TEMPLE LAW REVIEW

VOL. 88 NO. 1 FALL 2015

ARTICLES

UNDER CONTAINMENT: PREEMPTING STATE EBOLA QUARANTINE REGULATIONS

Eang L. Ngov[*]

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

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

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

I thank the editors and journal members at *Temple Law Review* for their meticulous and thorough edits and other assistance in the publication of this Article.

This Article was presented at the American Constitution Society's First Annual Constitutional Law Scholars Forum hosted by the Barry Student Chapter on March 20, 2015, and at the Loyola University Chicago Sixth Annual Constitutional Law Colloquium on November 7, 2015.

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

TABLE OF CONTENTS

INTRODUCTION

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

1. Ebola first arrived in the United States in 1989, when laboratory monkeys tested positive for Ebola. Paul E. Kilgore, John D. Grabenstein, Abdulbaset M. Salim & Michael Ryabak, *Treatment of Ebola Virus Disease*, 35 PHARMACOTHERAPY: J. HUM. PHARMACOLOGY & DRUG THERAPY 43, 44 (2015); Alison Bruzek, *Ebola in the United States: What Happened When*, NPR (Oct. 15, 2014), http://www.npr.org/blogs/health/2014/10/15/356098903/ebola-in-the-united-states-what-happened-when. For a history of the Ebola virus and outbreaks, see Georgina Casey, *Ebola—The Facts*, KAI TIAKI NURSING NEW ZEALAND, Dec. 2014 –Jan. 2015, at 20, 20–21.

2. *Cases of Ebola Diagnosed in the United States*, CTRS. DISEASE CONTROL & PREVENTION, http://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/united-states-imported-case.html (last visited Nov. 1, 2015). Before Duncan, there were patients who contracted Ebola and were flown to the

hemorrhagic fever[3] with a high mortality rate, particularly in Third World countries.[4] While West Africa struggled to control the quickly rising death toll caused by the virus,[5] fears in America[6] mounted when two nurses who cared for Duncan[7] and aid workers returning from Africa were diagnosed with Ebola.[8]

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

United States to receive treatment. *See* Sydney Lupkin, *Ebola in America: Timeline of the Deadly Virus*, ABC NEWS (Nov. 27, 2014, 11:01 AM), http://abcnews.go.com/Health/ebola-america-timeline/story?id=26159719.

3. *See Ebola*, CTRS. DISEASE CONTROL & PREVENTION, http://www.cdc.gov/niosh/topics/ebola/ (last visited Nov. 1, 2015).

4. The CDC reports that "[t]he 2014 Ebola epidemic is the largest in history, affecting multiple countries in West Africa." *2014 Ebola Outbreak in West Africa*, CTRS. DISEASE CONTROL & PREVENTION, http://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/ (last visited Nov. 1, 2015). As of October 7, 2015, there were 28,465 total cases (suspected, probable, and confirmed) of Ebola, resulting in 11,312 deaths. *Id.*

5. *See* Lupkin, *supra* note 2.

6. Media Matters released a report tracking the number of Ebola-related stories, finding that "CNN ran 146 stories on Ebola the week of October 14, when panic was peaking." Jonathan Cohn, *Why Public Silence Greets Government Success*, AM. PROSPECT (May 8, 2015), http://prospect.org/article/why-public-silence-greets-government-success.

7. *See* JAMES JAY CARAFANO, CHARLOTTE FLORANCE & DANIEL J. KANIEWSKI, HERITAGE FOUND., THE EBOLA OUTBREAK OF 2013–2014: AN ASSESSMENT OF U.S. ACTIONS 4 (2015), http://thf_media.s3.amazonaws.com/2015/pdf/SR166.pdf ("Duncan's entrance into the United States and the infection of two of his nurses galvanized public fears of Ebola.").

8. *See* Lupkin, *supra* note 2.

9. For a history of quarantine, see Mark A. Rothstein, *From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine*, 12 IND. HEALTH L. REV. 227, 229–34 (2015) [hereinafter Rothstein, *From SARS to Ebola*].

10. *Quarantine and Isolation*, CTRS. DISEASE CONTROL & PREVENTION, http://www.cdc.gov/quarantine/ (last visited Nov. 1, 2015).

11. *See id.*

12. *Id.*

13. Bruzek, *supra* note 1.

14. Thomas W. Geisbert & Peter B. Jahrling, *Towards a Vaccine Against Ebola Virus*, 2 EXPERT REV. VACCINES 777, 777 (2003).

> About 95 per cent of cases fall within this incubation period but 98 per cent of cases fall with[in] an incubation period of one to 42 days, hence the World Health Organisation's requirement of 42 days Ebola-free to declare an outbreak contained. Mean incubation times in the west Africa outbreak appear to be nine to 11 days.

Casey, *supra* note 1, at 23 (footnote omitted).

suit.[16] Louisiana banned attendance to the annual American Society of Tropical Medicine and Hygiene meeting for all researchers who visited West Africa within a three-week span from the meeting,[17] threatening a twenty-one-day mandatory hotel room quarantine for any noncomplying attendees.[18] In total, twenty-one states imposed mandatory quarantines.[19]

The CDC[20] formulated guidelines for monitoring symptoms[21] and controlling movement based on the level of risk posed by persons exposed to Ebola.[22] These guidelines were less stringent than state guidelines and did not recommend mandatory quarantine for noncontagious, asymptomatic individuals.[23] The controversy surrounding mandatory Ebola quarantines lies in the fact that asymptomatic persons are not contagious[24] because Ebola is not airborne but is contracted through contact with bodily fluids,[25] infected animals,

15. Matt Flegenheimer, Michael D. Shear & Michael Barbaro, *Under Pressure, Cuomo Says Ebola Quarantines Can Be Spent at Home*, N.Y. TIMES (Oct. 26, 2014), http://www.nytimes.com/2014/10/27/nyregion/ebola-quarantine.html?_r=0.

16. Bruzek, *supra* note 1. Connecticut also joined those states and imposed a quarantine on travelers returning from West Africa. Evan Lips, *Yale Grad Student Says Ebola Quarantine Driven by Politics*, NEW HAVEN REGISTER (Oct. 28, 2014, 7:59 PM), http://www.nhregister.com/general-news/20141028/yale-grad-student-says-ebola-quarantine-driven-by-politics.

