

FIELD PREEMPTION AND THE PRESUMPTION OF FEDERAL ACTION: A THREE-WAY SUPREMACY CLAUSE TUG OF WAR

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I. INTRODUCTION	159
II. BACKGROUND	162
A. <i>State Conflicts within Preemptive Federal Space</i>	162
1. Immigration enforcement by the states is limited.....	163
2. Border security represents a key nexus between federal interests, constitutional authority, and local state interests in protection of its citizenry.....	164
B. <i>Security of a state and its borders is the preeminent issue and represents the baseline case for this pre-emption analysis.</i>	165
1. The impact of <i>Arizona v. United States</i> on the border security debate is critical.....	166
2. Border security issues in Texas are the most recent reflection of the tension between the federal Executive and the states.	167
3. Needs of the States: Setting up Conflict with Federal Priorities.....	168
a. Enforcement Resources	168
b. Fiscal Predictability	168
III. ANALYSIS.....	169
A. <i>The paradigm for preemption analysis has shifted from two actors to three actors.</i>	170
1. The conflict has been typically expressed as a two-actor tug: Federal v. State.	170
2. This paradigm forms the three-actor conflict: State versus Congress versus Executive.....	170

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- a. The State171
 - b. The Congress, as expressed in Legislation and Case Law as the *Will of Congress*171
 - c. The Executive Agent.....172
 - B. *Traditional state expectations of federal government action are rooted deeply in the demands of the Constitution.* 172
 - C. *Preemption characteristics: Congress has been the preeminent voice of federal preemption status*..... 175
 - 1. Historically, preemption is funneled into two categories.176
 - 2. Within implied preemption, and in traditional analysis, preemption is further subdivided into field preemption, conflict preemption, and obstacle preemption.176
 - 3. Field Preemption presents the stressing case for analysis. ...178
 - 4. There is a resulting expectation that the federal Executive agent will act in a field preempted area.179
 - 5. Null Preemption and failure to act.....180
 - 6. The federal Executive creates the conflict.....182
 - D. *Preemption characteristics: The federal Executive is the corresponding agent of preemptive activity, but has broad discretion in law.* 183
 - 1. The federal Executive has promised to enforce the laws.183
 - 2. Executive discretion allows the federal Executive wide freedom to operate in a dynamic and dangerous world.185
 - 3. The limits of discretion are pushed by the Executive and reinforced by the Judiciary.186
 - E. *Executive discretionary inaction meets preemption in the Will of Congress*..... 187
 - 1. Rationale and causes for discretionary inaction are typically within normal boundaries.188
 - 2. State compensation mechanisms may be unsatisfactory.189
 - 3. The judiciary reaction to preemption coupled with inaction is on record but not powerful.....191
 - 4. Presidential discretion may exist in extreme: Nullification. 193
 - 5. The border security hypothetical becomes constitutionally plausible.....195
- IV. RESOLUTION199
 - A. *Confluence of three forces yields a power struggle with limited checks.* 199
 - 1. Congressional *Will* must be expressed, or more accurately, re-expressed.....200
 - 2. The Separation of Powers means limited power to force the federal Executive to act.201
 - 3. The state has the *Will* and interest to act.....201
 - B. *The key to remedial action lies in two dimensions: Substantiality and Will of the current Congress.*202

- 1. Establishment of Substantiality: The size of the Void determines the requirement to act.....202
- 2. Establishment of the *Will* of the current Congress: A step to remedial action.203
- C. *Resolution to ensure constitutionality of state remedial actions.*204
 - 1. Congress statutorily allows state police powers authority to operate in the Void.205
 - a. Statutory language allowing state action.205
 - b. In the alternative, disassembly of the massive field of federal law.207
 - 2. Congress re-expresses its *Will* to affect desired preemption parameters.....208
 - 3. Concurrent Resolution: the mechanism of solvency.210
- V. CONCLUSION.....210

I. INTRODUCTION

Consider the hypothetical: the U.S. Border Patrol is recalled from the border to deal with a major infectious breakout at various detention facilities throughout the United States. Although it remains the stated “*Will of Congress*” that the federal government exert complete occupation of the Border Security field, the border of state *X* is left essentially unguarded by direction of the Executive Branch, in direct opposition to that *Will*. Opportunistic terrorist infiltration through a porous border has become predictable through intelligence assessment. Governor Smith asks her Attorney General what rights and responsibilities she has to remedy the security “Void.” The Attorney General tells her clearly that it is the preeminent function of the government to provide security for the citizens of her state. Equally clear, the Attorney General tells Governor Smith that she has absolutely no authority under the Supremacy Clause of the U.S. Constitution to take any border security action, whatsoever. What options are available to Governor Smith, and which shall she choose?

It is, however, no longer an academic hypothetical. “In August, the Texas Department of Public Safety put out a bulletin that said ISIS social media messages showed ‘militants are expressing an increased interest in the notion that they could clandestinely infiltrate the southwest border of US, for terror attack.’”¹

In his forceful dissent in *Arizona v. United States*, Associate Justice

¹ *Immigration Worker Union Warns ‘Serious Threat’ of ISIS Entering US*, FOX NEWS (Sept. 18, 2014), <http://www.foxnews.com/politics/2014/09/18/immigration-worker-union-warns-serious-threat-isis-entering-us/>.

of the United States Supreme Court, Antonin Scalia, wrote of an impending constitutional crisis imposed on the states through an inactive federal government.² “What I do fear--and what Arizona and the States that support it fear--is that ‘federal policies’ of nonenforcement *Will* leave the States helpless before those evil effects of illegal immigration that the Court’s opinion dutifully recites in its prologue but leaves unremedied in its disposition.”³ Justice Scalia’s dissent focuses our constitutional attention sharply on the field of immigration and border security, fully occupied by the federal government through the *Will of Congress*.⁴ Inherent in that full occupation of the field is the implied preemption of state law by a massive body of federal law.⁵ “First, States are precluded from regulating conduct in a field that Congress has determined must be regulated by its exclusive governance.”⁶ Justice Scalia continues: “I accept as a given that State regulation is excluded by the Constitution when (1) it has been prohibited by a valid federal law, or (2) it conflicts with federal regulation--when, for example, it admits those whom federal regulation would exclude, or excludes those whom federal regulation would admit.”⁷ Yet in this case, in spite of massive federal law and an expressed *Will of Congress* that the federal government exert full authority in immigration and border security, the branch charged with execution of the law failed to substantially execute, by choice.

States and municipalities rely on federal enforcement for immigration and border security.⁸ State budgets, law enforcement manpower and security resources are sized and maintained on assumptions.⁹ It is a principal assumption that through total federal enforcement action, those scarce state resources and finances can be directed elsewhere.¹⁰ The presumption is that border security and attendant law enforcement are the sole responsibilities of the federal government.¹¹ It should be redundant to suggest and expect that federal resources will therefore provide border security and enforcement on behalf of the state. But if the federal government fails by policy design to provide those presumed security and enforcement services, a state is left without programmed resources, or more critically, the constitutional latitude to provide its own security.¹² A state government, prevented from enacting

² 132 S. Ct. 2492, 2514 (2012) (Scalia, J., concurring in part and dissenting in part).

³ *Id.* at 2519 (internal citation omitted).

⁴ *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941).

⁵ *Id.* at 66.

⁶ *Arizona*, 132 S. Ct. at 2495; *see also* *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 115 (1992) (Souter, J., dissenting).

⁷ *Arizona*, 132 S. Ct. at 2514 (Scalia, J., concurring in part and dissenting in part).

⁸ *Id.* at 2500 (majority opinion).

⁹ *See* SUSAN COMBS, TEX. COMPTROLLER PUB. ACCOUNTS, WINDOW ON STATE GOVERNMENT, <https://wayback.archive-it.org/414/20080822082442/http://www.window.state.tx.us/border/ch12/ch12.html> (last visited Apr. 20, 2016).

¹⁰ *Id.*

¹¹ *Arizona*, 132 S. Ct. at 2500.

¹² *See* COMBS, *supra* note 9.

and enforcing law in a fully occupied field, is left with no alternative legal recourse to enforce law or provide fundamental protection of its citizens.¹³

The federal government exerts the Supremacy Clause of the Constitution to establish exclusive federal space in such varied areas, including immigration, border security, environmental regulation, and federal airspace. In doing so, the normal presumption of government at all levels is that by exerting that implied preemption, the federal government then acts to enforce federal responsibilities, standards, and security activities in accordance with law, regulation, and the expressed or implied *Will of Congress*.

But, what if the federal government actively invokes supremacy in the field, but fails to act substantively in the field for any one of a variety of potential reasons? The constitutional tug noted by Justice Scalia results.¹⁴ This is similar to null preemption, but with a twist.¹⁵ There are significant federal laws in federal space, but they are intentionally not enforced. Indeed, traditionally, the conflict is framed between federal and state occupation in a field.¹⁶ However, the conflict has morphed in the 21st Century into a three-way battle between states' rights and obligations, the *Will of Congress*, and the discretion of the Executive. This has become a powerful struggle, with momentous consequences. And yet, "[I]ttle attention is paid in the academic literature to the propriety of this federal preemption by inaction."¹⁷

What are the obligations and rights of the states? Again, Justice Scalia foreshadows the immense conflict inherent in that question: "[F]ield preemption' cannot establish a prohibition of additional state penalties in the area of immigration."¹⁸ We can express this concept in a more generalized manner. Therefore, the absence of substantial federal action in executing U.S. law in a field deemed exclusive to the federal government voids the corresponding field preemption and enables individual state enforcement actions.

This Comment will begin by examining recent, topical incidents of state government stymied by field preemption, yet struggling with issues that remain unresolved due to federal inaction in the fields currently. In a federal system that embodies dual citizenship, individual states have express needs and responsibilities to their citizens under state law, as well as responsibilities and restrictions under the Constitution. This establishes the baseline for struggle when the federal government fails to act in a predictable manner.

¹³ *Arizona*, 132 S. Ct. at 2514 (Scalia, J., concurring in part and dissenting in part).

¹⁴ *Id.* at 2519.

¹⁵ Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1019 (2010).

¹⁶ *Id.* at 1042.

¹⁷ Robert L. Glicksman, *Nothing is Real: Protecting the Regulatory Void Through Federal Preemption by Inaction*, 26 VA. ENVTL. L.J. 5, 8 (2008).

¹⁸ *Arizona*, 132 S. Ct. at 2519.

The consequential needs of the states and the implication of a failure of federal government to meet those expressed needs in traditionally occupied federal space create conflict and constitutional uncertainty. This analysis will review the concept of null preemption put forward by Professor Jonathan Remy Nash, and embrace an emergent concept applicable to field occupied areas of law.¹⁹ The result of unchecked discretion of the “federal Executive,” and the implication of inaction by the federal Executive will be examined, in the context of the equivalent of an unchecked veto of legislation after enactment. This also necessitates an examination of the policy and political pressures inherent in that “Executive Discretion.” This conflict then demands a constitutionally-relevant resolution path that will result in the satisfaction of the three principle actors: the state, Congress, and the federal Executive.

II. BACKGROUND

A. *State Conflicts within Preemptive Federal Space*

State conflicts within preemptive federal space are on the rise, manifested by the absence of federal action. In many ways, the preemption conflict between state and federal governments is omnipresent in today’s dynamic political environment.²⁰

As Professor [Garrick] Pursley explains, “[p]reemption . . . shapes the regulatory environment for most major industries—drugs and medical devices, tobacco, banking, air transportation, securities, cars, and boats[,] to name a few,” and it “determines the diversity, scope, and delivery of a wide variety of important government services to citizens”; as a result, “it is the issue of constitutional law that most directly impacts everyday life.”²¹

The impact of non-enforcement of federal law in preemptive fields potentially cuts across a significant swath of state police powers. “As Garrick Pursley has observed, ‘preemption may be the most important issue for modern federalism theory because it reallocates regulatory authority between the national and state governments.’”²² States have sought action of the federal government, and the impact of non-enforcement is most keenly felt by a few states.²³ These states have attempted remedial action to better enforce a safer

¹⁹ See Nash, *supra* note 15, at 1015 (describing his theory of Null Preemption, as a comparison to field preemption and the absence of federal action).

²⁰ See Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 261–84 (2011).

²¹ *Id.* at 255.

²² *Id.* at 254–55.

²³ See, e.g., Alicia Lee & William Dong, *Arizona v. United States (11-182)*, CORNELL U. L. SCH.: LEGAL INFO. INST., <http://www.law.cornell.edu/supct/cert/11-182> (last visited Apr. 20, 2016) (describing

or more protective environment for its citizens in the absence of federal enforcement of laws.²⁴ “Some of the most important federalism choices that Congress and executive actors make have to do not so much with the scope of federal regulation, but rather with the extent to which that regulation will displace state law.”²⁵

In response to state action to protect or defend its populace in these fields, the federal government has exerted its preemption, either administratively or through the courts, resulting in a stymied enforcement process.²⁶ In particular, the area of immigration control not only exemplifies important aspects of the current “*preemption yet inaction*” debate, but it also serves as a catalyst for the resulting border security preemption conflict.

1. Immigration enforcement by the states is limited.

Immigration enforcement by the states is limited by clear federal preemptive status. Insufficient federal action in a preempted area of immigration serves not only as an example of *preemption yet inaction*, but as a forcing function to stimulate the border security *preemption yet inaction* case. Unenforced immigration issues have become significant state burdens.²⁷ “The state of Arizona maintains that it faced rampant illegal immigration, which increased crime and harmed Arizona’s economy.”²⁸ The causation of the immigration issue in Arizona was potentially traced to earlier federal legislative action.²⁹ “The defects in IRCA [(“Immigration Reform Control Act”)], combined with unprecedented growth and job creation by the US economy in the 1990s and early 2000s, as well as deeply ingrained migration push factors in Mexico and, more recently, Central America, enabled illegal immigration to continue to grow.”³⁰ Clearly, the state of Arizona had an interest in immigration directly into the Arizona economy.

In response to this concern, in April 2010, the Arizona State Legislature enacted the Support Our Law Enforcement and Safe Neighborhoods Act (“S.B. 1070”), which establishes or amends state immigration offenses and defines local police officers’ immigration law enforcement authority. Section 1 of S.B. 1070 states that the Arizona legislature’s goal in

the State of Arizona’s position on attempting to control its perception of increasing immigration, and its impact).

²⁴ Jordan Jodré, *Preemptive Strike: The Battle for Control Over Immigration Policy*, 25 GEO. IMMIGR. L.J. 551, 553 (2011).

²⁵ Young, *supra* note 20, at 255.

²⁶ See, e.g., Lee & Dong, *supra* note 23 (explaining the United States’ arguments in support of preemptive doctrine applied to Arizona S.B. 1070).

²⁷ *Id.*

²⁸ *Id.*

²⁹ See DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 1 (2013).

