-emption will certainly fail, as no pre-emption clause exists in the specification. Unfortunately, express pre-emption is more easily established than its implied equivalent, because congressional intent is manifested in a clause within the statute. Furthermore, pre-emption is not favored in the absence of persuasive reasons, such as when the facts support no other conclusion or when Congress has unmistakably so intended. Nonetheless, when a party asserts the affirmative defense of pre-emption, the court should make the following analysis: whether Congress, in enacting the federal statute or policy, intended to exercise its constitutionally delegated authority to set aside the laws of a state. If so, the Supremacy Clause requires the court to follow federal, not state law. If, however, explicit pre-emption does not appear in the federal statute, as it does not here, then a court that is determining whether the federal law pre-empts the state law must consider whether the federal statute’s objective or purpose reveals clear, but implicit pre-emptive intent.

KKK-A-1822 was promulgated to provide stability, standardization, uniformity and safety to the ambulance manufacturing industry. It has been successful, even undergoing four revisions in the last twenty-five years in order to keep current with manufacturing technology. To allow a claim based on negligent design against a manufacturer who met the specification would serve only to create a new standard in one state and would surely thrust the industry back into the chaos it experienced prior to federal intervention. Simply put, the objective of the specification was to provide uniformity and standardization to the field. To permit a state tort claim would upset that uniformity and, therefore, frustrate the objective and purpose of the federal act. That frustration, under the doctrine of implied conflict pre-emption, requires a court to find that the federal regulation must supercede, displace, and pre-empt the state claim. In other words,

134. This is termed implied pre-emption.
139. See discussion supra Part III.A.
140. The current specification is KKK-A-1822D and was preceded by KKK-A-1822, KKK-A-1822A, KKK-A-1822B, and KKK-A-1822C. The revisions included changes to the specification to reflect advances in vehicle manufacture, medical equipment, and emergency life-saving procedures. Past versions available from GSA at 7CAFL, P.O. Box 6477, Fort Worth, TX 76115 (mailing code AMBU-0001).
141. See discussion supra Part III.A.
if the compliant manufacturer is held liable, no practical standardization will have occurred and ambulances that meet KKK-A-1822D will no longer be considered reliable and safe. The result would be to establish a body of law that lies in direct contradiction to the purposes of the federal specification. Under these circumstances, federal pre-emption of the state claim should be fully justified.

In opposition, however, if Congress really had a “clear and manifest” intent to pre-empt state law with respect to this specification, would the analysis require so many “if, then” leaps? Instead, would not the analysis be clear, short and definitive? The answer, simply, is no. Most of the analytical work necessary in this case was needed to establish that the (1) purpose of (2) a federal act or law was (3) in danger of frustration (4) by a state law. Initially, the purpose of the federal act had to be lifted from whatever historical materials were available. Next, the specification had to be shown to qualify as a federal regulation. Then, one had to establish that the purpose of the federal specification was in danger of being frustrated, and lastly, that the frustration (common law tort claim) qualified as state law. After those four factors were established, the analysis is quite simple and rather short. Much the same analysis must take place in every conflict pre-emption test.

However, if a state court is foreclosed, through pre-emption, from finding that the ambulance was defectively designed, what remedy can an injured party seek? How can the victim challenge the competence of the federal specification? The answer lies within the framework of the separation of powers doctrine. The objective of the Constitution was to establish three, separate and equal branches of government, the legislative, the judicial, and the executive. Each branch has specific duties.

145. See discussion supra Part III.A.
146. See discussion supra Part III.B.
147. See discussion supra Part III.C.
148. See discussion supra Part III.C.
The executive branch\textsuperscript{149} approves and executes the legislation written and passed by the legislature,\textsuperscript{150} and the judicial branch\textsuperscript{151} interprets and enforces that legislation.\textsuperscript{152} At its very foundation, the separation of powers doctrine forbids one branch of government from exercising powers properly belonging to a different branch.\textsuperscript{153} Therefore, it is generally recognized that constitutional boundaries are invaded when one branch of the government attempts to exercise powers exclusively delegated to another.\textsuperscript{154} Quite simply, the courts are not free to simply rewrite statutes that Congress has seen fit to pass. The judiciary may not usurp the power of the legislature.\textsuperscript{155}

By allowing a court to increase the standard established by the very existence of Federal Specification KKK-A-1822D, the judiciary is in effect re-writing the specification, a task properly lying within the province of the legislature. Congress has delegated the authority to the General Services Administration to write, promulgate, and publish federal specifications.\textsuperscript{156} The subject matter is uniquely technical in nature, and the specification itself has evolved over the course of thirty years, constantly being checked, rechecked, and rewritten by the very experts that developed it in the first place. The General Services Administration, not any part of the judiciary, is the segment of our government with the knowledge, expertise, and understanding to properly shape the future of the specification.\textsuperscript{157} How then, does a victim challenge the specification?

In short, the victim should write her Congressional representative. As a representative of her constituents, it is the elected official in the legislative branch whose job it is to spur change in legislation. Congress

\begin{thebibliography}{99}
\bibitem{149} U.S. CONST. art. II.
\bibitem{150} U.S. CONST. art. I, § 1.
\bibitem{151} U.S. CONST. art. III.
\bibitem{152} The court noted that:
\begin{quote}
"[t]he powers of the government, divided into the legislative, executive, and judicial branches, are separate and divisible. The legislative branch has the authority to make, alter, and repeal the law; the executive branch administers and enforces the law; and the judicial branch has the authority to interpret and apply the law."
\end{quote}
Richardson v. Tenn. Bd. of Dentistry, 913 S.W.2d 446, 453 (Tenn. 1995).
\bibitem{154} \textit{In re} D.L., 669 A.2d 1172, 1176 (Vt. 1995).
\bibitem{155} \textit{Id.}
\bibitem{156} See discussion \textit{supra} Part III.B.
\end{thebibliography}
gave the authority to the GSA to write the specification, therefore it must also be Congress that forces or allows the GSA to change the specification. To allow otherwise is to defile one of the most fundamental constitutional doctrines, that which both grants power and limits power simultaneously.

CONCLUSION

Some scholars criticize the Court for its pre-emption rules, terming the Court's analysis as a threat to federalism and those powers granted to the states. Should a court be allowed to search in every dark corner and lift every rock to find pre-emption? The answer must be in the affirmative if federal legislation is to retain its influence and regulatory power. Even those that claim that the Court has over-extended pre-emption past its natural and constitutional boundaries must admit that the current obstruction of purposes doctrine properly permits many acts of the federal government to pre-empt state laws and claims. Until the Supreme Court sees fit to revise and narrow the scope of pre-emption, arguments such as that within this comment will continue to surface and succeed.

-MICHAEL J. DENNING

158. Id.
159. See Raeker-Jordan, supra note 1, at 1468-69.
160. Id.
† Northern Illinois University College of Law Scribes Competition Nominee (2001).