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

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

Jess Bidgood & Kate Zernike, *From Governors, a Mix of Hard-Line Acts and Conciliation over Ebola*, N.Y. TIMES (Oct. 30, 2014), http://www.nytimes.com/2014/10/31/us/kaci-hickox-nurse-under-ebola-quarantine-takes-bike-ride-defying-maine-officials.html?_r=0.

18. Bruzek, *supra* note 1.

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

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

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

22. *Factsheet on Updated CDC Guidance: Monitoring Symptoms and Controlling Movement to Stop the Spread of Ebola*, CTRS. DISEASE CONTROL & PREVENTION, http://www.cdc.gov/vhf/ebola/pdf/monitoring-symptoms-controlling-movement.pdf (last visited Nov. 1, 2015); *see also* Betsy McKay, Collen McCain Nelson & Stephanie Armour, *CDC Rejects Mandatory Ebola Quarantines,* WALL ST. J. (Oct. 27, 2014, 7:43 PM), http://www.wsj.com/articles/federal-ebola-quarantine-guidelines-released-by-cdc-1414443143.

23. McKay et al., *supra* note 22.

24. Memorandum from the Majority Staff, Comm. on Energy and Commerce, to the Subcomm. on Oversight and Investigations (Oct. 14, 2014), http://docs.house.gov/meetings/IF/IF02/20141016/102718/HHRG-113-IF02-20141016-SD002.pdf.

25. Professor Mark Rothstein explains that the risk of infection does not result merely from contact with any bodily fluid, but

or contaminated objects.[26]

The federal authority to impose quarantines is specified in 42 U.S.C. § 264, the section of the Public Health Service Act that governs quarantines and communicable diseases.[27] The Act gives

> the Secretary of the Department of Health and Human Services (HHS) responsibility for preventing the introduction, transmission, and spread of communicable diseases from foreign countries into the United States and within the United States and its territories/possessions. . . . Under its delegated authority, CDC, through the Division of Global Migration and Quarantine, is empowered to detain, medically examine, or conditionally release persons suspected of carrying a communicable disease.[28]

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

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

Rothstein, *From SARS to Ebola*, *supra* note 9, at 259.

26. *Transmission*, CTRS. DISEASE CONTROL & PREVENTION, http://www.cdc.gov/vhf/ebola/transmission/index.html (last visited Nov. 1, 2015); Radio Interview by KOGO News Radio with Kristi Koenig, Professor of Emergency Med., U.C. Irvine Sch. of Med. (Oct. 30, 2014), http://www.kogo.com/onair/afternoon-news-55377/kristi-koenig-on-ebola-12920492/.

27. 42 U.S.C. § 264 (2012).

28. *Questions and Answers on Legal Authorities for Isolation and Quarantine,* CTRS. DISEASE CONTROL & PREVENTION, http://www.cdc.gov/sars/quarantine/qa-isolation.html (last visited Nov. 1, 2015).

29. Exec. Order No. 12,452, 48 Fed. Reg. 56,927 (Dec. 22, 1983).

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

31. U.S. CONST. art. I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

32. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *see also* Raich v. Gonzales, 500 F.3d 850, 867 (9th Cir. 2007) ("Police power is unquestionably an area of traditional state control.").

states with the federal government.[33]

Following Governor Cuomo's announcement, the White House conceded that it had "limit[ed] . . . power" to enforce the CDC guidelines against the states,[34] and tension with the White House ensued as presidential aids sought to persuade states to reconsider their mandatory bans.[35] Governor Chris Christie later modified New Jersey's mandatory quarantine requirement to allow Kaci Hickox, a nurse who had contact with Ebola-infected persons through her voluntary aid work in Africa,[36] to spend the remainder of the quarantine period in her home.[37] Contrary to numerous news media reports,[38] Governor Christie denied insinuations that his actions were the result of pressure from the White House.[39]

These events bring to the forefront an important question: Who should regulate quarantines? Further, what if Governor Christie had not relented? Recent scholarship on Ebola has focused on the civil rights of those affected by quarantine,[40] particularly liberty and due process interests, all of which are important inquiries. But the issue of proper allocation of power between the states and the federal government to regulate Ebola quarantine has received little attention.

This Article explores whether federal standards could preempt state Ebola regulations. There are political concerns that the federal government might consider in deciding whether it wants federal law to preempt state law.[41] This Article does not suggest that such political constraints should be disregarded or that preemption can be achieved easily, but rather, the purpose of the Article is to provide legal arguments for preemption, if the federal government chooses to

33. James J. Misrahi, Joseph A. Foster, Frederic E. Shaw & Martin S. Cetron, *HHS/CDC Legal Response to SARS Outbreak*, 10 EMERGING INFECTIOUS DISEASES 353, 353 (2004).

34. McKay et al., *supra* note 22. Ironically, the media reported that Governor Cuomo "cast decisions on screening procedures as 'a federal issue.'" Flegenheimer et al., *supra* note 15.

35. Flegenheimer et al., *supra* note 15.

36. *See* Rosa Prince, *U.S. Nurse Who Threatened to Sue over Ebola Quarantine to Be Freed*, TELEGRAPH (Oct. 27, 2014, 2:46 PM), http://www.telegraph.co.uk/news/worldnews/ebola/11190337/US-nurse-who-threatened-to-sue-over-Ebola-quarantine-to-be-freed.html.

37. Lawrence O. Gostin & Eric A. Friedman, *State Quarantine Powers Under the Constitution: Fear in the Age of Ebola*, AM. CONST. SOC'Y BLOG (Nov. 4, 2014), http://www.acslaw.org/acsblog/state-quarantine-powers-under-the-constitution-fear-in-an-age-of-ebola. Kaci Hickox spent the first three days of her quarantine "in a tent on hospital grounds." *Id.*

38. *E.g.*, Prince, *supra* note 36 (reporting that "amid suggestions that the White House also opposed the quarantining of health workers who did not have symptoms, for fear it would put others off volunteering, Mr[.] Christie changed tack").