³⁰ *Id.*

enacting this statute was to deter illegal immigrants from entering the country and from engaging in economic activity.³¹

A catalyst for the drafting of the legislation was the concern among Arizona political leadership that they needed to act in response to an insufficiently active federal enforcement operation.³² “During this time, there [was] strong and sustained bipartisan support for strengthened immigration enforcement, along with deep skepticism over the federal government’s will or ability to effectively enforce the nation’s immigration laws.”³³ The federal government argued that in spite of its limited enforcement action, Arizona was precluded from enforcing immigration laws within the federally-occupied immigration sphere.³⁴ Therefore, Arizona’s government and resources became subject to the discretionary federal enforcement policies at that time.³⁵

Coincidentally, states were struggling to make up the perceived federal enforcement deficit.³⁶

The perpetual inaction of the federal government has led numerous state governments to enact legislation intended to supplement or enhance current federal immigration law. According to the National Conference of State Legislatures, there were a record number of 222 immigration laws enacted and 131 resolutions adopted in forty-eight states in 2009.³⁷

Yet the ultimate constitutionality of these legislative initiatives will bear on the precedential application of *Arizona v. United States* to other states’ efforts.

2. Border security represents a key nexus between federal interests, constitutional authority, and local state interests in protection of its citizenry.

In another example of the clear expectation conflict between state and federal authorities, border security pits state interests against federal enforcement policies. The issue is closely related to the federal-state preemptive relationship in the immigration field, but distinct in key areas. Border security in the context of this Comment is not focused on immigration and the lawful or unlawful access to U.S. citizenship or residency rights, but on the defense and protection of the population of the United States against

³¹ Lee & Dong, *supra* note 23 (internal citations omitted).

³² See MEISSNER ET AL., *supra* note 29, at 1.

³³ *Id.*

³⁴ See Brief for the United States at 26, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182) (describing the position of the United States that Arizona S.B. 1070 intrudes on exclusive federal authority).

³⁵ *Id.* at 17.

³⁶ Jodré, *supra* note 24, at 553.

³⁷ *Id.*

harm, whether through illegal cross-border, violent activity, military action by a foreign actor, or non-state terrorist activity. While the defense mechanisms at the borders may be one in the same, the character is different. It is the intent of this analysis to focus on this border security mandate of government.

Border security has become a critical topic in southwestern states of the United States. The National Conference of State Legislatures (“NCSL”) “urge[d] the federal government to fulfill its responsibilities with regard to border security”³⁸ Indeed, Texas has quantified the border security issue directly to the federal government.

Drug cartels and related forces are waging war in Northern Mexico, their tactics including death threats, torture, car bombings, kidnappings, assassinations and beheadings. Since 2006, this war has taken 28,000 lives. Absent stronger federal action, it’s only a matter of time before that violence affects more innocent Americans.³⁹

In this case, border security may be the implied and the sole responsibility of the federal government, but the impact is felt keenly in the immediate border states most critically. The states have a requirement to defend territorial borders. But these border states are put in a precarious position when the federal security capability is available but not employed, yet is the sole legal actor authorized to defend that border.

B. Security of a state and its borders is the preeminent issue and represents the baseline case for this pre-emption analysis.

The 2010 National Security Strategy of the United States addresses security within the United States and the need to address and protect the U.S. borders implicitly.⁴⁰

Our best defenses against this threat [violent extremist penetration] are well informed and equipped families, local communities, and institutions. The Federal Government will invest in intelligence to understand this threat and expand community engagement and development programs to empower local communities. And the Federal Government, drawing on the expertise and resources from all relevant agencies, will clearly communicate our policies and

³⁸ *Policies for the Jurisdiction of the Law, Criminal Justice and Public Safety Committee*, NAT’L CONF. STATE LEGISLATORS, <http://www.ncsl.org/ncsl-in-dc/task-forces/policies-law-and-criminal-justice.aspx> (last visited Apr. 20, 2016).

³⁹ Letter from Rick Perry, Governor, to Barack Obama, President (Aug. 9, 2010), http://governor.state.tx.us/files/press-office/080910_PerryObamaletter.pdf [hereinafter Letter from Governor Perry].

⁴⁰ See EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 19 (2010), http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

intentions, listening to local concerns, tailoring policies to address regional concerns, and making clear that our diversity is part of our strength—not a source of division or insecurity.⁴¹

However, the missing element in this statement of defensive strategy of the homeland is an explicit acknowledgement of state authority and its role in the strategic federal security scheme.⁴² The statement is clear in federal intelligence, policy, and awareness of concerns of the local citizens. The statement does not specify or even allude to a collateral role of the state's defense of borders, supported by the federal government.

1. The impact of *Arizona v. United States* on the border security debate is critical.

The residual debate and impact of *Arizona v. United States* overshadows this discussion and provides a tenable linkage of federal border security responsibility to the parallel responsibility of each state.⁴³ In his dissent, Justice Scalia writes:

[T]he Constitution . . . provides that “[n]o State shall, without the Consent of Congress, . . . engage in War, *unless actually invaded, or in such imminent Danger as will not admit of delay.*” This limits the States’ sovereignty . . . but leaves intact their inherent power to protect their territory.⁴⁴

The issue is timely in 2014. The introductory hypothetical has become more of a real planning exercise than a hypothetical. “The Pentagon’s top commander in South America [Marine General John Kelly, Chief of the U.S. Southern Command] has warned that if Ebola surfaces in Central America or the Caribbean, there will be a stampede of people heading north across the Rio Grande to the U.S. to escape the disease.”⁴⁵ General Kelly further states, “[t]hey will run away from Ebola, or if they suspect they are infected, they will try to get to the United States for treatment.”⁴⁶ The border will be tested, and responsibility for border security rests with the federal government. The states appear to be powerless to provide independent border security, even if capable, in deference to federal field preemption in border security. Yet, the attempt to provide state border security otherwise preempted is ongoing in Texas.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See generally 132 S. Ct. 2492 (2012).

⁴⁴ *Id.* at 2512 (Scalia, J., concurring in part and dissenting in part) (internal citation omitted).

⁴⁵ Mark Thompson, *General: Expect ‘Mass Migration’ to U.S. if Ebola Comes to Central America*, TIME (Oct. 9, 2014), <http://time.com/3486009/marine-general-john-kelly-ebola-migration/>.

⁴⁶ *Id.*

2. Border security issues in Texas are the most recent reflection of the tension between the federal Executive and the states.

A crucial frontline in the U.S. border security issue remains the Texas experience.⁴⁷ According to the Texas Department of Public Safety:

The most significant public safety and homeland security vulnerability in Texas is an unsecured border with Mexico, which has enabled the Mexican Cartels to become multi-billion dollar international crime syndicates that dominate the U.S. drug and human smuggling and trafficking markets. They employ terrorist tactics and corruption to expand or defend their criminal enterprise activities, and they work closely with transnational and Texas-based gangs to further their criminal operations throughout Texas and the nation.⁴⁸

The issue of security on the Texas border is typically put into terms that implicate federal inaction in the field. “Perry says Texas had to act because the federal government has failed to secure the border.”⁴⁹ In doing so, the Texas state government has allocated millions of dollars and committed National Guard troops, under state control, to attempt to assist federal efforts to meet security needs and deny cartels and criminals easy access into Texas.⁵⁰ Texas Governor Rick Perry, in 2014, deployed 1,000 troops under his state authority.⁵¹

At the state and local level, the Texas imperative to make up for the perceived federal border presence is most keenly felt. “Border security is a federal responsibility but a Texas problem, and Texas has invested hundreds of millions of state dollars in efforts to support and supplement security forces already in place. Still, this is a problem that will only be solved with more federal accountability and involvement.”⁵² Texas, however, continues to increase its military-like presence on the border, in lieu of federal law enforcement. For example, “[i]n September 2009, Gov. Perry announced the formation of highly-skilled Ranger Recon Teams — which include Texas Rangers, Texas National Guard Counterdrug forces, Highway Patrol and DPS Aviation assets — in order to address threats building in the unincorporated

⁴⁷ TEX. DEP’T OF PUB. SAFETY, TEXAS BORDER SECURITY DASHBOARD (2015), <https://www.txdps.state.tx.us/PublicInformation/documents/borderSecDshbrd20150409.pdf>

⁴⁸ *Id.*

⁴⁹ Manuel Bojorquez, *As Texas Steps Up Border Security, Critics Decry “Militarization”*, CBS NEWS (Aug. 13, 2014, 7:24 PM), <http://www.cbsnews.com/news/as-texas-steps-up-border-security-critics-decry-militarization/>.

⁵⁰ Manny Fernandez, *Texas Bolsters Border Patrol With Its Own*, N.Y. TIMES (Aug. 6, 2014), http://www.nytimes.com/2014/08/07/us/texas-is-accused-of-overreaching-and-overspending-to-police-border.html?_r=0.

⁵¹ *Id.*

⁵² OFFICE OF THE GOVERNOR, RICK PERRY, BORDER SECURITY, <https://wayback.archive-it.org/414/20141117014906/http://governor.state.tx.us/initiatives/border/> (last visited Apr. 20, 2016).

areas along the Texas-Mexico border.”⁵³ Clearly the efforts of Texas in bolstering border security appear to some legal scholars as significantly conflicting with the federal mandate to fully occupy the field.⁵⁴

3. Needs of the States: Setting up Conflict with Federal Priorities

Federal priorities are focused on key questions that impact the United States as a sovereign nation, including national defense and some suitable control of immigration. States’ priorities are focused in this area on two principle attributes: (i) enforcement resources, and (ii) fiscal predictability.

a. Enforcement Resources

Again, Texas provides an illustrative example of a resource-conflicted approach to security, in conflict with federal action, *or inaction*. Despite Texas Governor Perry’s requests for federal action to secure the state border, there has been no federal answer. “Since early 2009, Gov. Perry has repeatedly called on Washington to authorize the deployment of 1,000 Title 32 National Guard soldiers to the Texas-Mexico border to support border security operations currently underway.”⁵⁵

b. Fiscal Predictability

The ability to plan and resource scarce dollars to allocate to border security is important to any government. In referring to the fractured nature of border security in Texas, the situation:

reflects the inability of local leaders to independently call forth the resources to deal with issues, because funding either does not exist, or must first be approved by agencies whose responsibilities extend far beyond the Border region. If the Border region is to deal successfully with the crucial problems of the 21st century, this situation must change.⁵⁶

Indeed, the budgetary realities that dictate a state makeup for federal inaction cause significant fiscal impact.

In a fiscally conservative state, whose leaders espouse a low-tax, low-spend mantra, the \$500 million spent on border

⁵³ *Id.*

⁵⁴ See generally Rebecca Leber, *Texas Attorney General Describes Border Security as Keeping Out ‘Third World Country Practices’*, THINKPROGRESS (Feb. 6, 2014, 10:00 AM), <http://thinkprogress.org/immigration/2014/02/06/3250651/abbott-immigration/> (quoting Margaret Hu, Professor at Washington and Lee School of Law who stated: “[I]f the Texas border security plan is seen as interfering with the federal government’s foreign policy and national security policy, and other sovereignty interests, it could also be construed as unconstitutional”).

⁵⁵ OFFICE OF THE GOVERNOR, *supra* note 52.

⁵⁶ COMBS, *supra* note 9.

security has become an exception to the rule.

“It’s a very bittersweet situation,” said State Representative Dennis Bonnen, the Republican chairman of a House committee studying the fiscal impact of border operations. “It’s a clear federal responsibility, but they choose to not do the job, so we have no choice but to fill the holes.”⁵⁷

The issue of federal inaction impacting states who must make up the difference is not isolated to Texas. The National Emergency Management Association (“NEMA”) has noted the fiscal and budgetary mismatch.⁵⁸ A priority in the time of comingled responsibilities is to “[e]nsure state and local governments and the private sector are provided the resources needed to address immigration and border security related issues pending federal resolution of a broader national immigration and border security policy.”⁵⁹

Clearly, a mutually supportive environment of border security roles and responsibilities is advantageous:

In unity there is strength. The more local, state, and federal law-enforcement agencies and operations reinforce one another, the more they share information and resources, the more they “deconflict” operations, establish priorities, and focus energies across the spectrum of criminal activities, the more effective will be the outcome of separate activities.⁶⁰

The issue remains whether the states traditional expectations of federal sovereignty action in border security can be exerted upon the federal government in this field. And if not, who has residual responsibility for preempted border security duties that the federal government fails to meet?

There is a clear conflict between the federal government’s obligation to enforce the laws and provide border security, the needs of the states, and the reality of an absence of federal action to fill the obligation in a field where no one else can act constitutionally.

III. ANALYSIS

In consideration of this background, the federal government has compelling constitutional direction to fulfill its obligations, especially in field preemptive space, where it is the only legal actor. Using the border security

⁵⁷ Fernandez, *supra* note 50.

⁵⁸ See NAT’L HOMELAND SEC. CONSORTIUM, PROTECTING AMERICANS IN THE 21ST CENTURY: IMPERATIVES FOR THE HOMELAND 6–7 (2014), https://www.iafc.org/files/grHomeSec_ProtectingAmerica nsInThe21stCentury.pdf.

⁵⁹ *Id.* at 7.

⁶⁰ OFFICE OF NAT’L DRUG CONTROL POLICY, EXEC. OFFICE OF THE PRESIDENT, 1999 NATIONAL DRUG CONTROL STRATEGY, at IV.5 (1999), <https://www.ncjrs.gov/ondcppubs/publications/policy/99ndcs/iv-e.html>.

issue as the baseline for the analysis of preemption and the presumption of federal action, the framework in pre-emption can no longer be expressed as a simple tug of war between the federal and state governments.⁶¹ The constitutional discussion has become more complex, with multiple competing actors in modern case law.⁶²

A. The paradigm⁶³ for preemption analysis has shifted from two actors to three actors.

This conflict is not traditional . . .

1. The conflict has been typically expressed as a two-actor tug: Federal v. State.

This is the traditional paradigm of preemption.⁶⁴ It assumes that the federal government is acting as a single entity, derived from the *Will of Congress* to express the law and the power of the Executive to enforce that law.⁶⁵ “[T]he States’ historic police powers cannot be superseded by a Federal Act unless that is Congress’ clear and manifest purpose, and that any understanding of a pre-emption statute’s scope rests primarily on ‘a fair understanding of congressional purpose . . .’”⁶⁶ This tug is further expressed in clear language in the Supreme Court’s landmark analysis in *Cipollone v. Liggett Group, Inc.*: “Thus, since our decision in *McCulloch v. Maryland*, . . . it has been settled that state law that conflicts with federal law is ‘without effect.’”⁶⁷ Thus, in prior analyses, the ever-present *Will of Congress*, as expressed also in terms of congressional “purpose” or “objective,” represents the entirety of the federal side in the preemption tug of war, as is clearly observable in both the majority opinion and the dissents in *Arizona v. United States*.⁶⁸ In the 21st century, the federal side of the preemption equation has bifurcated, changing character, as the conflict potentially manifests between not only state and federal, but between federal congressional and federal Executive, leading to the three-actor struggle.⁶⁹

2. This paradigm forms the three-actor conflict: State versus Congress

⁶¹ See generally *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504 (1992) (depicting an example of the traditional analysis of federal versus state preemptive rights).