39. Flegenheimer et al., *supra* note 15.

40. For an excellent discussion of the liberty interest and ethical concerns raised by Ebola quarantine, see Rothstein, *From SARS to Ebola*, *supra* note 9.

41. Preemption is also applicable to local government regulations. *See, e.g.*, Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 613 (1991) (deciding whether the Federal Insecticide, Fungicide, and Rodenticide Act preempted a town's regulation of pesticide use). The term "state law" is used throughout this Article to encompass the constitutions, regulations, rules, and ordinances of states, municipalities, etc.

pursue that strategy. Additionally, a discussion of what quarantine measures are appropriate and how they can be implemented is beyond the scope of this Article. This Article does not presuppose that implementation of quarantines is efficacious or advisable[42] but aims to resolve the legal quandary over Ebola quarantines—how may the federal government regulate Ebola within state borders? While this Article focuses on Ebola quarantine regulations, the thrust of it is also applicable to state quarantine regulations over other illnesses, such as Severe Acute Respiratory Syndrome (SARS)[43] and the like.

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

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

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

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

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

Donna Barbisch, Kristi L. Koenig & Fuh-Yuan Shih, *Is There a Case for Quarantine? Perspectives from SARS to Ebola*, DISASTER MED. & PUB. HEALTH PREPAREDNESS, Mar. 2015, at 1, 1. For a public response to mandatory quarantines, see Robert J. Blendon, Catherine M. DesRoches, Martin S. Cetron, John M. Benson, Theodore Meinhardt & William Pollard, *Attitudes Toward the Use of Quarantine in a Public Health Emergency in Four Countries*, HEALTH AFFAIRS, Mar. 2006, at W15, W16 (surveying residents of Hong Kong, Taiwan, Singapore, and the United States on their concerns regarding compulsory quarantine).

43. In 2003, President George W. Bush signed an executive order that allowed quarantining persons with SARS and other contagious diseases, but not the flu. Exec. Order No. 13,295, 68 Fed. Reg. 17,255 (Apr. 4, 2003), http://www.cdc.gov/sars/quarantine/exec-2004-04-03.html.

44. 42 U.S.C. § 264(e) (2012).

45. *See infra* Part III.A for a discussion of anti-preemption clauses.

regulate health, safety, and welfare.[46] The Court generally operates with a presumption against preemption when federal law touches on traditional state powers.[47] However, even in traditional areas of state power, the Court has found preemption of state laws. Thus, neither the presumption against preemption, invoked when the federal law implicates state police powers, nor the anti-preemption clause would necessarily safeguard state Ebola quarantine regulations from preemption.

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

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

46. *See* Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health, 186 U.S. 380, 387 (1902) ("That from an early day the power of the States to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress, is beyond question.").

47. *See infra* Section II.

48. *See infra* Part I.C for a discussion of the different types of preemption.

49. Of course, the viability of these arguments depends on whether there is sufficient leadership from the Executive for a court to discern the federal objective. Public health experts have noted the failure of the CDC and the President to provide clear guidance regarding Ebola. At first, the CDC did not recommend quarantining persons who had contact with patients before the patients became infectious. Rothstein, *From SARS to Ebola*, *supra* note 9, at 256. Later, the CDC revised its policy to recommend all health workers who traveled to West Africa—even those who were asymptomatic—to undergo "direct active monitoring." *Id.* at 257. Professor Rothstein observes, "The CDC's revision of its guidance, however, by following more aggressive state policies, may have increased doubts about the adequacy of CDC's initial recommendations, thereby seeming to confirm the wisdom of the expanded quarantine measures imposed by some state governments." *Id.* at 260–61.

50. *See infra* Part I.C for a discussion of field and obstacle preemption.

federal preemption of state Ebola quarantine laws would protect the United States as well as countries abroad.

I. FRAMING THE QUARANTINE ISSUE

A. The Intersection of Federalism, Supremacy, and Preemption

"Today's legal debates about federalism, as it applies to issues of health and safety . . . are often debates about statutory preemption."[51] Federalism involves determining the proper allocation of power between the federal and state governments[52] and encompasses the recognition that "both the National and State Governments have elements of sovereignty the other is bound to respect."[53] Federalism includes the balance of Congress's exercise of its powers, as granted in Article I of the Constitution, with the reservation of power to the states, as articulated in the Tenth Amendment.[54]

At times, maintaining that balance necessitates the utilization of preemption, one mechanism of distributing power between the federal and state governments.[55] Preemption commands that state law yield in the face of conflicting federal law[56] and owes its origins to the Supremacy Clause,[57] the source of congressional power to preempt[58] state law.[59] Preemption functions by

51. Robert R. M. Verchick & Nina A. Mendelson, *Preemption and Theories of Federalism* 1 (Univ. of Michigan Law Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 98, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1030597.

52. *Id.* at 2.

53. Arizona v. United States, 132 S. Ct. 2492, 2500 (2012).

54. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

55. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 405 (4th ed. 2011) ("Ultimately, preemption doctrines are about allocating governing authority between the federal and state governments.").

56. The Court has used the terms "conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference" to describe some of its considerations in determining the validity of state laws in light of federal law. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

57. U.S. CONST. art. VI, cl. 2 (declaring that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

58. Scholars use different terminology to describe overruling existing state law. Professor Stephen Gardbaum uses "preemption" while Professor Thomas Merrill uses "displacement"; this Article uses the terms interchangeably. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770 (1994); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 730–31 (2008).

59. *Arizona*, 132 S. Ct. at 2500. The Court itself has recognized that preemption derives from the Supremacy Clause. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" (quoting Felder v. Casey, 487 U.S. 131, 138 (1988))); Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152 (1982) ("The pre-emption doctrine . . . has its roots in the Supremacy Clause . . . .").

overriding existing valid state law. As will be discussed later in greater detail, some instances of preemption void the particular state law at issue, leaving other nonconflicting state law in tact; in other instances, preemption results in banning states from regulating in an entire area of law.

B. Values of Federalism

Whether preemption should be applied rests on a value judgment about the benefits of federalism: (1) protection against federal tyranny, (2) states' ability to tailor policies reflecting local concerns, and (3) states as laboratories.[60] The following provides a brief discussion of these benefits, but an exhaustive exploration is beyond the scope of this Article.

The first justification for protecting state sovereignty is that it is a bulwark against federal tyranny. This justification depends on the vertical separation of powers between the levels of government as a means to "avoid the undue concentration of power in the federal government and preserve essential individual liberties."[61] But "there has been a major shift over time as to how abusive government is best controlled. . . . Judicial review is seen as an important check against tyrannical government actions."[62]

Yet, some scholars observe that the Court's recent use of preemption has hampered civil rights and protection of individuals.[63] Dean Erwin Chemerinsky criticizes the Court's preemption jurisprudence as "wrong in invalidating desirable state and local laws creating liability for injured consumers, protecting

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

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

60. CHEMERINSKY, *supra* note 55, at 320–22; Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 13, 16–17 (William L. Buzbee ed., 2009).

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

62. CHEMERINSKY, *supra* note 55, at 321.

63. *See, e.g.*, Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1315–16 (2004).

children from tobacco advertisements, and requiring insurance companies to disclose their Holocaust-era policies."[64]

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

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

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

64. *Id.*

65. *See, e.g.*, Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1736 (2010) (suggesting that many challengers of immigration laws now use preemption arguments as an alternative to equal protection claims).

66. *Id.*

67. *Id.*

68. *Id.* at 1745.

69. *See* Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 99 (1985) ("prefer[ring] an equal protection approach . . . because it answers, in a way that preemption reasoning does not, the moral and philosophical claims that resident aliens make against their state governments").

70. CHEMERINSKY, *supra* note 55, at 321; Verchick & Mendelson, *supra* note 60, at 16–17.

71. Chemerinsky, *supra* note 63, at 1324 (alteration in original) (quoting DAVID SHAPIRO, FEDERALISM: A DIALOGUE 91–92 (1995)).

72. *Id.* at 1333.

73. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

mandate?"[74] Relatedly, state-centered approaches might lead to negative externalities that harm people out of state.[75]

Ultimately, federalism should be justified on the basis of the people. "States' rights are not an end in themselves. They are a means to the crucial objectives of advancing freedom and enriching the lives of those in the United States."[76] Thus, it should not be presumed that state sovereignty best effectuates the values underlying federalism. Preemption might be the more effective vehicle in the case of Ebola. Generally, those who support state sovereignty and individual rights would argue against preempting state law. In the case of Ebola, however, preempting state quarantine laws would advance individual rights, such as those of Kaci Hickox and others subjected to mandatory quarantine.

C. Types of Preemption

In addition to consideration of the value of federalism, the other consideration in applying preemption[77] rests on a determination of congressional intent to exclude state regulation, for, as the Court has stated, congressional intent is the "ultimate touchstone."[78] The most explicit manifestation of congressional intent is express preemption, by which Congress, through the text of legislation, withdraws specified powers from the states.[79] When a statute lacks an express preemption clause, congressional intent to prohibit state intrusion can also be inferred through two forms of implied preemption: field or conflict preemption.[80]

Field preemption results when states legislate in a field over which Congress has exclusive governance.[81] Field preemption exists when federal legislation in a particular area is so extensive and "pervasive" as to signal the federal government's implied intent to occupy the field and exclude states from legislating in that field.[82] The Court has described field preemption as involving

74. CHEMERINSKY, *supra* note 55, at 322.

75. Verchick & Mendelson, *supra* note 60, at 18.

76. Chemerinsky, *supra* note 63, at 1316.

77. For a history of the development of preemption doctrines, see Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 972–1005 (2002); Patricia L. Donze, *Legislating Comity: Can Congress Enforce Federalism Constraints Through Restrictions on Preemption Doctrine?*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 239, 246–49 (2000–2001); Gardbaum, *supra* note 58, at 785–807.

78. Arizona v. United States, 132 S. Ct. 2492, 2531 (2012) (Alito, J., concurring in part and dissenting in part) (citing Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

79. *Id.* at 2500–01 (majority opinion); *see also* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (describing the types of preemption).

80. *See Arizona*, 132 S. Ct. at 2501. Professor Gardbaum argues that the term "conflict preemption" is contradictory because when a valid state law yields to federal law, it is not due to preemption but to supremacy. Gardbaum, *supra* note 58, at 809.

81. *Arizona*, 132 S. Ct. at 2501.

82. *Id.* ("The intent to displace state law altogether can be inferred from a framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement

federal legislation that is intended to be a "single integrated and all-embracing system,"[83] "complete scheme,"[84] "harmonious whole,"[85] or "comprehensive and unified system."[86] A dominant federal interest in a field might also lead to an assumption that Congress intended to exclude state legislation in the area.[87]

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

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

83. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 74 (1941)).

84. *Id.* (quoting *Hines*, 312 U.S. at 66–67).

85. *Id.* at 2502 (quoting *Hines*, 312 U.S. at 72).

86. *Id.*

87. *See Rice*, 331 U.S. at 230; *Hines*, 312 U.S. at 70.

88. *Arizona*, 132 S. Ct. at 2501 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).

89. *Hines*, 312 U.S. at 67; *see also Arizona*, 132 S. Ct. at 2501. Obstacle preemption is controversial. First, the problem in attacking a state law under obstacle preemption lies in the difficulty of ascertaining the "full purposes and objectives" of federal law. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228 (2000). Because each member of Congress has her own reason(s) for passing legislation and the process of lawmaking entails compromises, it is difficult to attribute a collective purpose to a federal statute. *Id.* at 280.

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

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

90. *See, e.g.*, *Arizona*, 132 S. Ct. at 2501 (referring to conflict preemption as including "cases 'where compliance with both federal and state regulations is a physical impossibility,' and . . . instances

but state laws that impede a federal objective can be preempted even if state and federal laws are not mutually exclusive.[91]

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

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

91. CHEMERINSKY, *supra* note 55, at 404.

92. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 104 n.2 (1992) (noting that preemption categories are not "rigidly distinct" (citing English v. Gen. Elec. Co., 496 U.S. 72, 79 n.5 (1990))).