⁶² See generally *Arizona v. United States*, 132 S. Ct. 2492 (2012) (discussing preemption and the relationship between the federal and state governments).

⁶³ See *supra* text accompanying note 1 (describing how the analytical framework has been traditionally characterized with two actors, and in the revised model contains three actors).

⁶⁴ See *supra* text accompanying note 1.

⁶⁵ See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 471 (1996) (expressing the role of the Congressional purpose in determining preemption).

⁶⁶ *Id.* (internal citation omitted) (quoting *Cipollone*, 505 U.S. at 530 n.27).

⁶⁷ 505 U.S. at 516 (internal citation omitted) (citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

⁶⁸ See generally 132 S. Ct. 2492 (2012) (explaining the significance of Congressional purpose).

⁶⁹ See, e.g., OFFICE OF THE GOVERNOR, *supra* note 52 (explaining that the conflict arises in the Texas border security case study due to substantive federal Executive inaction).

versus Executive.

In this construct, three principle actors take potentially adversarial positions in constitutional conflict, each with a distinct role in preemption analysis. They are the State, the Congress, and the federal Executive. The first actor is the state.

a. The State

The state is traditionally modeled as the principle constitutional antagonist.⁷⁰ In the construct of this Comment, the state's position is characterized by self-interest, colored through its strategy, legislation and actions in meeting a critically-perceived need. In the instant case, this Comment shall assume that security of the state, specifically against border threats, is the first and principle role of government. The specific case application requires two further assumptions for the purposes of this study. First, the principle border security focus is on the international border, and in this case, that border is between the United States and Mexico, in the Texas border segment. Any intrastate borders, such as Texas and New Mexico, are not applicable in this constitutional debate. The second additional assumption is that the state acts as a single political entity. While any state consists of a government structure parallel to the federal structure, the state acts as a single political entity in the preemption paradigm. For analytical purposes, in this case, the state of Texas's actions and needs are represented through the actions of the governor. The relationship of the state to the federal government is characterized through its governor's actions on behalf of a unified state interest.⁷¹

b. The Congress, as expressed in Legislation and Case Law as the *Will of Congress*

The second actor in the three-way analysis is the Congress. The congressional position is demonstrated through legislative action and portrayed by the courts as the *Will*, *objective* or *purpose* of Congress.⁷² In the context of this preemption, these three terms are treated as consistent and interchangeable. This is the baseline of preemption impact and constitutionality, specifically in field preemption analyses.⁷³ For example,

[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . [the Court] 'start[s] with the

⁷⁰ See *supra* text accompanying note 1.

⁷¹ See, e.g., Letter from Governor Perry, *supra* note 39 (demonstrating Texas Governor Perry's call for federal action in Title 32 National Guard activation to assist in securing the border, and portraying this as a "Texas" request to the federal government).

⁷² See *supra* text accompanying note 1.

⁷³ See *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.⁷⁴

c. The Executive Agent

The traditional two-way preemption conflict, as expressed in *Wyeth*, now requires the addition of a third actor, the federal Executive. This is defined for the purposes of this Comment as the executive branch, encompassing the President of the United States, or a federal Executive agency acting at the direction of the President. Within the expanded paradigm of this paper, preemption's three political actors, the President or his executive agencies operate as a single entity and with a single voice, operating under the direction of the person of the President. It is critical to note that in this analysis paradigm, the actions of the federal Executive may or may not be in concert with the *Will of Congress*, as expressed in either resolution or law. Further, the federal Executive may hypothetically go so far as to have chosen, within this three-way paradigm, to ignore most or all of the enforcement actions that comprise the *Will of Congress*.

Therefore, the two federal actors may be in opposition to each other, yet both also in separate opposition to the needs of the state. For example, in this border security case study, the state of Texas has expressed a requirement to secure an unprotected portion of the international border.⁷⁵ In the absence of federal resources to accomplish that task, the State (as represented by the Texas Governor) has expressed a clear desire to act to fill the gap.⁷⁶ The resulting state action of sending non-federalized National Guard troops to the border conflicts with the *Will of Congress*, as expressed in the complete body of international border security law.⁷⁷ That *Will* traditionally anticipates that the federal government, embodied in the Department of Homeland Security, shall fully occupy this field, to the exclusion of any Texas action.⁷⁸ If the executive agents in this scenario, both President and the Department of Homeland Security, take no substantial action to fulfill the *Will of Congress* in this field, then the Executive appears in conflict with both state needs and the congressional objective. Thus, the traditional expectations of state, congressional and executive interaction in a preempted field sets up a three-way conflict.

B. Traditional state expectations of federal government action are rooted

⁷⁴ *Id.* (first citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); and then quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

⁷⁵ See TEX. DEP'T. OF PUB. SAFETY, *supra* note 47.

⁷⁶ Letter from Governor Perry, *supra* note 39.

⁷⁷ See Leber, *supra* note 54.

⁷⁸ See generally *id.*

deeply in the demands of the Constitution.

The Supremacy Clause forms the basis for a federal requirement for action.⁷⁹ “The fundamental principle of supremacy of law, the crux of our constitutional government, requires that all public officials obey the mandates of the Constitution and the lawful enactments of the Congress.”⁸⁰ The form of government of the United States is in practice a dual citizenship model. Under the Tenth Amendment, “[t]he 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.”⁸¹ Within the Constitution, a conflict resolution of priorities is well established: “Article VI of the Constitution provides that the laws of the United States ‘shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.’”⁸² In evaluating the impact of the Tenth Amendment on the Supremacy Clause, the Supreme Court observed in a case involving the Economic Stabilization Act of 1970: “[This Amendment] is not without significance. [It] expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs States’ integrity or their ability to function effectively in a federal system.”⁸³ The impact of this allowance that Congress, or in a more generalized sense, the federal government, may not act to impair a state’s integrity has clear bearing on the instant issues. The question to answer is whether federal *inaction* that impairs a state’s integrity will therefore allow a state to constitutionally act in a field preempted area.

The Fourteenth Amendment extends the privileges of constitutional rights to the citizens of the states:⁸⁴

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁸⁵

The operative element of the Fourteenth Amendment is the notation of citizenship of both the United States and the individual state. While the

⁷⁹ U.S. CONST. art. VI, cl. 2.

⁸⁰ C.B.S. Imports Corp. v. United States, 450 F. Supp. 724, 728 (Cust. Ct. 1978).

⁸¹ U.S. CONST. amend. X.

⁸² Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) (citing U.S. CONST. art. VI, cl. 2) (demonstrating the traditional preemption analysis).

⁸³ See Fry v. United States, 421 U.S. 542, 547 n.7 (1975).

⁸⁴ U.S. CONST. amend. XIV, § 1.

⁸⁵ *Id.*

Fourteenth Amendment serves to extend rights of the U.S. Constitution to the states, it recognizes the citizenship of the individual in a distinct state that has corresponding responsibilities to its citizens.⁸⁶

Of course, this responsibility of individual states to their corresponding citizenry is tempered by the Supremacy Clause.⁸⁷ “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”⁸⁸ In this regard, it is clear that in conflict between state and federal interests, the Supremacy Clause sets the stage for a pre-eminent federal position over the states.⁸⁹ While not universal, the presumption that the co-equal federal actors will operate in concert in fundamental areas of government as a single supreme federal entity is inherent in the Supremacy Clause, as superior to the state actor.⁹⁰ But the status of the states vis-à-vis the federal sovereign is not necessarily that of an inferior.⁹¹ “We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.”⁹² Thus, the Supremacy Clause and the parent document suggest that the states have obligations and rights, accompanied by sovereignty that is comparable to the federal government.⁹³ But the corresponding expectation must be that those obligations of the federal government to the states in areas where the federal government is supreme, by expression of law or implication, will be met by activity commensurate with the state sovereign’s needs.

The Tenth Amendment is limited by the Fourteenth Amendment and the Supremacy Clause.⁹⁴ The Tenth Amendment states that: “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.”⁹⁵ The Tenth Amendment serves to protect the police powers of the state from unwanted intrusions by the federal government beyond those powers enumerated or

⁸⁶ *Id.* (acknowledging that citizens are citizens of both the United States and their own state).

⁸⁷ See U.S. CONST. art. VI, cl. 2 (defining the subordination of the states to the supremacy of the federal government in certain areas of law).

⁸⁸ *Id.*

⁸⁹ JOHNNY H. KILLIAN ET AL., CONG. RESEARCH SERV., RL75-500, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 961 (2004).

⁹⁰ See generally *id.* at 974 (explaining the applicability of the Supremacy Clause to federal Executive agencies created by Congress “to discharge the duties for the performance of which they were created [by federal legislation]”).

⁹¹ See *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (discussing the co-equal presumption of state and federal sovereignty in Justice O’Connor’s majority opinion).

⁹² *Id.*

⁹³ See *id.*

⁹⁴ See generally KILLIAN ET AL., *supra* note 89, at 967 (describing the evolved power of the federal government to more broadly overcome state law after *League of Cities*).

⁹⁵ U.S. CONST. amend. X.

allowed by the Fourteenth Amendment.⁹⁶ “The purpose of the doctrine of Tenth Amendment immunity articulated in *National League of Cities* . . . is to protect the States from federal intrusions that might threaten their ‘separate and independent existence.’”⁹⁷ There are two areas of note within the context of the Supreme Court’s language. Principally, the phrase “separate and independent existence” is used in the context of *National League of Cities* and *EEOC* to secure the rights of states within the context of labor in *National League of Cities v. Usery*⁹⁸ and age-based discriminatory action in *EEOC v. Wyoming*.⁹⁹ The motivation of “separate and independent existence”¹⁰⁰ is a general one, and applicable in a larger context to the insurance of the integrity of the state in its most basic physical circumstances as well, to include the integrity of its physical border. The second item to note within the language of the Court is the concept of protection of federal intrusion that serves to threaten a state’s integrity.¹⁰¹ This Comment distinguishes *federal action* that is impactful on a state from the concept of *federal inaction* that is impactful on a state. Ultimately, this forms the root of the argument that a state’s right to “separate and independent existence” is assured by protection from both federal action, as well as federal inaction.

C. Preemption characteristics: Congress has been the preeminent voice of federal preemption status.

In principle, the *Will of Congress* has represented the federal interest in countering states intrusions into preemptive areas, express or implied.¹⁰² This concept of congressional representation of the superior federal position in the supremacy argument can be traced to the very beginnings of constitutional conflict between federal and state law.¹⁰³ In *Gibbons v. Ogden*, that congressional role is expressed clearly as the sole actor in the analysis:

[I]t has been contended, that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a *law passed by Congress* in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers.

⁹⁶ See *EEOC v. Wyoming*, 460 U.S. 226 (1983).

⁹⁷ *Id.* (discussing the Tenth Amendment’s effect to ensure states the right to a separate and independent existence).

⁹⁸ See generally 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

⁹⁹ See generally 460 U.S. at 226 (discussing the method to secure the rights of states within the context of age-based discriminatory action).

¹⁰⁰ *Nat’l League of Cities*, 426 U.S. at 845.

¹⁰¹ See KILLIAN ET AL., *supra* note 89, at 1615 (explaining the balance of state and federal police powers).

¹⁰² See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 60–64 (1941); see also *Arizona v. United States*, 132 S. Ct. 2492, 2514 (2012) (Scalia, J., concurring in part and dissenting in part).

¹⁰³ See generally *Gibbons v. Ogden*, 22 U.S. 1 (1824).

But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it.¹⁰⁴

Thus, the framers and the early Supreme Court saw in *Ogden* the opportunity to express the supremacy of federal law when in conflict with state law.¹⁰⁵ This concept of supremacy as defined by the *Will* or actions of Congress has been the fundamental concept of the construction of the two-actor preemption tug of war.

1. Historically, preemption is funneled into two categories.

These are express preemption and implied preemption. Under the Supremacy Clause, “State action may be foreclosed by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment”¹⁰⁶ The distinction is found in the clarity of congressional intent. “Express” in Black’s Law Dictionary is defined as “[c]learly and unmistakably communicated; stated with directness and clarity.”¹⁰⁷ Express preemption is then language declared in legislation that clearly provides that the federal government will exert sole authority and action in the area of the subject. Conversely, implied preemption generally is the alternative, in which the intent of Congress is found not in words, but in the purpose and extent of the legislation.

2. Within implied preemption, and in traditional analysis, preemption is further subdivided into field preemption, conflict preemption, and obstacle preemption.

“When considering preemption, ‘we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’” State law is preempted only when Congress expressly intended to preempt state law, when the federal regulatory scheme is so pervasive that it demonstrates Congress’s intent to occupy the field, or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁰⁸

Thus, the Supreme Court lays out the parameters of preemption in the various

¹⁰⁴ *Id.* at 210 (emphasis added).

¹⁰⁵ See KILLIAN ET AL., *supra* note 89, at 960.

¹⁰⁶ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (internal citations omitted).

¹⁰⁷ *Express*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁰⁸ John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons from Environmental Regulation*, 60 L. & CONTEMP. PROBS. 209, 215–16 n.72 (1997) (internal citations omitted).

categorizations, as one would expect. A view of preemption of a lower court opinion, however, becomes highly instructive, as it encompasses precedent doctrine and an impression of the subject as merged by multiple sources, including Supreme Court language.¹⁰⁹ A case in point—a lower court’s view of the four major preemption categories, as laid out by the District Court of the District of South Dakota in a railway case involving the Burlington Northern and Santa Fe railroad.¹¹⁰

Preemption traditionally comes in four “flavors” . . . :

(1) “express preemption,” resulting from an express Congressional directive ousting state law; (2) “implied preemption,” resulting from an inference that Congress intended to oust state law in order to achieve its objective; (3) “conflict preemption,” resulting from the operation of the Supremacy Clause when federal and state law actually conflict, even when Congress says nothing about it; and (4) “field preemption,” resulting from a determination that Congress intended to remove an entire area from state regulatory authority.¹¹¹

This analysis model of the four preemption buckets by the court in *Burlington* is highly instructive. The court delineates the various traditional aspects of preemption doctrine, as historically and precedentially interpreted by the Supreme Court.¹¹² The lower court here begins with express preemption as the clear expression of congressional directive or expressive *Will*.¹¹³ The discussion of implied preemption is again framed in congressional intent or *Will*.¹¹⁴ Conflict Preemption is similarly framed from state and federal law conflict, without congressional language.¹¹⁵ Field preemption is likewise based on congressional intent to exclude an area from a state authority. The unifying element in the lower court’s analysis is **Congress**.¹¹⁶ All preemption analysis in *Burlington* is through the lens of congressional *Will* or intent.¹¹⁷ As a general observation and rule, the body of preemption interpretation is evaluated against the bounds of congressional expression of its *Will* or intent.

¹⁰⁹ See generally *South Dakota v. Burlington N. & Santa Fe Ry.*, 280 F. Supp. 2d 919, 927 (D.S.D. 2003).

¹¹⁰ *Id.* For an excellent discussion of preemption doctrine and categorization, see William Hochul III, Note, *Enforcement in Kind: Reexamining the Preemption Doctrine in Arizona v. United States*, 87 NOTRE DAME L. REV. 2225, 2227–31 (2013).

¹¹¹ *Burlington*, 280 F. Supp. 2d at 927 (internal citations omitted).

¹¹² *Id.* (first citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); then citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); then citing *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963); and then citing *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (defining the four categories of preemption analysis).

¹¹³ *Id.* (citing *Morales*, 504 U.S. at 374).

¹¹⁴ *Id.* (citing *Hines*, 312 U.S. at 67).

¹¹⁵ *Id.* (citing *Paul*, 373 U.S. at 143).

¹¹⁶ *Id.* (citing *Fid. Fed. Sav. & Loan Ass’n*, 458 U.S. at 153).

¹¹⁷ See *id.* at 926.

Indeed, recall in *Arizona v. United States*, that Justice Scalia reflects on the *Will of Congress*¹¹⁸ in arguing immigration and security aspects of Arizona's state law.

3. Field Preemption presents the stressing case for analysis.

“In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’”¹¹⁹ Thus, field preempted law is that category of state law that is held invalid because Congress has implied, through a massive body of regulation, that it intended to fully occupy the field, to the exclusion of any state law.¹²⁰ “Field preemption may exist where a federal regulatory scheme touches an area ‘in which the federal interest is so dominant’ that it may be assumed that Congress intended, or purposed, to preclude state action in that area.”¹²¹ Within a field that has been preempted by an immense regulatory scheme, there is no room for state law or action.¹²² Federal law and action fully occupies the field in question, and it operates to the exclusion of the state. The state is constitutionally unable to regulate or act in that field, either in contradiction to the federal law in the field, or in support of the federal law in the field.¹²³ Dean and distinguished professor of law, Erwin Chemerinsky, cites the classic case *Hines v. Davidowitz* as compatible state law that is nonetheless subject to preemption in his work on constitutional law.¹²⁴ In *Hines v. Davidowitz*, the Supreme Court held that although a state immigration law complemented federal law, Congress left no room for other law, and therefore, Congress had implied that state immigration law was still preempted by the massive body of federal law within the field.¹²⁵

The nature of field preemption and its relationship to the state makes this the stressing constitutional case in the three-actor paradigm. Without room for either contradictory or complementary law at the state level, the realization must follow that Congress will be the sole actor in the field. Without the ability to support federal efforts mandated by Congress in law, a state is therefore totally reliant on the *Will of Congress* and the actions of the federal government to exercise the purpose and activities necessary for the

¹¹⁸ See 132 S. Ct. 2492, 2512 (2012) (Scalia, J., concurring in part and dissenting in part).

¹¹⁹ *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (internal citation omitted) (first citing *Fid. Fed. Sav. & Loan Ass'n*, 458 U.S. at 153; and then quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¹²⁰ Hochul III, *supra* note 110, at 2230.

¹²¹ *Id.* (internal citations omitted); see also *Rice*, 331 U.S. at 230 (discussing how the all-encompassing manner of a federal regulatory scheme will supersede state law).

¹²² See *Fid. Fed. Sav. & Loan Ass'n*, 458 U.S. at 153.

¹²³ See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 446–47 (Wolters Kluwer Law & Business, 4th ed. 2013).

¹²⁴ See *id.* at 447.

¹²⁵ *Id.*

implementation of the law. There is no room for state support; the state is, by the Supreme Court's precedent in *Hines*, totally reliant by implication of *Will of Congress* and by interpretation of that pervasive *Will* or intent by the judiciary. In any other type of preemption analysis, the scheme of federal law may only extend as either expressed, or as in conflict or obstacle preemption allows.¹²⁶ In those categories, the field may not be totally excluded; state law may exist within the field to the extent that it does not impact or conflict with the stated federal body of law or regulation.¹²⁷ However, in field preemption, the result is completely distinct. The *Will of Congress* is so encompassing as to fully occupy an entire field, effectively and fully excluding all other state action.¹²⁸

4. There is a resulting expectation that the federal Executive agent will act in a field preempted area.

This is assertable because of the complete elimination of any state power within a field-preempted area. There are two observations that give rise to this assertion. First, the area or field is important, both to the federal government and to the state. This is by definition. If the field was unimportant, Congress would not have defined an entire body of law in order to govern the field to its exclusive jurisdiction. The effort and content of a massive body of law in a field suggests that the *Will of Congress* is implied in important constitutional contexts. An observer can conclude that there is no area so important in the view of Congress that it is field-preempted by massive law, yet expressly unimportant at the same time. They are mutually exclusive conditions. At the same time, a field that is so important to Congress that it exerts massive law, must carry similar importance to any state. In this context, an important issue to the state must be served. In the traditional analysis, there are only two servicing political entities capable of operating in the field: the state and the federal government.¹²⁹ If the state is precluded from operating at all in a field, by the preemptive *Will of Congress*, then it must expect and indeed rely on the federal government to enforce its law within the field to the mutual good of both the state and the federal government. The assumption of the state must logically be that the federal Executive agent, as the actor responsive to the federal *Will of Congress*, acts to execute the enacted law in the field. There is no other constitutionally-enabled actor.¹³⁰ To do otherwise would leave a Void of action in a full body of law.

There is a similar imperative defined in the concept of null

¹²⁶ See generally *id.* at 432–55 (discussing basic concepts of preemption doctrine).

¹²⁷ *Id.*

¹²⁸ *Id.* at 447.

¹²⁹ See *supra* text accompanying note 1.

¹³⁰ See *supra* text accompanying note 1.

preemption by Professor Nash.¹³¹ In the case of null preemption, generally, a Void exists in the federal regulatory scheme, but the states are nonetheless preempted from action through various implied or expressed wishes of Congress.¹³² For example, Professor Nash highlights “New York State’s airline passenger ‘bill of rights’”¹³³ In this case, there were numerous episodes of aircraft stuck on taxiways at major New York airports for hours, while passengers suffered without necessities, followed by an attempt by the state of New York to provide legislative limitations on airlines operating on New York airports, in order to prevent significant passenger discomfort.¹³⁴ Professor Nash cites *Air Transport Association of America, Inc. v. Cuomo*, in which the Second Circuit held that the New York law was expressly preempted by the pervasive Federal Airline Deregulation Act of 1978.¹³⁵ Of note is not the express preemption itself, but Professor Nash’s observation that although the U.S. Department of Transportation had considered such a passenger Bill of Rights, it had not done so, and therefore, a null space or Void existed in the area of passenger rights.¹³⁶ In this case, the Void of federal *action and regulation* existed in preempted space as expressed in the Deregulation Act.¹³⁷ This is similar to field preemption and failure to act, but differentiable in structure and implication.

5. Null Preemption and failure to act.

Professor Nash defines null preemption in two steps.¹³⁸ It is the coexistent “preemption of state law and the choice of a ‘zero level’ of federal regulation.”¹³⁹ These two elements give substance to the null preemption concept. The first is the existence of a preemption of state law.¹⁴⁰ This is typically enabled through express preemption.¹⁴¹ In Professor Nash’s model, null preemption requires an affirmative preemptive action against the presence of state law.¹⁴² The second dimension is the regulatory Void.¹⁴³ Critically, Professor Nash explains that: “Null preemption’s regulatory Void can be dissipated only when either the federal government dissolves its affirmative preemption of state law and the state government regulates, or the federal government itself chooses to regulate.”¹⁴⁴

¹³¹ See Nash, *supra* note 15, at 1016–21.

¹³² *Id.* at 1021.

¹³³ *Id.* at 1032.

¹³⁴ *Id.*

¹³⁵ *Id.* (citing 520 F.3d 218, 221 (2d Cir. 2008)).

¹³⁶ *Id.* at 1032–33.

¹³⁷ *Id.* at 1032.

¹³⁸ *Id.* at 1033–34.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1034.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* (internal citation omitted).

The concept of null preemption can be generalized to the absence of federal regulation in a preempted field, thus precluding state regulation as well. “On one hand, field preemption seems to provide an example of null preemption achieved through implicit preemption: It knocks out state laws within the entire field, even those that are not directly covered by the governing federal regulation.”¹⁴⁵ However, there is a clear distinction between *null preemption* and the instant topic of *field preemption coupled with federal inaction* that becomes immediately obvious. Null preemption depends on a regulatory Void in a preempted area of law.¹⁴⁶ This Comment’s focus is on *field preemption coupled with federal inaction*, the very concept of field preemption becomes necessarily distinct from null preemption and makes it non-inclusive in Nash’s theory. By its very definition, field preemption is an entire field of law that is preempted precisely because Congress has created a massive body of law to control the field.¹⁴⁷ Contrast this situation to null preemption where there is a regulatory Void in the preempted area. “The very existence of field preemption turns on there being substantial federal regulation of the field.”¹⁴⁸ Null preemption’s field is then not defined by massive regulation signaling congressional intent, but by a regulatory Void in an area where there is expressed intent to preempt. Professor Nash describes the subtle and not so subtle difference: “Viewed more globally, therefore, the preemption is accomplished via the imposition of massive federal regulation, which can hardly be described as the absence of a federal standard.”¹⁴⁹

Field preemption coupled with federal inaction is thereby distinguished from Professor Nash’s model of null preemption, although there is similar cause: the federal actor. In Nash’s null preemption, the conflict is brought on by a lack of regulation, resulting in a Void that the states are preempted from filling.¹⁵⁰ Nash introduces the concept of two potential actors causing that regulatory Void at the federal level, Congress or the federal Executive.¹⁵¹ Both the concept of *null preemption and field preemption coupled with federal inaction* carry the concept of potentially dueling federal actors into the corresponding models. In his *null preemption* model, Nash acknowledges the potential coexistence of substantial congressional law in a field, coupled with a Void of federal regulatory guidance.¹⁵² For the purposes of this Comment, discussing the instant concept of *field preemption coupled*

¹⁴⁵ *Id.* at 1042.

¹⁴⁶ *Id.* at 1034.

¹⁴⁷ *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *see also* Nash, *supra* note 15, at 1041 (discussing two types of implicit preemption).

¹⁴⁸ Nash, *supra* note 15, at 1042.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1039.

¹⁵¹ *Id.* at 1036–37 (describing and categorizing a complete theoretical framework for four “types” of actor agent/effect in null preemption theory).

¹⁵² *Id.* at 1038.

with *federal inaction*, that Void is not based on lack of regulation, but is based on lack of activity and is solely confined to the federal Executive agent. In this paradigm, Congress has expressed its *Will* thoroughly through a massive, comprehensive body of law. Federal agency regulation is not lacking. However, federal agency action to implement the *Will of Congress* is missing.

6. The federal Executive creates the conflict.

In this concept, the tug of war between states and the *Will of Congress* exists, as it always has. It has been delineated throughout constitutional preemption debate as dependent on the struggle between the state and the ever-present *Will of Congress*.¹⁵³ However, Professor Nash's addition of the federal Executive actor to the traditional dual preemption antagonists presents a more refined model and an added dimension.¹⁵⁴ In building on his model, in the concept of field preemption and an activity Void, the federal Executive actor adds to the strain, but in a distinct area of preemption, and in a distinct manner from the null preemption model.¹⁵⁵ The inaction is applied to field preemption, and the federal inactivity is not in regulatory action, but in enforcement action.¹⁵⁶ In this new model of field preemption, the body of law is sufficient, but the recalcitrant federal Executive agent/actor fails to carry out the *Will of Congress*, for a variety of reasons.¹⁵⁷ In the example of *Arizona v. United States*, the effect of federal inaction in spite of massive bodies of law in the field of immigration has caused severe impact.¹⁵⁸

[I]n the last decade federal enforcement efforts have focused primarily on areas in California and Texas, leaving Arizona's border to suffer from comparative neglect. The result has been the funneling of an increasing tide of illegal border crossings into Arizona. Indeed, over the decade, over a third of the Nation's illegal border crossings occurred in Arizona.¹⁵⁹

In an analogous manner to the immigration effect, the inaction of the federal Executive actor to secure the border has caused a corresponding security

¹⁵³ See *supra* text accompanying note 1; see, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 59 (1941); see also *Arizona v. United States*, 132 S. Ct. 2492, 2514 (2012) (Scalia, J., concurring in part and dissenting in part).

¹⁵⁴ Nash, *supra* note 15, at 1036.

¹⁵⁵ Compare *id.* at 1037–38 (describing the federal Executive's lack of existing regulations), with *Arizona*, 132 S. Ct. at 2520–21 (demonstrating the federal Executive's lack of enforcement of existing regulations).

¹⁵⁶ See *supra* text accompanying note 155.

¹⁵⁷ Rationale to not enforce may include, but is not limited to, budgetary, political, or discretionary considerations.

¹⁵⁸ 132 S. Ct. at 2520–21.

¹⁵⁹ *Id.* (describing the impact of the federal failure to enforce immigration law in the Arizona border area).

threat to the state of Arizona.¹⁶⁰ The *Will of Congress* is expressed that the border be secure, and that the federal Executive be the sole actor to secure the national border.¹⁶¹ The field is established; Congress has expressed a *Will* to be the sole actor in that field.¹⁶² The state is powerless to contradict or complement the federal agent in fulfilling the wishes of Congress.¹⁶³ But contrary to the state's needs and the *Will of Congress*, the federal Executive agent has substantially failed to act to secure Arizona's border.¹⁶⁴ This illuminates the federal Executive's emerging role in the preemption tug of war.

D. Preemption characteristics: The federal Executive is the corresponding agent of preemptive activity, but has broad discretion in law.

In this three-way struggle, the federal Executive forms the second element of the federal level. In traditional analysis, this executive actor and the congressional actor work in concert to form the federal entity, competing with the state in the preemption argument.¹⁶⁵ In consideration of the background of modern congressional–Executive relationships, this concerted action representation may not be accurate. The federal Executive may (and does) act in opposition to both state and congressional entities, for its own political purposes.¹⁶⁶

1. The federal Executive has promised to enforce the laws.

The marked and distinct division between the congressional and the Executive branches is illuminated by the Supreme Court in the landmark *Youngstown Sheet & Tube Co. v. Sawyer* decision, marking the conflict in a federal takeover of the strategic steel industry during the Korean War.¹⁶⁷

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.¹⁶⁸

¹⁶⁰ *Id.*; cf. TEX. DEP'T OF PUB. SAFETY, *supra* note 47 (describing the security deficiencies resulting from the unsecured border in Texas, as well as Arizona).

¹⁶¹ *See generally Arizona*, 132 S. Ct. at 2498 (acknowledging Congress as the sole field occupant).