The boundaries between the types of preemption may become blurrier as Congress begins to meld implied preemption with express preemption provisions. In one particular statute, Congress has written obstacle preemption into its legislation: "[A] requirement of a State, political subdivision of a State, or Indian tribe is preempted if . . . the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter . . . ." 49 U.S.C. § 5125(a)(2) (2012); *see also* Nelson, *supra* note 89, at 279 (quoting legislation); Note, *supra* note 89, at 1076 (referring to statute).

93. Scholars alike have described the Court's preemption jurisprudence as a "muddle," "chaos," an "awful mess," and "wildly confused." Nelson, *supra* note 89, at 232–33 (collecting scholarly criticisms of the Court's treatment of the preemption doctrines); *see* Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 178 ("The Supreme Court's preemption jurisprudence is famous for its incoherence."). Professor Hoke has remarked,

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

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

94. *Gen. Elec. Co.*, 496 U.S. at 79 n.5 (1990). Professor Nelson suggests that field and conflict preemption should not be confined to the subset of implied preemption, but that both types of preemption may arise in the context of an express statement or by implication. Nelson, *supra* note 89, at 263.

95. 505 U.S. 88, 104 n.2 (1992).

96. *Gade*, 505 U.S. at 109 (Kennedy, J., concurring in part and concurring in the judgment).

foreign relations power.[97] Ultimately, the Court has noted the lack of "an infallible constitutional test or an exclusive constitutional yardstick" and resolved that "[i]n the final analysis, there can be no one crystal clear distinctly marked formula."[98]

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

II. PRESUMPTION AGAINST PREEMPTION

One shield that states could deploy to protect their quarantine regulations is the presumption against preemption. The Court has devised a presumption against preemption,[99] based on the fact that

> because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," we "start with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[100]

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

97. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 398 (2003) (discussing the appropriate label for the type of preemption in *Zschernig v. Miller*, 389 U.S. 429 (1968)).

98. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

99. Some scholars question the presumption against preemption. Professor Nelson, for example, offers a theory that the Supremacy Clause is a non obstante provision, and as such, it undermines the presumption against preemption. Nelson, *supra* note 89, at 232. He explains that non obstante clauses have been used to obviate the need to harmonize a new law with prior ones by allowing the new law to displace any prior contradictory law. *Id.* Thus, the natural operation of the Supremacy Clause's non obstante provision rebuts the need for a residual presumption against the invalidation of state laws. *Id.* at 293. For different reasons, Professor Jack Goldsmith advocates for abandoning the presumption against preemption, as well as the presumption in favor of foreign affairs. Goldsmith, *supra* note 93, at 177. Professor Viet D. Dinh argues that when Congress legislates within its enumerated power, no presumption for or against preemption should be applied. Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2092 (2000).

100. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (alteration in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); then quoting Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 715–16 (1985)).

101. Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

102. *Rice*, 331 U.S. at 230.

103. Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991). For an explanation about the differences between the presumption against preemption and the clear statement rule, see Young, *The Ordinary Diet of the Law*, *supra* note 93, at 271–72.

States could argue that Ebola quarantine regulations are strictly within their purview because health and safety are established areas of traditional state power,[104] and consequently, the presumption against preemption should apply. *Morgan's Steamship Co. v. Louisiana Board of Health* is one of the earliest Supreme Court cases to review quarantine regulations.[105] The case's central issue involved the constitutionality of the fee New Orleans imposed for each vessel passing a quarantine station.[106] The Court upheld the fee against allegations that the fee was in fact a tonnage tax, a tax prohibited by the Constitution.[107] In so doing, it recognized quarantine as a police power.[108] In another case, *Compagnie Francaise de Navigation a Vapeur v. Louisiana Board of Health*, the Court upheld, on the basis of state police powers, a quarantine resolution that prohibited vessels from landing in parishes under quarantine.[109] In *Jacobson v. Massachusetts*, by upholding state compulsory smallpox vaccination laws, the Court also affirmed state police powers to regulate health and safety: "According to settled principles the police power of a State must be held to embrace, at least such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[110] Thus, that quarantine regulation falls within state police powers is not controversial.

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

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

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

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

105. 118 U.S. 455 (1886).

106. *Morgan's S.S.*, 118 U.S. at 455.

107. *Id.* at 461–63.

108. *Id.* at 464.

109. 186 U.S. 380, 387 (1902).

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

111. *Morgan's S.S.*, 118 U.S. at 464.

112. *Compagnie Francaise*, 186 U.S. at 389.

113. *Jacobson*, 197 U.S. at 25.

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

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

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

114. For example, Dean Erwin Chemerinsky argues that *Geier v. American Honda Motor Co*., 529 U.S. 861 (2000); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); and *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003) indicate that the Supreme Court maintains a presumption in favor of preemption. Chemerinsky, *supra* note 63, at 1318–24.

115. Raeker-Jordan, *supra* note 89, at 1468.

116. Davis, *supra* note 77, at 1013.

117. In *Cipollone v. Liggett Group, Inc.*, Justice Scalia, joined by Justice Thomas, rejected the majority's conclusion "that express pre-emption provisions must be construed narrowly, 'in light of the presumption against the pre-emption of state police power regulations,'" and suggested that the Court apply ordinary rules of statutory construction to the express provision. 505 U.S. 504, 544 (1992) (Scalia, J., concurring in the judgment in part, dissenting in part). Chief Justice Roberts and Justice Alito have also taken this view. Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 TUL. L. REV. 1257, 1266 (2010).

118. 532 U.S. 141, 143 (2001).

119. *Egelhoff*, 532 U.S. at 151.

120. *Id.* at 151–52.

121. 520 U.S. 833, 840–41 (1997).

122. 453 U.S. 210 (1981) (preempting the state court's division of military nondisability retired pay as community property in a divorce proceeding).

Ridgway,[123] or *Hisquierdo v. Hisquierdo*.[124]

Property law is another traditional area of state power that is not immune to preemption. In *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, property owners challenged the due-on-sale provision in a trust deed held by a federally chartered savings and loan association.[125] The Court conceded that "real property law is a matter of special concern to the States," but asserted that "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail."[126] Accordingly, the Court found the state's due-on-sale law preempted on the basis of obstacle preemption.[127]

Even in the state's traditional field of health and safety, the Court has found preemption, despite any presumption against preemption. In *Gade*, the Court recognized a state's "compelling interest" to protect health and safety and to regulate licensing and professions.[128] But it reiterated "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield [to federal law]," and invalidated the state's regulation of the training, testing, and licensing of hazardous waste workers.[129]

The Court has insisted on a showing of "clear and substantial" federal interests before preempting laws within traditional state powers, but the Court, "even in th[ose] area[s], has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights."[130] Thus, to preserve their Ebola quarantine regulations, states should not rest solely on the presumption against preemption but must be prepared to defend against the various forms of preemption.