¹⁶² *Id.* at 2502.

¹⁶³ *Id.* at 2501; *see also* *Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941).

¹⁶⁴ *Arizona*, 132 S. Ct. at 2521 (Scalia, J., concurring in part and dissenting in part).

¹⁶⁵ *See supra* text accompanying note 1.

¹⁶⁶ *See, e.g., Arizona*, 132 S. Ct. at 2521 (Scalia, J., concurring in part and dissenting in part) (demonstrating the federal Executive acting contrary to the *Will of Congress* by not substantially enforcing elements of federal immigration law in Arizona, and acting coincidentally contrary to the desires of the state, as manifest by the Governor's will).

¹⁶⁷ *See generally* 343 U.S. 579 (1952).

¹⁶⁸ *Id.* at 587.

The President does not make or abrogate law; the President executes law.¹⁶⁹ The obligations of the President to faithfully execute the laws are explicitly expressed in Article II of the Constitution.¹⁷⁰ “[H]e shall take Care that the Laws be faithfully executed”¹⁷¹ This means that the President or his executive agencies will execute the laws that have been passed by Congress, and enacted through Executive signature or a valid override of a veto.¹⁷² The constitutional functionality of the President is clearly in regulatory and departmental action, implementing the law, and not in the making of law.¹⁷³ “Under our constitutional scheme, Congress’s role is to enact laws. The President’s role, in turn, is to execute those laws; he cannot make up the law on his own.”¹⁷⁴ There is a broad expectation that the federal Executive will indeed enforce the laws and take responsive action in accordance with those laws.¹⁷⁵ This enforcement of law and federal action is complex on its face and requires the concerted action of the entire executive branch to execute the law. Certainly, events of the 21st Century have not made the task simpler or less dynamic. So to meet these ever-present challenges, the President, as the federal Executive, is authorized to enact the law.¹⁷⁶ It is not an easy job, and the political power of the Presidency reflects that observation. “By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience.”¹⁷⁷ This implies that the President must use skill and judgment in directing how, and in what manner, lawful authority can be brought to bear in the interests of the nation.¹⁷⁸ Indeed, the entire federal Executive branch faces the complexity of a dangerous world, and needs to perform its duties in a responsive and well-considered manner. This is the normative expectation of the federal Executive.¹⁷⁹

While the congressional scheme dictates that the President must execute the laws that Congress enacts, it does not require that this function be performed robotically. On the contrary, the very separation of legislative and executive functions implies that enforcing the laws may be a matter of judgment, a task of applying general laws appropriately -

¹⁶⁹ *Id.*

¹⁷⁰ U.S. CONST. art. II, § 3.

¹⁷¹ *Id.*

¹⁷² *See generally* U.S. CONST. art. I, § 7, cl. 2.

¹⁷³ *Youngstown*, 343 U.S. at 587; *see also* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 697 (2014).

¹⁷⁴ Price, *supra* note 173, at 689.

¹⁷⁵ *See, e.g., Youngstown*, 343 U.S. at 587.

¹⁷⁶ U.S. CONST. art. II, § 3.

¹⁷⁷ *Nat’l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 590 (D.C. Cir. 1974).

¹⁷⁸ *Id.*

¹⁷⁹ *See generally Youngstown*, 343 U.S. 582–85 (noting that the expectation of a federal Executive is to perform in a responsive and well-considered manner).

“faithfully” - in particular factual circumstances.¹⁸⁰

This flexibility in action is embodied in the concept of Executive Discretion.¹⁸¹

2. Executive discretion allows the federal Executive wide freedom to operate in a dynamic and dangerous world.

This is not a new concept. The President is and must always be responsive to the needs of the nation in challenging times.¹⁸² In the *Youngstown* decision, the Supreme Court examined the flexibility of Presidential power to meet perceived threats to the United States’ ability to defend itself during the Korean War.¹⁸³ In the President’s attempt to nationalize steel production facilities, in order to avert a strike and ensure uninterrupted flow of steel to the war effort, the Court noted that discretionary action by the President is authorized to a limit—that limit being the violation of Separation of Powers.¹⁸⁴ As the Court expressed:

The Executive is authorized to exert *the power of the United States* when he finds this necessary for the protection of the agencies, the instrumentalities, or the property of the Government. This does not mean an authority to disregard the *wishes of Congress* on the subject, when that subject lies within its control and when those wishes have been expressed, and it certainly does not involve the slightest semblance of a power to legislate, much less to ‘suspend’ legislation already passed by Congress.¹⁸⁵

It is in the last clause of the last sentence, that the concept of an overreaching Executive Discretion appears. The Court admonishes the federal Executive that it does not have the power in discretion to suspend legislation already passed, and enacted into law.¹⁸⁶ In other words, the President is obliged not only to actively enforce law, but is further obliged not to ignore law already enacted.¹⁸⁷ This suggests strongly that law is to be enforced by the federal Executive, and that there is no room for un-favored law to be non-enforced. But there can be practical bounds observed in that reality.

¹⁸⁰ Price, *supra* note 173, at 696–97.

¹⁸¹ *Id.*

¹⁸² See *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (describing the relationship between presidential power and the assent of Congress, in this case acting in the absence of congressional consent due to “imperatives of events”).

¹⁸³ See *id.* at 582–84 (majority opinion).

¹⁸⁴ See *id.* at 587–89.

¹⁸⁵ *Id.* at 691 (Vinson, C.J., dissenting) (emphasis added) (referencing and quoting the brief of the Solicitor General of the United States in an earlier oil case, *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915)).

¹⁸⁶ *Youngstown*, 343 U.S. at 691.

¹⁸⁷ Price, *supra* note 173, at 689; see also *Youngstown*, 343 U.S. at 691 (Vinson, C.J., dissenting).

3. The limits of discretion are pushed by the Executive and reinforced by the Judiciary.

Professor Zachary Price¹⁸⁸ describes discretion operationally. “Enforcement discretion—the authority to turn a blind eye to legal violations—is central to the operation of both the federal criminal justice system and the administrative state.”¹⁸⁹ In this sense, the Executive must be allowed the opportunity to manage to exert some dominion over his or her branch of government in order to deal with a variety of situations: budget restrictions, limited manpower, and potentially ambiguous law are just a few examples. The constitutional structure allows this discretion to exist.¹⁹⁰ “This executive task of applying law to fact necessarily entails some degree of judgment. Unless the division of legislative and executive functions is pure formalism, the establishment of an executive branch independent from the legislature must signify a measure of discretionary executive control over enforcement.”¹⁹¹ Thus, the President may not be strictly bound by a mandate to enforce all certain law in a field.¹⁹² There appears to be some lesser-defined extent where discretionary enforcement is acceptable.

The federal Executive clearly and certainly exercises this discretionary enforcement, usually manifested as a conscious disregard of enforcement activity, leaving a Void. Professor Price cites President George W. Bush’s administration as having pursued this disregard of a field of law through a policy of “deregulation through nonenforcement.”¹⁹³ The Presidential inaction in non-enforcement of the laws is not unique to that administration.¹⁹⁴

Under President Obama, the executive branch announced policies of . . . delaying for substantial periods the enforcement of key provisions of the Affordable Care Act (“ACA”) The Administration also claimed statutory authority to waive key requirements of federal welfare laws, the ACA, and the No Child Left Behind Act.¹⁹⁵

In response, the courts appear to have consistently attempted to pull back the concept of discretion.¹⁹⁶ In doing so, a more definitive view of non-

¹⁸⁸ For an outstanding review of the history and implications of Executive Discretion, see Price, *supra* note 173.

¹⁸⁹ *Id.* at 673.

¹⁹⁰ *See id.* at 697.

¹⁹¹ *Id.*

¹⁹² *See Youngstown*, 343 U.S. at 588–89 (Frankfurter, J., concurring).

¹⁹³ Price, *supra* note 173, at 674.

¹⁹⁴ *Id.* (comparing the Administrative actions of both President Bush and President Obama in applying presidential discretion).

¹⁹⁵ *Id.* at 673–74 (citing Department of Health and Human Services and Department of Education actions that demonstrate the administration’s intent to waive provisions of the respective acts).

¹⁹⁶ *See, e.g., In re Aiken Cty.*, 725 F.3d 255, 257 (D.C. Cir. 2013).

enforcement of the law has appeared.

[T]he President must abide by statutory *prohibitions* unless the President has a constitutional objection to the prohibition. If the President has a constitutional objection to a statutory mandate or prohibition, the President may decline to follow the law unless and until a final Court order dictates otherwise. But the President may not decline to follow a statutory mandate or prohibition simply because of policy objections.¹⁹⁷

Thus, the boundaries are now more strictly drawn by the judiciary, in order to reign in an overbroad, discretionary power within the federal Executive.¹⁹⁸ This is not just recent, but can be traced to earlier opinions of the courts, finding their basis in long-standing Supreme Court precedent from 1838, describing the conflict between congressional intent and failure of duty of the Postmaster to pay for services obtained.¹⁹⁹ “To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible.”²⁰⁰ Therefore, in summary, there can occur a clear conflict between the federal government’s obligation to enforce the laws, the needs of the states, and the reality of an absence of federal action to fill the obligation in a field where no one else can act constitutionally. Herein lies the conflict.

E. Executive discretionary inaction meets preemption in the Will of Congress.

Two forces come together in a clash of constitutional direction. On one side of the balance of power equation sits Congress, which has expressed its *Will* to act through appropriately enacted legislation. On the other side of the equation sits the federal Executive, with the discretion to act in varying degrees to enforce or enable the legislation enacted by Congress. In the middle, the states presume that those forces are in balance and accord, as the states are the ultimate benefactors of law and federal action. Yet those powers may be unbalanced. Congress may express its *Will* through a massive body of enacted federal law, the ultimate effect of which is to preempt state law and

¹⁹⁷ *Id.* at 259 (explaining the court’s perception of the gravity of the implications of discretion by the President). “This case raises significant questions about the scope of the Executive’s authority to disregard federal statutes. The case arises out of a longstanding dispute about nuclear waste storage at Yucca Mountain in Nevada.” *Id.* at 257.

¹⁹⁸ *Id.*

¹⁹⁹ See *Nat’l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1947) (citing *Kendall v. United States*, 37 U.S. 524, 612 (1838)).

²⁰⁰ *Id.* (citing the U.S. Supreme Court’s contrary view of early Presidential examples of discretion as opined in *Kendall*).

action within that field. Coincident to that expression of the *Will of Congress*, and its effect in closure of the field to the states, the federal Executive may choose to not respect the *Will of Congress* by not enforcing the law or by not taking positive action in accord with the law. Left in a Void, the states are unable to act, because the field is closed out, as defined by the earlier *Will of Congress*. In the 21st Century scenario, the power and control seem to be in the federal Executive's corner through its wide discretion to act, without a suitable check. Here discretion meets preemption, and the state has lost.

1. Rationale and causes for discretionary inaction are typically within normal boundaries.

The impetus for reduced executive action to support a law are not unanticipated. There may be a multitude of reasons that exist in a dynamic, politically-charged world for modifying federal actions under law. One such political theory is put forward by Professor Price:

[S]tructural forces may well explain why recent Presidents have so frequently resorted to *nonenforcement* rather than seeking a change in law. In an era of partisan polarization and legislative gridlock, Presidents often cannot count on Congress to develop legislative solutions to perceived problems, or even to negotiate over such solutions in good faith.²⁰¹

Other motivations are equally valid, and in many instances, are compelling to a federal Executive seeking to implement highly complex law.²⁰² Professor Price noted the recent implementation of the ACA by the administration of President Obama as a case in point.²⁰³ In Professor Price's example, the law required insurance plans to comply with newly implemented mandates contained in the law.²⁰⁴ As a "transitional policy,"²⁰⁵ the Department of Health and Human Services declined to enforce compliance with the insurance policy mandates, and suspended civil penalties for non-compliance.²⁰⁶ Professor Price assessed the motivation of the Executive to operational and political factors.²⁰⁷ This is due to both implementation of an immensely complex law, as well as political realities of reducing initial cost shock to a constituency.²⁰⁸ Each motivation for discretionary implementation

²⁰¹ Price, *supra* note 173, at 686–87 (emphasis added).

²⁰² See generally *id.* at 749–54.

²⁰³ See generally *id.*

²⁰⁴ *Id.* at 750 (describing the circumstances of non-enforcement of the insurance plan compliancy provisions of the Affordable Care Act).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See generally *id.*

²⁰⁸ See *id.* (describing the motivations of the President and departments in implementation of the Affordable Care Act).

of the ACA is predictable, and may not be unreasonable in context. But where is the line between acceptable discretion and a conscious, unacceptable Void? A principal example is present in environmental law. There is a significant implication “at stake when federal inaction is alleged to preempt state law: the battle over the authority of the states to regulate activities that contribute to global climate change in light of the federal government’s largely sluggish response to the environmental and health risks posed by climate change.”²⁰⁹ An even broader example is the cornerstone issue in preemption: immigration.²¹⁰ In this region of preemption law, the focus remains squarely on *Arizona v. United States*.²¹¹ This case is the immigration tee up to the border security field hypothetical, and it is instructive to analyze the focus on discretion in *Arizona* pre-trial arguments. In its brief on certiorari to the Supreme Court, the United States explained that: “The INA establishes the grounds on which an alien may be ordered removed. It also gives the Executive Branch *discretion* to grant various forms of relief from removal, up to and including permanent cancellation of removal and adjustment to lawful-permanent-resident status.”²¹² Political, humanitarian, and economic rationale are all given as potential reasons for employing this extremely open-ended regulatory allowance for discretion. Thus, for a state like Texas that is on the front line of immigration issues that require expenditure of state resources in reaction to federal immigration enforcement, the ability of the federal Executive to have such a wide discretion that includes permanent cancellation of removal is absolutely significant in creating a Void, and is potentially highly impactful to state resources.²¹³

2. State compensation mechanisms may be unsatisfactory.

In seeking to counter the Void caused by a preempted inability to act on behalf of its own state interests, and a federal Executive that is non-assertive in fulfilling the *Will of Congress*, the state may have few choices to act. This is certainly consistent with state experiences in the immigration field.²¹⁴ One of the few compensatory actions possible is the passage of law for either effect or impact.²¹⁵ Clearly state law in a field-preempted area is a highly suspected candidate for preemption, but the very passage of law does send a powerful signal, and that is exactly what has happened.²¹⁶ Within our

²⁰⁹ Glicksman, *supra* note 17, at 8–9 (discussing the implications on climate change efforts due to federal inaction in a regulatory scheme).

²¹⁰ See *Arizona v. United States*, 132 S. Ct. 2492, 2494 (2012).

²¹¹ See, e.g., Hochul III, *supra* note 110, at 2226.

²¹² Brief for the United States at 3, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (emphasis added) (internal citations omitted) (delineating the rationale of the United States Government for exercising discretion in enforcement of immigration laws in Arizona).

²¹³ See Fernandez, *supra* note 50 (discussing the fiscal impact of federal non-enforcement of border responsibilities on the Texas budget).

²¹⁴ See Jodré, *supra* note 24, at 553.

²¹⁵ *Id.*

²¹⁶ *Id.* (showing 222 immigration laws enacted in forty-eight states in 2009 due to federal inaction).

hypothetical border security field, there are even fewer opportunities to act. This is an area where inaction of the federal Executive is nearly uncompensatable by the state.²¹⁷ The actions of the Texas Governor to move National Guard troops to the border areas can, in function, only partially compensate for Border Patrol with its law enforcement abilities.²¹⁸

This trend is increasing.²¹⁹

Despite historic federal dominance in the sphere of immigration, states recently began enacting statutes that regulate the lives of immigrants with increasing frequency. These statutes, defended by state governments as public safety ordinances - matters of traditional state police power - have created the present conflict between historic state police powers and the federal government's dominance in the field of immigration.²²⁰

Medtronic, Inc. v. Lohr has provided a historical basis for states preservation of police power rights against a potentially overbearing federal government.²²¹ “[T]he historic police powers of States were not to be superseded by Federal Act unless that was the clear and manifest purpose of Congress.”²²² But this presumption of the preservation of a state's police power has eroded.²²³ According to Professor Chemerinsky's assessment in 2004 of this supportive theory of residual state power, “recent Supreme Court preemption cases clearly put the presumption in favor of preemption.”²²⁴

The current direction of the courts to preempt state law in recognition of the *Will of Congress* is the principle argument in question. The answer remains uncertain even in the forcing function case of immigration. “With state governments delving into the ostensibly federal domain of immigration, federal courts must ascertain whether such state legislation passes constitutional muster, or if such laws impinge upon federal authority. The Courts of Appeals have arrived at divergent answers.”²²⁵

This is pure preemption analysis. But the courts are increasingly asked to adjudicate a second question: Given that the *Will of Congress* is expressed over state interests, but the federal Executive thwarts that *Will* by inaction, is there still presumptive field preemption? Professor Nash speaks

²¹⁷ See, e.g., Letter from Governor Perry, *supra* note 39.

²¹⁸ See *id.*

²¹⁹ See Hochul III, *supra* note 110, at 2231–32.

²²⁰ *Id.*

²²¹ 518 U.S. 470, 485 (1996).

²²² *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

²²³ Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1315 (2004).

²²⁴ *Id.* (describing a shifting of presumption away from favoring the states to one of federal presumption).

²²⁵ Jodré, *supra* note 24, at 553.

of this conflict between Void and states' rights in the context of *Null Preemption*.²²⁶ Notably, his words are on point when extended to the instant topic of *Field Preemption coupled with Executive inaction*. "The regulatory voids resulting from such instances of 'null preemption' are rarely normatively justified. Even if states lack a normative justification for regulating, still the structure of the federal system means that null preemption offends states' sovereign prerogative to protect their citizens."²²⁷ The judiciary can be decisive on this point, but has apparently not staked a firm position.

3. The judiciary reaction to preemption coupled with inaction is on record but not powerful.

The Supreme Court has outlined the tug in this states' power preemptive analysis in rather clear language from *Wyeth v. Levine*.²²⁸ This position appears particularly strong in evaluating the police power of a state that perceives risk to citizens in either an immigration or border security scenario. But the track record of high court review of these preemption issues is inconsistent and is not powerful, nor clear, in recent Court precedent.²²⁹ An analysis of the judiciary's enforcement of preemption versus discretion must focus on the Supreme Court's view of preemption in a field that is critical to state interests.

Two cases are identified by Professor Lauren Gilbert in SCOTUSblog as indicative of uncertainty in the basic concept of preemption, even before turning to a discretionary void left by the federal Executive.²³⁰ In *Chamber of Commerce of the United States v. Whiting*, several businesses, the U.S. Chamber of Commerce, and civil rights groups challenged a law that allowed suspension and revocation of business licenses if the business was found to have employed illegal immigrants.²³¹ The Court upheld the law, stating that it was not preempted, in part because the licensing of businesses was a part of immigration law that was allowed to the states by Congress, and therefore outside the area Congress intended to regulate.²³² In that way, the law was not impliedly-preempted for either conflict or field preemption.²³³ It

²²⁶ See Nash, *supra* note 15, at 1015.

²²⁷ *Id.*

²²⁸ 555 U.S. 555, 565 (2009) (first citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); and then quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (observing that: "[I]n 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 were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'").

²²⁹ See Lauren Gilbert, *Presuming Preemption: Implications of Chamber of Commerce v. Whiting*, SCOTUSBLOG (July 15, 2011, 9:31 AM), <http://www.scotusblog.com/2011/07/presuming-preemption-implications-of-mchamber-of-commerce-v-whiting/>.

²³⁰ *Id.*

²³¹ 131 S. Ct. 1968 (2011).

²³² *Id.* at 1987.

²³³ See *id.*

is instructive to note the limits of analysis the Roberts Court restricted itself to in deciding the case. “Implied preemption analysis does not justify a ‘freewheeling judicial inquiry into whether a state statute is in tension with federal objectives’; such an endeavor ‘would undercut the principle that it is Congress rather than the courts that pre-empts state law.’”²³⁴

Contrasting in *Lozano v. City of Hazleton*, Lozano and other individuals sued the city of Hazleton, Pennsylvania, arguing against certain ordinances, where the federal Executive had not acted, that prohibited employment and rental of dwellings to illegal immigrants, making it unlawful to recruit, hire, or employ unlawful workers in Hazleton.²³⁵ The Third Circuit found both field and conflict preemption applicable in overturning a portion of the law, as immigration housing policy and law was “within the exclusive domain of the federal government.”²³⁶ The Supreme Court granted certiorari and remanded back to the Third Circuit.²³⁷ The distinctions in the Supreme Court’s treatment of the cases, within a short period of time, is not clear.²³⁸ In *Whiting*, outside of explicitly finding an express preemption, the Court intentionally moved away from an examination of implied preemption.²³⁹ Yet in *Hazleton*, the Court seemed to be telling the Circuit to relook at its preemption analysis and not to presume preemption, whether implied preemption or conflict preemption.²⁴⁰ Professor Gilbert strikes at the issue succinctly:

The Court’s decisions in *Whiting* and *Hazleton* underscore the tension in preemption doctrine between cases where the Court has emphasized the presumption *against* preemption where Congress regulates in an area of “traditional state concern” and those where the Court has declined to apply the presumption on the basis that Congress has created a comprehensive regulatory regime. Both *Whiting* and *Hazleton* involved laws regulating *immigrants* in the field of *employment* in a sphere where Congress has acted and thus underscore the conflict between these two lines of cases.²⁴¹

The Supreme Court has not been consistent or clear on the preemption analysis.²⁴² This idea is stated by William Hochul III: “For the Court’s preemption analysis, it is important to first establish whether these

²³⁴ *Id.* at 1985 (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring)).

²³⁵ 620 F.3d 170, 177 (3d Cir. 2010), *vacated*, *City of Hazleton v. Lozano*, 563 U.S. 1030 (2011).

²³⁶ *Id.* at 224.

²³⁷ *Lozano*, 563 U.S. 1030.

²³⁸ See Gilbert, *supra* note 229.

²³⁹ *Id.* (evaluating the narrowness *Whiting* decision).

²⁴⁰ See *id.*

²⁴¹ *Id.*

²⁴² See generally Price, *supra* note 173, at 682–85.

state statutes qualify as traditional exercises of state power, thereby creating a presumption that Congress does not intend to preempt the statutes.”²⁴³ But practicality and solutions to states’ issues may be weighing on appellate courts’ views. The Third Circuit in *Hazleton* discusses this policy gap.²⁴⁴ “The dispute we are now called upon to address is one of an increasing number of cases that have arisen from actions that state and local governments have taken because of illegal immigration.”²⁴⁵ The catalyst issues of immigration law clearly dictate future preemptive uncertainty in any analytical case of border security.²⁴⁶ Then, the next layer of precedential uncertainty to be added is the additional dynamic of significant, purposeful inaction by the federal Executive.

4. Presidential discretion may exist in extreme: Nullification.

The shifting of power by the Executive in order to create action or void in a policy area can be enabled through the concept of discretion. As discussed *supra*, the concept of discretion is precedentially accorded a degree of acceptance.²⁴⁷ But Executive Discretion is an expanding phenomenon, as Professor Price indicates a rise in the modern instances of discretion of the federal Executive.²⁴⁸ “Federal officials have even adopted public nonenforcement policies in some circumstances; notable recent examples include the Obama Administration’s stated policies of immigration nonenforcement and suspension of the employer health insurance mandate.”²⁴⁹ Yet, the Void of inaction itself does not automatically suggest that there is a gap that must be filled. The Supreme Court has found even inaction gaps to show and support federal preemption and therefore barring state compensatory enforcement actions.²⁵⁰ In a notable example, the Court found in *Isla Petroleum*: “Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn — not from federal inaction alone, but from inaction joined with action.”²⁵¹ Thus, a Void of action in a preemptive field may not immediately draw a requirement or even a constitutionally-acceptable reaction from a state. However, when discretion becomes extreme, the complexity may change the state’s reaction.

²⁴³ Hochul III, *supra* note 110, at 2232.

²⁴⁴ *See* Lozano v. City of Hazleton, 620 F.3d 170, 175 (3d Cir. 2010), *vacated*, City of Hazleton v. Lozano, 563 U.S. 1030 (2011).

²⁴⁵ *Id.*

²⁴⁶ *See, e.g., id.*; *see also* Chamber of Commerce of U.S. v. Whiting, 131 S. Ct. 1968, 1987 (2011) (discussing the inability of states to implement licensing sanctions). *But see* Arizona v. United States, 132 S. Ct. 2492 (2012) (explaining state law must give way to federal law given an express preemption provision).

²⁴⁷ *See* Price, *supra* note 173, at 673–75.

²⁴⁸ *Id.* at 742.

²⁴⁹ *Id.*

²⁵⁰ *See, e.g.,* P.R. Dep’t of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988).

²⁵¹ *Id.* at 503.

Discretion beyond the judiciary's accepted precedent becomes significantly problematic. Returning to *National Treasury Employees Union*, "[t]he Supreme Court, in rejecting that contention [that the President can refrain from executing law], observed that its logical extension would give the President authority effectively to nullify Acts of Congress."²⁵² Thus, a President, "acting" to not enforce a significant portion of law can effectively nullify law.²⁵³ The baseline case is found in *Dames and Moore v. Regan*.²⁵⁴ President Reagan terminated claims against Iran, following the Hostage Crisis.²⁵⁵ In that case, Dames and Moore argued that the Executive did not have the power to nullify law and remove their claim against the Iranian government.²⁵⁶ The Supreme Court held that Congress authorized the nullification of certain Iranian claims, post-hostage crisis, and the discretionary nullification actions of the federal Executive survived review.²⁵⁷ The Court evaluated the case against the highest standard of presidential power, in the presence of congressional express approval.²⁵⁸ But, what if the federal Executive nullifies significant law in a field where there is no congressional approval, acquiescence, or even acknowledgement? In fact, the original border security hypothetical suggests that there is significant congressional (and state) disfavor with a policy of presidential inaction. What standard then?

The Supreme Court in *Dames and Moore* even forecast this eventuality in describing the narrowness of its decision in that case.²⁵⁹ "We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority."²⁶⁰ In the case of *Dames and Moore*, the President acted with not just congressional acquiescence, but with some explicit congressional approval.²⁶¹ However, that alternative situation has now arisen. In the border security field, and its triggering immigration field, the federal Executive acts against the approval of the current Congress.²⁶² The enacted law is silent, and the only standard present to force Executive action is the "Well and Faithful Clause" of the

²⁵² Nat'l Treasury Emps. Union v. Nixon, 492 F.2d 587, 604 (D.C. Cir. 1974) (evaluating the meaning of the President's duties under the Well and Faithful Clause). The Court described that duty limitation, indicating "[t]hat constitutional duty does not permit the President to refrain from executing laws duly enacted by the Congress as those laws are construed by the judiciary." *Id.*

²⁵³ See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 655.

²⁵⁶ *Id.*

²⁵⁷ See *id.* at 687–88 (highlighting the potential for the "President's loose discretion").

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 688.

²⁶¹ See *id.* at 687–88 (discussing Congress' general acquiescence to the President's actions and the Senate committee's actual approval of establishment of a Tribunal).

²⁶² See Robert Costa, *Congressional Republicans Consider Using Short-Term Funding Bill to Pressure Obama*, WASH. POST (Nov. 14, 2014), http://www.washingtonpost.com/politics/congressional-republicans-consider-using-short-term-funding-bill-to-pressure-obama/2014/11/14/4d1cde3e-6c3b-11e4-a31c-77759fc1eacc_story.html.

Constitution. The standard for this scenario is against the President: “[W]hen the President acts in contravention of the will of Congress, ‘his power is at its lowest ebb,’ and the Court can sustain his actions ‘only by disabling the Congress from acting upon the subject.’”²⁶³ Congress surely has indicated that it does not want to be disabled from the debate regarding the field of immigration and border security. “Congressional Republicans said . . . that they might create a series of showdowns over funding the government to try to force President Obama to back down on his expected plans to overhaul the nation’s immigration system.”²⁶⁴

Discretion in the extreme, when in a preempted field, yields a powerfully daunting constitutional issue. The significant inaction of the federal government produces a Void where there is, by definition, considerable incentive by a targeted state to act.²⁶⁵ This is not nullification alone. *This is nullification within a preempted field.* The concept creates such a significant gap that a state must respond in compensation but is constitutionally unable by the definition of the field. The issue is untried, and as demonstrated *supra*, the courts appear hesitant to engage. Professor Price sums up the context of the issue: “[A]lthough enforcement discretion is a valid executive authority, one with deep historical and normative roots in our constitutional tradition, it is subject to important limits - limits that the executive branch must recognize, even if courts are unlikely to enforce them.”²⁶⁶

5. The border security hypothetical becomes constitutionally plausible.

In returning to the case study in border security, Congress has enacted a full series of law to ensure the borders are secure.²⁶⁷ That is a task to be taken on fully by the federal government.²⁶⁸ However, the federal Executive has chosen through “discretion in extreme” to not enforce the law in the interrelated field-exempted areas of immigration and border security. The hypothetical is potentially fulfilled in a recent presidential initiative to nullify certain immigration and deportation laws. A Texas state representative summarizes the reality of the hypothetical-turned-case study:

Republican Texas state Sen. Charles Schwertner [says] he believes the states will be more fiscally burdened because Obama’s executive actions would encourage more illegal immigrants to enter the U.S. in the long run. He said Texas

²⁶³ *Dames*, 453 U.S. at 669 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952)).

²⁶⁴ *Costa*, *supra* note 262.