III. EXPRESS PREEMPTION

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

123. 454 U.S. 46 (1981) (holding that the Federal Servicemen's Group Life Insurance Act precluded application of constructive trust against the insurance proceeds).

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

125. 458 U.S. 141, 148–49 (1982) (citing Wellenkamp v. Bank of Am., 582 P.2d 970 (Cal. 1978)).

126. *Fid. Fed. Sav. & Loan Ass'n*, 458 U.S. at 153 (quoting Free v. Bland, 369 U.S. 663, 666 (1962)).

127. *Id.* at 156.

128. 505 U.S. 88, 108 (1992).

129. *Gade*, 505 U.S. at 108–09 (quoting Felder v. Casey, 487 U.S. 131, 138 (1988)).

130. Ridgway v. Ridgway, 454 U.S. 46, 54 (1981) (quoting Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979)).

determining the scope of the preemption.[131]

In the present situation, the relevant federal statute, the Public Health Service Act, does not contain an express preemption clause,[132] and, therefore, states need not fear this form of preemption. Better yet, states could make use of the Public Health Service Act's *anti*-preemption clause.[133] Anti-preemption clauses are an express declination to override state law. Relatedly, saving clauses, provisions within a statute that contain express intent to leave some aspect of state law intact, function like anti-preemption clauses. Because the Court has sometimes used these terms interchangeably,[134] both types of clauses will be analyzed.

A. Anti-Preemption Clauses

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

> Nothing in this section or section 266 of this title, or the regulations promulgated under such sections, may be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States), except to the extent that such a provision *conflicts* with an exercise of Federal authority under this section or section 266 of this title.[135]

California Coastal Commission v. Granite Rock Co. is one example of an

131. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001) ("In these cases, our task is to identify the domain expressly pre-empted . . . .").

For examples of instances in which the Supreme Court found express preemption of state laws, see *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), in which the Court found state tort claims preempted through the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act; *Engine Manufacturers v. South Coast Air Quality Management*, 541 U.S. 246 (2004), in which the Court concluded that the Federal Clean Air Act preempted state motor vehicle pollution standards; *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001), in which the Court held that the Federal Cigarette Labeling and Advertising Act expressly preempted a state law regulating point-of-sale and outdoor advertising of cigarettes; *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000), in which the Court determined that the Federal Railroad Safety Act preempted a wrongful death claim alleging that a railroad failed to maintain adequate warning devices at its crossings; and *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), in which the Court concluded that the Employee Retirement Income Security Act preempted state law tort and contract claims for breach of contract, retaliatory discharge, and wrongful termination of disability benefits.

For an example of a circumstance in which the Court upheld a state law against an express preemption challenge, see *California Division of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316 (1997), in which the Court found that the Employee Retirement Income Security Act did not preempt California's wage law.

132. 42 U.S.C. § 264 (2012).

133. *Id.* § 264(e).

134. *See infra* note 141 for a discussion of the interchangeable use of the terms "anti-preemption clause" and "saving clause."

135. 42 U.S.C. § 264(e) (emphasis added).

effective congressional disclaimer against preempting state law.[136] Granite Rock, a company that held unpatented mining claims on federally owned land in California, challenged California's permit requirement for mining within the state.[137] Granite Rock relied upon the following provision of the Federal Coastal Zone Management Act of 1972 (CZMA):

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

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

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

136. 480 U.S. 572, 592 (1987). Another example of a state's successful assertion of an anti-preemption provision can be found in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 746 (1985).

137. *Granite Rock*, 480 U.S. at 576–77.

138. 16 U.S.C. § 1456(e)(1) (2012).

139. *Granite Rock*, 480 U.S. at 592 (quoting S. REP. 92-753, at 1 (1972)).

140. *Id*. at 593.

141. 15 U.S.C. § 1012(b) (2012). Courts have used the term "anti-preemption" clause interchangeably with the term "saving clause" to identify this provision of the McCarran-Ferguson Act. *See* Barnett Bank of Marion Cnty. v. Nelson, 517 U.S. 25, 27–28 (1996) (referring to the provision as an anti-preemption rule); *Metro. Life Ins. Co*., 471 U.S. at 746 (referring to the provision as a saving clause).

142. *Barnett Bank*, 517 U.S. at 38.

business of insurance.'"[143] In *Barnett Bank of Marion County, N.A. v. Nelson*, the issue arose out of the tension between a federal law authorizing national banks to sell insurance and a state law prohibiting such banks to sell insurance.[144] The anti-preemption clause was not applied to protect state law in *Barnett Bank* because the federal authorization to sell insurance specifically related to the business of insurance.[145]

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

B. Saving Clauses

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

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

143. *Id.* 27–28 (quoting 15 U.S.C. § 1012(b)).

144. *Id.* at 28–29.

145. *Id.* at 38.

146. The Court has used the terms "savings clause" and "saving clause" to describe such provisions. *See, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 100 (1992) (O'Connor, J., plurality) (referring to a "saving clause"); Int'l Paper Co. v. Ouellette, 479 U.S. 481, 493 (1987) (referring to a "savings clause"). For an additional discussion of saving(s) clauses, see *Wyeth v. Levine*, 555 U.S. 555, 567 (2009).

147. 514 U.S. 280, 284 (1995).

148. *Freightliner*, 514 U.S. at 284 (quoting 15 U.S.C. § 1397(k) (1988) (repealed 1994)).

149. *Id.* at 286.

150. 479 U.S. 481, 493 (1987).