²⁶⁵ See *supra* text accompanying note 1 (discussing the operational standard of “significant federal inaction”).

²⁶⁶ Price, *supra* note 173, at 688.

²⁶⁷ See OFFICE OF THE GOVERNOR, *supra* note 52.

²⁶⁸ *Id.*

will continue to resist offering new services to unauthorized immigrants, “protected” or not.

“I guess it will put a strain on our medical system, our social safety networks,” he told FoxNews.com. “It encourages further lawlessness, and it is unfair to those seeking to immigrate legally.”

“Texas is going to take the stand it needs to – we’re going to protect our citizens.”²⁶⁹

So, by definition of the immigration and border fields, Congress has signaled in no uncertain terms through massive law that the state has no appropriate role.²⁷⁰ Ideally, the actions of the federal Executive match up precisely with the *Will of Congress*. This relationship between the President and Congress is depicted in Figure 1.

²⁶⁹ Kelley Beaucar Vlahos, *Obama’s Immigration Overhaul Could Put Burden on States*, FOX NEWS (Nov. 15, 2014), <http://www.foxnews.com/politics/2014/11/15/obamas-immigration-overhaul-could-put-burden-on-states/>.

²⁷⁰ See generally *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152–53 (1982) (describing the characteristics and implications of field preemption).

**Span of the Federal Executive's Execution
in a
Preempted Field (Ideal)**

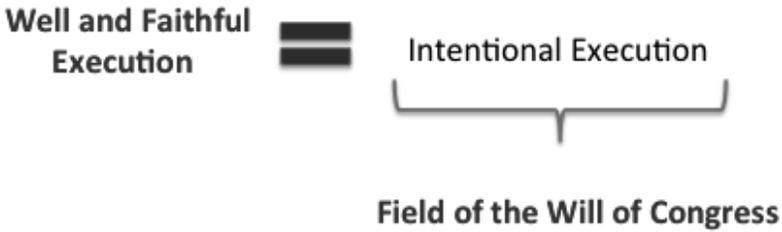


Figure 1: The Ideal: Execution matches the Will of Congress

But in a more pragmatic world, the federal Executive, through discretionary power, has chosen to not enforce significant aspects of that law. In this real world, the federal Executive does not fully execute the entirety of the “*Field of the Will of Congress*,” even to the point of effective nullification of a portion of the field law. The field that results, then, is made up of three components that vary with time. They are: (1) the Intentional Execution of the federal Executive; (2) the constitutionally-acceptable, discretionary inaction of the federal Executive; and (3) the remaining portion of the field that is consciously non-enforced, or effectively nullified—the Void. This relationship is depicted in Figure 2.

of the law for a specified category of insurance plans – precisely the form of **executive** nonenforcement that is presumptively impermissible.²⁷¹

This then leaves the state in a security conundrum, with its sovereign state government accountable to its population for security, but without a federal agent to act. The state is left with no available recourse to fill the Void, and no way to constitutionally compensate with its own police powers. This situation is depicted in Figure 2. If the federal Executive can, in Professor Price’s word, *impermissibly* exert such a discretionary power in extreme, nullify the law, and leave a significant Void that upsets the balance, can this be checked and remedied constitutionally?

The challenge is two-fold. First, how is “significance” in the Void defined in order to trigger a remedy? Then, once a significant Void is indeed identified, what constitutional remedy is available to resolve the issue on behalf of the state?

IV. RESOLUTION

A. Confluence of three forces yields a power struggle with limited checks.

The confluence of three powerful interests in a field of critical interest creates tension operationally and constitutionally. Congress *A*, at some time in the past, has expressed its *Will* in a body of law that the federal Executive should exert sole power in an area, in this case, border security. The state, which has an international border subject to Congress *A*’s *Will*, relies on the federal Executive to exert that power and regulation in the border security field. Federal Executive *A* does so, to the satisfaction of every actor involved.

At some time in the future, things change. For political, budgetary or policy reasons, the new federal Executive *B* orders a halt in execution of some laws in the field of border security. The state experiences non-enforcement of federal law within its territory and sees a rise in budgetary issues and security breaches due to the lack of border enforcement. Due to the constitutional nature of field preemption, the judiciary will not allow state law and state enforcement to make up the Void.²⁷² Through an exercise of discretion, this deliberate failure is at odds with the intent and *Will* of past Congress *A*, which may or may not be synchronous with the *Will* of current Congress *B*. The issue of resolution faces a sturdy obstacle of the Separation

²⁷¹ Price, *supra* note 173, at 751 (describing impermissible Executive enforcement inaction in not enforcing various provisions of the Affordable Care Act’s insurance mandate, and by analogy, depicting a Void similar to that created by impermissible Executive enforcement inaction in the example Border Security field).

²⁷² *South Dakota v. Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919, 927 (D.S.D. 2003) (describing the characteristics of field preemption).

of Powers.

1. Congressional *Will* must be expressed, or more accurately, re-expressed.

The *Will of Congress* is the catalyst for any preemptive action.²⁷³ The *Will of Congress* to preempt law in an entire field has been traditionally manifest by the massive volume of law in that field. Given a previous time A, actors and budget, the *Will of Congress* was clearly that the federal Executive operate completely and uniquely in the field, in this case border security. However, at a current time B, the actors, budget, and situation have changed. At some level of federal Executive activity, the *Will of Congress* that the federal Executive be the sole actor in the field may have changed. To what effect is the *Will of Congress B* able to override the *Will of Congress A*?

The issue is an extension of the conceptual impact of legislative silence on judicial interpretation. “Ultimately, the most significant problem facing the silent acquiescence argument is its inconsistency with the Court’s own theory of statutory interpretation, that ‘[i]t is the intent of the Congress that enacted’ the statute in question ‘that controls.’”²⁷⁴ As the Supreme Court has moved in *stare decisis* cases to consider inaction of Congress as acquiescence to a federal Executive’s interpretation of law, then the Court moves effectively to take into account a *Will of Congress B* over the initial *Will of Congress A* on the point in question.²⁷⁵ While Lawrence C. Marshall argued for a *super stare decisis* that will force congressional engagement when necessary to alter interpretative history,²⁷⁶ the concept is closer to a re-expressive *Will*, instead of mere silence.

Guido Calabresi, in *A Common Law for the Age of Statutes*, put such a revised legislative *Will* in context.²⁷⁷ “When a court says to a legislature: ‘You (or your predecessor) meant X,’ it almost invites the legislature to answer: ‘We did not.’”²⁷⁸ Given an appropriately expressive format, Congress *B* can successfully express its *Will* over Congress *A*. This is consistent with *Food and Drug Administration v. Brown and Williamson Tobacco Corp.*, where in spite of initial congressional intent in the original language of the statutory authorization of the FDA, the FDA failed to enforce regulatory action in cigarettes and smokeless tobacco products, creating a long-lasting Void, and then argued it was not responsible for regulating tobacco

²⁷³ See *Arizona v. United States*, 132 S. Ct. 2492, 2514 (2012) (Scalia, J., concurring in part and dissenting in part); see also *Hines v. Davidowitz*, 312 U.S. 52, 60–67 (1941) (describing the *Will of Congress*).

²⁷⁴ Lawrence C. Marshall, “Let Congress Do It”: *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 193 (1989).

²⁷⁵ See *id.*

²⁷⁶ See *id.* (advancing the concept of super stare decisis in judicial interpretation); see also Maria Crist, Lectures on Legislative Interpretation at the University of Dayton School of Law (2014).

²⁷⁷ See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 31–32 (Harv. Univ. Press 1982).

²⁷⁸ *Id.*

products.²⁷⁹ In attempting to exert later control in their own, self-created Void, the FDA was precluded from authority by later Congress, based on subsequent congressional action during the time the FDA renounced authority.²⁸⁰ It therefore appears sufficient in precedent that Congress *B* can exert a positive degree of *Will* over the initial *Will of Congress A*. In the instant case study, the *Will of Congress A* that the federal Executive fully occupy the field may be alterable through an expression of the current Congress *B*. But what should this revised *Will* seek to effect?

2. The Separation of Powers means limited power to force the federal Executive to act.

Congress can exert a firm *Will*. Indeed, in our border security scenario, Congress *A* has expressed a clear intent, through its massive law, that the federal Executive should execute exclusive enforcement and action. Yet the federal Executive has ignored the *Will of Congress A*, in discretion and nullification. Presumably, a subsequent expression by Congress *B* of that same “*Will*” will result in a similar unsatisfactory, discretionary reaction. At the same time, Congress *B* cannot force the federal Executive to act beyond its normal lawmaking and oversight functions. Ordering specific performance as a remedy in a services contractual breach is generally regarded as ineffective at the least, and the likely equivalent of servitude. In the same way, a Congress *B*, ordering the accomplishment of a specific enforcement task, is either an ineffective government equivalent of directed servitude of one branch or a distinct violation of Separation of Powers. The concept does not work in contracts law, and is not appropriate for “social contract” law either, especially if the federal Executive has indicated an unwillingness to act. However, the entity that does have the most powerful incentive to act in the three-way preemption struggle is the *state*.

3. The state has the *Will* and interest to act.

The state has the *Will* and the need to act in the Void.²⁸¹ Indeed, in the border security hypothetical, the state is attempting to act in lieu of federal action.²⁸² In the real case scenario, the Texas Governor has already dispatched National Guard troops to the border in the absence of sufficient federal border security assets in place.²⁸³ Professor Gilbert is on point, given this hypothetical scenario and actual case study, in her comment: “If a state or local law regulates *immigration*, field preemption principles may apply and the law should be preempted unless the federal government has delegated

²⁷⁹ 529 U.S. 120 (2000).

²⁸⁰ *See id.*

²⁸¹ *See e.g.*, Letter from Governor Perry, *supra* note 39; *see also* Jodré, *supra* note 24, at 553.

²⁸² *See* Letter from Governor Perry, *supra* note 39.

²⁸³ *See* OFFICE OF THE GOVERNOR, *supra* note 52.

power to the state to regulate.”²⁸⁴ This effectively places the state in the Void left between the federal Executive’s actions, acceptable discretion, and the span of the *Will of Congress*.²⁸⁵ As discussed *supra*, the state has a strong incentive to fill both the Void and the space filled by acceptable discretion.²⁸⁶ The rationale for the state incentive to act to fill these spaces is founded in the security mandate of the state government and for sustainment of its fiscal operation.²⁸⁷ But there must be a trigger to enable state-level remedial action in filling the Void.

B. The key to remedial action lies in two dimensions: Substantiality and Will of the current Congress.

There are two dimensions to possible reconciliation of the strain of the state against the preemptive Void. They lie in the size of the Void and the *Will* of the current Congress.

1. Establishment of Substantiality: The size of the Void determines the requirement to act.

So long as the Void remains small, the implications of conflict remain correspondingly small. The issues of a non-enforcement Void created by excessive Executive Discretion are manageable under a current balance of powers. The Executive can potentially be held in check in routine circumstances by either a state lawsuit and resulting court order, or through a less formal congressional-Executive adversarial political relationship.²⁸⁸ These actions are the normal ebb and flow of power, and they do not signal a constitutional preemption issue beyond the traditional tug.

If the Void in a field-preempted area becomes substantial, then the situation changes significantly. In a large Void scenario, the *Will of Congress* has been ignored by the Executive in a likewise substantial manner, causing the state to feel enforcement, security or compensation deficiencies within the field.²⁸⁹ In this case, the state is precluded by preemption from taking action to directly remedy the Void, and is therefore put at risk. The question is one of proper determination of substantiality of the Void. There is no direct measure, nor a quantifiable means to establish a trigger. However, there is an indirect measure of substantiality. If Congress *B* is willing to act to remedy

²⁸⁴ Gilbert, *supra* note 229.

²⁸⁵ See *supra* Figure 2.

²⁸⁶ See Fernandez, *supra* note 50.

²⁸⁷ See *id.*

²⁸⁸ See, e.g., *Arizona v. United States*, 132 S. Ct. 2492 (2012); see also *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (demonstrating the typical court action to restrain federal Executive Discretion, or to preempt state action, bringing the federal and state tug of war into balance with the *Will of Congress*).

²⁸⁹ See, e.g., *TEX. DEP’T OF PUB. SAFETY*, *supra* note 47 (describing the substantial issues facing the state of Texas as a result of federal Executive inaction in enforcing law in the field of border security).

the Void created by the inaction of federal Executive *B*, the Void is, by definition, **substantial**. Thus, an action of Congress to reaffirm or restate its *Will* in the field is its own mark of a **substantial Void** in the Executive's failure to execute its *Will*. Substantiality and *Will* merge in the desire of Congress *B* to take action.

The action of Congress *B* to reassert its *Will*, in contrast to Congress *A*'s original *Will*, is naturally a difficult one. The bar is high. In suggesting that the *Will of Congress B* is clear and unambiguous in declaring its view on current events and excesses, one may suppose that the *Will* reflects a uniform view of the feelings of Congress. However, the clear nature of the body suggests that Congress *B*'s re-expressed *Will* to act, marking a Void of substantive size, is through a majority vote, and will never be unanimously agreed upon. But the majority can indeed hold the power to re-express. While not all representatives or senators may agree to the re-expressed *Will*, the key is what margin represents a sufficiently re-expressed *Will*. To restate the question: what majority level reflects appropriate substantiality?

In fairness, the margin, as an entering argument, must be the same as was expressed in the original *Will of Congress A*. Thus, if the original *Will* was expressed on a simple majority basis, so must the *Will of Congress B* to re-exert. If the original *Will* was expressed on an overriding two-thirds majority to enact, then Congress *B* must re-exert its *Will* on the same two-thirds majority. In this way, Congress *B* cannot act to undo an action of Congress *A*, at a lower consensus level than the original legislative action. This establishes an imperative and hurdle that the *Will of Congress A* is not modified easily by Congress *B*. Professor Jamelle C. Sharpe puts this potential conflict between Congress *A* (enacting Congress) and Congress *B* (sitting Congress) in perspective, and wisely warns of the Supreme Court's wariness to overturn an original *Will of Congress* lightly.²⁹⁰

Courts must choose whether to follow the directives of the Congress that enacted the potentially preemptive statutory language or the directives of the sitting Congress that has the power to overrule its interpretation. . . . Courts that view their role as protecting the legislative bargain reached by the enacting Congress will likely be mindful of how the sitting Congress will respond to their decisions-so as to further minimize the possibility of legislative override²⁹¹

2. Establishment of the *Will* of the Current Congress: A step to remedial action.

Given substantiality of the Void, Congress expresses its *Will* for

²⁹⁰ See Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163, 197-98 (2011).

²⁹¹ *Id.*

execution of action to fill the Void. In the case at hand, that *Will* of the originating Congress *A* was impliedly expressed by the creation of a massive body of law in the field. Left untouched, that massive body of law conveys the same field preemptory message. In order to effect a re-expression of its *Will*, either through a modification or a full reiteration, Congress must go beyond an implied preemptive intent and clearly express its revised *Will*. This is consistent with the voice of Justice Scalia in his *Arizona* dissent²⁹² and signals a solution path. In this way, the *Will of Congress B* can be evaluated against the originating *Will of Congress A*, paving the way for resolution.

The critical partner in a re-expressive *Will of Congress* is the state. In this question, Texas is the unrequited partner, and its unsecured border is the Void. So long as the state has the police power and desire to remediate, there is a way forward other than reliance on the federal Executive to self-correct.

C. Resolution to ensure constitutionality of state remedial actions.

While the Void remains, the states are stymied to act, even though they might be willing partners with appropriate powers and resources. In viewing the cause of the Void as less important than the options available to fill that Void, there is some applicable academic literature to assist in establishing a solution set. Recall that the field preemption Void is created by a federal Executive embracing discretion to an extreme, effectively nullifying a portion of law in the field.²⁹³ In Professor Nash's model of null preemption, a similar Void is created by an absence of regulation.²⁹⁴ When viewed from this perspective, Professor Nash lays out the crucial imperative for a solution set.²⁹⁵ "Null preemption's regulatory void can be dissipated only when either the federal government dissolves its affirmative preemption of state law and the state government regulates, or the federal government itself chooses to regulate."²⁹⁶ Professor Nash's implication is that the federal government must act to fill the Void or affirmatively remove preemption as a barrier to state action.²⁹⁷ Thus, the path to fill the Void is laid out in either traditional congressional action or through a clear, re-expressive *Will*. Congress can either legislatively allow state police powers or in the alternative, re-express its *Will* to allow co-incident action by the states in a generally field-preempted area. This generalized situation is depicted in Figure 3, showing the reduced *Will of Congress*, and the addition of states'

²⁹² 132 S. Ct. 2492, 2514 (2012) (Scalia, J., concurring in part and dissenting in part).

²⁹³ See *supra* Figure 2 (describing the relationship between the *Will of Congress* in Field Preemption and the Void).

²⁹⁴ See Nash, *supra* note 15, at 1034.

²⁹⁵ See *id.*

²⁹⁶ See *id.* (describing how a Null Preemption Void is eliminated; while the Void creating mechanisms are different in Null and Field preemption, this solution is appropriate to consider and potentially analogous to the elimination of the Void in Field Preemption).

²⁹⁷ *Id.*

action to compensate for the Void, bringing execution up to the full measure required.

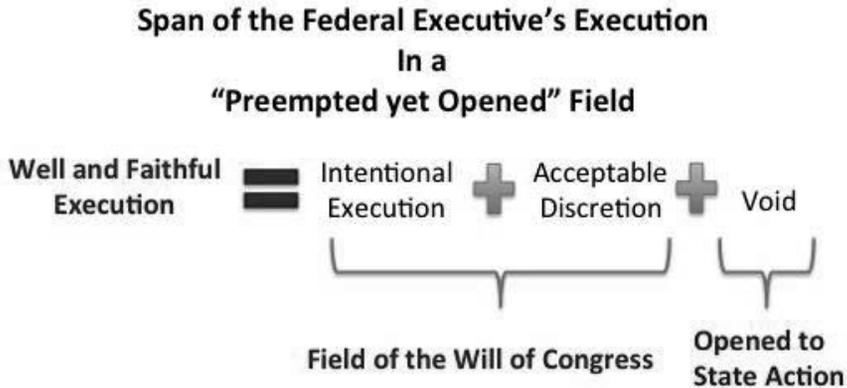


Figure 3: Reduced Field of the Will of Congress, supplemented by state action.

The dominant question remaining within this study is how to effectively open the Void to states to act in that space left open by the federal Executive’s inaction. There are two apparent avenues to this end: express legislative operation of Congress to open the Void or a broad re-statement of the *Will of Congress*. We will examine each.

1. Congress statutorily allows state police powers authority to operate in the Void.

This option is clearly the most direct and can be achieved in two ways. The first, and simplest, requires Congress to specifically allow state action in a limited role. The second, and broader option, requires Congress to dismantle a portion of the field, thus eliminating the fixed boundaries of field preemption, and opening the field to state action in the gaps created by the Void.

a. Statutory language allowing state action.

Given a willing partner, this solution mode appears simplest. Congress *A* had originally established the body of law so pervasive as to create a field. In this case, Congress *B* sees a Void that exists in its desired enforcement of the law in the field. Congress *B* can act to allow state action to fill that Void. This congressional action has the effect of reducing the field,

and supplementing it through allowance of state action in the congressionally-perceived Void. Historically, the concept of preemption was limited, and supported states' activities to complement the *Will of Congress*.²⁹⁸ Professor Chemerinsky described the precedential nature of a similar, less absolutist view of preemption, in deference to state activity.²⁹⁹ “[D]uring the first third of this century, dual federalism was entirely about restricting the authority of Congress by narrowly defining its powers under Article I and by reserving a zone of activities to the states.”³⁰⁰ In doing so, Congress allows state activity in a very narrow, defined area. Traditionally, the method of assenting to, or even fully asserting, its desire to allow state action in a predominant area was through funding incentivization.³⁰¹ For example, in *South Dakota v. Dole*, the federal government acted to entice South Dakota to raise the purchase age of alcohol from nineteen to twenty-one by threatening to withhold highway funds.³⁰² South Dakota challenged the Secretary of Transportation’s ability to entice state action, and that ability was upheld.³⁰³ The practice has more generalized implications for expressing a federal or congressional *Will*. “Incident to [the Spending Clause], Congress may attach conditions on the receipt of federal funds[] Thus, objectives not thought to be within Article I’s ‘enumerated legislative fields[]’ may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.”³⁰⁴ Even reticent states can be, and have been, made to fill gaps created by Congress.

[T]here are a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests. As relevant here, Congress may, under its spending power, attach conditions on the receipt of federal funds[] Moreover, where Congress has the authority to regulate private activity under the Commerce Clause, it may, as part of a program of “cooperative federalism,” offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.³⁰⁵

Thus, Congress can invite and even urge states to fill in the Void of federal Executive inaction in narrow areas through the use of its budgetary powers.

²⁹⁸ See *id.* (describing an earlier Twentieth Century notion of preemption, focused on restricting Congressional power and reserving power to the states).

²⁹⁹ Chemerinsky, *supra* note 223, at 1328–29.

³⁰⁰ *Id.* at 1328.

³⁰¹ See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (discussing the relationship in preemption between the states and federal governments).

³⁰² See generally *id.* at 203.

³⁰³ See *id.*

³⁰⁴ *Id.* at 206 (internal citation omitted).

³⁰⁵ *New York v. United States*, 505 U.S. 144, 145 (1992) (internal citations omitted).

b. In the alternative, disassembly of the massive field of federal law.

A second method of directly creating a state opportunity to act in the Void left by federal Executive inaction, albeit in a still limited confine, is to disassemble a portion of the federal law on point, allowing states to fill that gap. The operational methodology of this path lies in Congress acting to repeal limited aspects of federally-unenforced border security law that constitutes the Void, with the understanding that willing states will fill in the gap as required. The *Will of Congress* becomes explicitly exclusive of the narrow area of law that Congress repeals. This sets a broader tone, however. “Congress’s chosen level of deference to state interests will be reflected in the language that Congress enacts, and there is no reason automatically to give that language a narrowing construction.”³⁰⁶ In this way, the *Will of Congress* that the sovereign states partner with the federal Executive in filling the Void becomes much clearer than simply an explicit “repeal Federal and replace with state” tactic. The language, as Professor Caleb Nelson points out, can reflect a larger congressional *Will* that is broader in context.³⁰⁷ In this way, the courts can potentially observe the larger congressional *Will* that supports state interests and action. As the states then act in concert with the federal Executive, their partnership ordained by the *Will of Congress* precludes a presumption of field preemption. Professor Chemerinsky argues a similar recommendation, limiting preemption to express preemption and clear conflict between federal and state law.³⁰⁸ Thus, the courts can observe the intent of Congress’ action to undo federal law, in deference to state action. Robert Weiner expresses this view:

[S]o long as the Court draws the inferences and makes the assumptions underlying field preemption in furtherance of the statutory goals, and so long as the Court in fact treats the purpose of Congress as the touchstone of its analysis, then there should be no need to indulge a presumption against preemption to show respect for state authority.³⁰⁹

Thus, Congress in this way can act to open action in a previously foreclosed field through targeted, specific areas, either through explicit statutory action, or statutory disassembly of a portion of the field, creating a presumption against preemption. Either option opens the field in a limited manner to an eager state, desiring to fill the Void constitutionally. But statutory action requires federal Executive assent and signature. Given the

³⁰⁶ See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 302 (2000).

³⁰⁷ See *id.*

³⁰⁸ See Chemerinsky, *supra* note 223, at 1332.

³⁰⁹ Robert N. Weiner, *The Height of Preemption: Preemption and the Role of Courts*, 32 HAMLIN L. REV. 727, 744 (2009).

Void was created by federal Executive policy decisions, approval of statutory mechanisms to resolve the Void is not a forgone conclusion. However, there is a broader option that can be preferable in meeting the more generalized needs of the states without resorting to statutory repeal, or federal Executive concurrence.

2. Congress re-expresses its *Will* to affect desired preemption parameters.

Congress has an opportunity to express itself on a broad and independent basis, vis-à-vis the federal Executive. It can potentially offer a unilateral invitation to states to partner with federal government. Congress can reassert its *Will* against the changing tide of the character of the issue and against the potential unwillingness of the federal Executive to enforce that *Will*. In his dissent in *Arizona*, Justice Scalia noted that in such conflict, implicit preemption does not satisfy the needs of competing dual federal systems.³¹⁰ State power to act requires that “‘Congress . . . unequivocally express[es] its intent to abrogate[]’ Implicit ‘field preemption’ will not do.”³¹¹ Weiner supports this argument that implied preemption must be made *more explicit* to adequately serve the parties.³¹² “The requirement of ‘a specific statement of pre-emptive intent’ to demonstrate ‘an implicit intent’ to preempt in and of itself bespeaks some doctrinal disarray.”³¹³ This is asserted by Justice Scalia and Weiner against the typical application of *Congressional Preemptive Will*: a positive statement that Congress desires to act solely within those bounds expressed.³¹⁴ That position makes field preemption an implied doctrine and express preemption mutually exclusive.

There appears, however, a method of expression of Congress that refines and reasserts the *Will of Congress*, yet is not mutually incompatible with the cautions of Justice Scalia and Weiner and is within the definitions of express and implied preemption. Whereas the typical express preemption is a positive definition of Congress’ *Will* to act exclusively in an area, Congress may similarly express a negative definition of its *Will* to remain non-exclusive in a portion of that field. In other words, Congress *B* expresses its *Will* to allow other agents to act within some defined bounds in a field originally specified by Congress *A*.

Operationally, there is no conflict or disarray, as was projected by

³¹⁰ See *Arizona v. United States*, 132 S. Ct. 2492, 2514 (2012) (Scalia, J., concurring in part and dissenting in part).

³¹¹ *Id.*

³¹² See Weiner, *supra* note 309, at 743.

³¹³ *Id.*

³¹⁴ See *South Dakota v. Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919, 927 (D.S.D. 2003) (explaining the concept of express preemption and describing express versus implied preemption in context).

3. Concurrent Resolution: the mechanism of solvency.

The mechanism of re-expression is through Concurrent Resolution of Congress, by original majority requirements.³¹⁶ The goal of Congress *B* is expression of its *Will* to the courts, the federal Executive and the states. This is not a statute, but an expression of congressional position, or *Will*. Therefore, it does not follow the path of a bill, in the sense of presidential signature requirements.³¹⁷ Indeed, it is an expression of the *Will of Congress* as a voice independent of the Executive. For example, Congress *B* expressly resolves that it is its *Will* that the federal government shall not be the sole actor in some limited area of border security. This opens the field in a clearly delimited area for state action. The *Resolution of Will* does not demand anything of the federal Executive. On the contrary, the resolution is silent on that topic, and allows a continued federal Executive enforcement, or non-enforcement, of the law, potentially eliminating the legislative override issue.³¹⁸ However, as depicted in our case study, Congress *B* has now unequivocally allowed, without constitutional preemption challenge, the opportunity for the state, Texas for example, to partner with the federal Executive in a manner consistent with the overall border security field and within the general intent of the originating Congress *A*.

V. CONCLUSION

Congress expresses its original *Will* through legislation. If it creates such a body of law in an area, the inference is that Congress has intended to fully occupy the field to the exclusion of either contradictory or complementary state law and enforcement. Yet Congress must leave enforcement of the body of law in a field to the federal Executive. This federal Executive may act in complete concert with the *Will of Congress*, or may only enforce some subset of the body of law in the field. There is an acceptable, discretionary option left to the federal Executive in enforcement of the *Will of Congress*. To the extent that the federal Executive fails to enforce the *Will of Congress* beyond the mere discretionary bounds, a Void is created. The states are excluded by implied field preemption theory to act within this Void. They must rely on the federal Executive to enforce within the field but are helpless in constitutionally enforcing within the Void. In pursuit of a policy of non-enforcement of federal law, the federal Executive can create a Void that has the potential to endanger individual states. In doing so, the paradigm of preemption has changed to a three-way struggle between

³¹⁶ See discussion on “substantiality” *supra* Section IV.B.1.

³¹⁷ Concurrent resolutions reflect the sense of both chambers and do not require a presidential signature.

³¹⁸ *Contra* Sharpe, *supra* note 290, at 197–98 (warning of the courts’ wariness of legislative override in supporting the *Will* of the sitting Congress (Congress *B*) in lieu of the enacting Congress (Congress *A*)).

the *Will of Congress*, the action of the federal Executive, and the needs of the state.

This struggle can be resolved constitutionally, within the boundaries of field preemption through a re-expressive *Will* of the current Congress. In this way, Congress can act as an independent checks and balance, not on Executive action, but on Executive *inaction*. The requirement to act is based on the substantial nature of the Void, measured by congressional desire and ability to act. If the Void is substantial, Congress can act with a corresponding majority, in concurrent resolution, to re-express its *Will*. If the Void is non-impactive or insubstantial, Congress will not be able to muster sufficient majority to re-express a *Will*. But in an expression of non-exclusive federal space within a field, Congress can maintain the field preemption presumption, alerting courts, the federal Executive, and states of its desire for state action to supplement or supplant the federal Executive and maintain the full body of law for future federal Executives. The state can then act with the firm knowledge that it is acting within the Constitution and bounds set by Congress.

The balance of power in such a free society is met by the ebb and flow of policy and politics. The challenge is always to meet the current issues of the day, and yet fully preserve the checks and balances to meet the needs, rights, and responsibilities of future generations. This is critically true of the balance between a federal Executive, Congress, the Courts, the states, and a changing security environment. The re-expressive *Will of Congress* to counter the presumption and failure of federal action in a field-preempted area is but one way to maintain that balance for future generations.