151. *Ouellette*, 479 U.S. at 484.

provisions that acted as a saving clause. The first provision provided that, "[e]xcept as expressly provided[,] . . . nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."[152] The second provision stated, "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . ."[153] The Clean Water Act, notwithstanding the saving clause, overrode Vermont's law because allowing states affected by discharge to regulate individually would impede federal objectives.[154] Casting aside the saving clause, the Court stated, "[W]e do not believe Congress intended to undermine this carefully drawn statute through a general saving clause . . . ."[155]

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

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

Additionally, section 18(a) of the OSH Act provided that no "State agency or court [shall be prevented] from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title."[158] Despite the saving clause, the Court held that the OSH Act preempted state laws establishing training for hazardous waste workers. The Court explained, "Although this is a saving clause, not a pre-emption clause, the natural implication of this provision is that state laws regulating the same issue as federal laws are not saved, even if they merely supplement the federal standard."[159]

Other examples of when the Court concluded that saving clauses were inadequate to salvage state law can be found in rulings discussing ERISA and the Death on the High Seas Act.[160] In *Pilot Life Insurance Co. v. Dedeaux*, the Court held that an employee's common law breach of contract and tort suit

152. 33 U.S.C. § 1370 (2012).

153. *Id.* § 1365(e).

154. *Ouellette*, 479 U.S. at 493–94.

155. *Id.* at 494.

156. 505 U.S. 88, 100 (1992).

157. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 4(b)(4), 84 Stat. 1590 (codified as amended at 29 U.S.C. § 653(b)(4) (2012)).

158. 29 U.S.C. § 667(a).

159. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 100 (1992).

160. *See, e.g.*, Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) (holding that a state suit alleging improper processing of claims for benefits was preempted by ERISA).

against the insurance company that issued his insurance policy[161] was not covered within the saving clause and thus was preempted by ERISA.[162] In *Offshore Logistics, Inc. v. Tallentire*, the Court interpreted a saving clause narrowly as a jurisdictional saving clause, which did not preclude imposition of federal substantive law to preempt conflicting state wrongful death statutes.[163]

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

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

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

161. *Id.* at 43.

162. *Id.* at 57.

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

164. *See, e.g.*, United States v. Locke, 529 U.S. 89, 105–07 (2000).

165. *Id.* at 105.

166. *Id.* at 106.

167. 529 U.S. 861, 868 (2000).

168. *Gier*, 529 U.S. at 867 (quoting 15 U.S.C. § 1392(d) (1988) (repealed 1994)).

169. *Id.* at 868 (quoting 15 U.S.C. § 1397(k) (1988) (repealed 1994)).

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

IV. CONFLICT PREEMPTION

A. *Physical Impossibility*

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

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

B. *Obstacle Preemption: Impeding a Federal Objective*

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

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

172. 373 U.S. 132 (1963).

173. *Florida Lime*, 373 U.S. at 132.

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

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

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

For examples of decisions upholding state laws against an obstacle preemption challenge, see *Wyeth v. Levine*, 555 U.S. 555, 581 (2009), in which the Court concluded that no obstacle preemption

state of Washington responded to the *Exxon Valdez* oil spill in 1989 by regulating oil tankers "regarding general navigation and watch procedures, English language skills, training, and casualty reporting."[177] Because of the similarity of its laws to federal law, the state of Washington argued that federal law did not preempt its regulation.[178] The Court disagreed:

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

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

existed because the Food, Drug, and Cosmetic Act did not provide a federal remedy for unsafe drugs, but rather relied on available state law remedies; *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 82 (1987), in which the Court found that the state law was consistent with the purpose of the Federal Williams Act, which regulated tender offers; *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 721 (1985), in which the Court determined that local requirements established for blood plasma collection by paid donors posed no interference with federal maintenance of a sufficient blood supply; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984), in which the Court perceived no conflict with the Price-Anderson Act or frustration of federal objectives by allowing a state award of punitive damages; and *Belknap, Inc. v. Hale*, 463 U.S. 491, 512 (1983), in which the Court ruled that a strike replacement's breach of contract claim against his employer did not frustrate the objectives of federal labor laws.

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

177. 529 U.S. 89, 116 (2000).

178. *Locke*, 529 U.S. at 115.

179. *Id.*

180. 312 U.S. 52, 59–60 (1941).

complemented federal law.[181]

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

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

In *Crosby*, by restraining the President's flexibility and discretion, the state law interfered with the President's authority over economic sanctions against Burma.[186] The Court reasoned,

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

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

181. *Hines*, 312 U.S. at 73 ("And whether or not registration of aliens is of such a nature that the Constitution permits only of one uniform national system, it cannot be denied that the Congress might validly conclude that such uniformity is desirable.").

182. 530 U.S. 363, 366 (2000).

183. *Crosby*, 530 U.S. at 369.

184. *Id.* at 379.

185. *Id.* at 379–80 (internal citation omitted).

186. *Id.* at 373–74.

187. *Id.* at 376.

188. *Id.* at 381.

189. *Id.* at 382–83.

the state law impeded congressional diplomatic objectives.[190]

1. Uniformity

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

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

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

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

191. *The U.S. Response to the Ebola Outbreak: Hearing Before the S. Comm. on Appropriations*, 113th Cong. (Nov. 12, 2014) (statement of Heather Higginbottom, Deputy Secretary of State for Management and Resources), http://www.state.gov/s/dmr/remarks/2014/233996.htm [hereinafter Statement of Heather Higginbottom]. The strategy has also been phrased as designed "[t]o control the outbreak; [t]o address the ripple effects on local economies and communities to prevent massive humanitarian disasters; [t]o coordinate a broader global response; and [t]o urgently build up public health systems in countries with few resources." *U.S. Deploying 3000 Troops to West Africa in Intensified Response? To Fight Ebola*, RTTNEWS (Sept. 17, 2014, 3:29 AM), http://www.rttnews.com/2384986/us-deploying-3000-troops-to-west-africa-in-intensified-response-to-fight-ebola.aspx.

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

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

194. Untereiner, *supra* note 117, at 1261–62.

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

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

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

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

195. *Id.*

196. Egelhoff v. Egelhoff*,* 532 U.S. 141, 148 (2001).

197. Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 11 (1987).

198. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 100 (1992).

199. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 496 (1987) (quoting Illinois v. City of Milwaukee, 731 F.2d 403, 414 (7th Cir. 1984)). With regards to legislation that takes into account federalism concerns, Professor Patricia Donze states that "[e]nvironmental and labor groups 'fear the measures [federalism bills] would undermine federal agencies' authority to enforce nationwide regulations and standards, setting back the clock on hard-won health and environmental protections.'" Donze, *supra* note 77, at 241 (quoting Ron Eckstein, *Federalism Bills Unify Usual Foes*, LEGAL TIMES, Oct. 18, 1999, at 1).

200. E. H. Lewinski-Corwin, *Quarantine in the Maritime Cities of the United States*, 60 J. AM. MEDIC. ASS'N 194, 195 (1913).

201. *Id.*

cooperation entirely beyond the reach of a state.[202]

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

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

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

203. Gostin & Friedman, *supra* note 37; Prince, *supra* note 36.

204. Julia Bayly, Shayna Jacobs & Corky Siemaszko*, Nurse Kaci Hickox Vows to Break New Ebola Quarantine Protocol in Maine, Take Issue to Court*, N.Y. DAILY NEWS (Oct. 30, 2014, 7:25 AM), http://www.nydailynews.com/life-style/health/kaci-hickox-remains-defiant-won-follow-maine-ebola-quarantine-article-1.1991074.

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

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

207. STANLEY M. LEMON, MARAGRET A. HAMBURG, P. FREDERICK SPARLING, EILEEN R. CHOFFNES & ALISON MACK, ETHICAL AND LEGAL CONSIDERATIONS IN MITIGATING PANDEMIC DISEASE: WORKSHOP SUMMARY 18–19 (2007) (citing Vitoria Sutton, Director of the Center for Bioterrorism, Law, and Public Policy at Texas Tech University, and Shelley Hearne of Johns Hopkins University).

208. *Nina Pham Moving from Texas for Ebola Treatment*, CBS (Oct. 16, 2014, 10:43 AM), http://dfw.cbslocal.com/2014/10/16/nina-pham-moving-from-texas-for-ebola-treatment/; Press Release,

experts who later cured her.[209] Additionally, the federal government's expertise makes it better equipped and informed to formulate national guidelines for fighting Ebola. The CDC guidelines, which do not include mandatory quarantining of asymptomatic persons,[210] have been described as "sensible, . . . based on science . . . [and] crafted in consultation with the people who are actually going there [to Africa] to do the work."[211] Thus, for the reasons articulated by the New York Assembly, the federal government could desire uniform standards for Ebola quarantine regulations, and therefore state quarantine laws could be preempted for thwarting national uniformity.

2. National Security and Global Response to Contain Ebola

In addition to the need for uniformity, state Ebola quarantines could interfere with other federal objectives—particularly the President's plan to fight Ebola. The United States has taken the lead in initiating a global response against Ebola,[212] and President Obama has prioritized Ebola as a national security concern,[213] as evidenced by his announcement: "We have to work together at every level—federal, state and local. And we have to keep leading the global response, because the best way to stop this disease, the best way to keep Americans safe, is to stop it at its source—in West Africa."[214]

State-mandated quarantines could interfere with the United States' national security and global response in a number of ways. First, national security would be compromised if Ebola spreads.[215] Mandatory quarantines risk deterring others from reporting symptoms or information about their recent contact with

Nat'l Insts. of Health, Texas Nurse Free of Ebola Virus; Discharged from NIH Clinical Center (Oct. 24, 2014), http://www.nih.gov/news/health/oct2014/od-24a.htm.

209. Press Release, Nat'l Insts. of Health, *supra* note 208.

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

211. President Barack Obama, Remarks by the President on American Health Care Workers Fighting Ebola (Oct. 29, 2014), https://www.whitehouse.gov/the-press-office/2014/10/29/remarks-president-american-health-care-workers-fighting-ebola [hereinafter Statement of President Obama].

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

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

214. *President Obama Provides an Update on the U.S.-Led Response to Ebola*, WHITE HOUSE, http://www.whitehouse.gov/ebola-response (last visited Nov. 1, 2015) (quoting President Barack Obama and providing an overview of the Obama administration's "global response" and coordinating domestic efforts against Ebola).

215. Statement of Heather Higginbottom, *supra* note 191 ("As President Obama said, 'If we don't make that effort now, and this spreads not just through Africa but other parts of the world[,] . . . it could be a serious danger to the United States.'" (omission in original)).

someone infected with Ebola.[216] If such persons fail to report this information, their conditions would not be monitored, and they risk infecting others. Moreover, mandatory quarantines could lead to the negative unintended consequence of spreading the disease in yet another way.

> Another risk associated with quarantine is the unintended impact on patients admitted to the hospital for other medical problems. Patients with acute coronary syndromes, strokes, cancer, and traumatic injuries were all subjected to confinement. In addition, the perceived benefit of confining medical personnel to the hospital did not guarantee that patients would be provided with timely and quality medical care.
>
> In the case of SARS, patients with multiple diagnoses were cross contaminated within the crowded hospital, adding to their health risks. In the case of Ebola, patients with malaria and dengue fever may be confined with Ebola patients. Given the risk, the benefit of this strategy may not outweigh the health risk to the large number of individuals affected.[217]

Second, because the individuals who have recently traveled to an Ebola-infected country are predominantly healthcare workers,[218] state-mandated quarantines risk stigmatizing them.[219] The scientific community agrees that the twenty-one-day quarantine is not grounded in science and could stymie efforts to stop Ebola at its source.[220] Researchers conclude that "[a]symptomatic persons do not spread Ebola, therefore such actions are not scientifically supported."[221] The Society for Healthcare Epidemiology in America and the Infectious Diseases Society of America, "two authoritative bodies within the United States," oppose mandatory quarantine of asymptomatic health workers and are concerned that "[t]his approach carries unintended negative consequences without significant additional benefits."[222] The CDC's more flexible Ebola quarantine policies have also garnered support from the Council of State and Territorial Epidemiologists, which "represent[s] the nation's 'disease detectives'

216. McKay et al., *supra* note 22 (reporting CDC Director's concern about healthcare workers' concealment of prior contact with Ebola patients due to fear of quarantines).

217. *See* Barbisch et al., *supra* note 42, at 8.

218. Statement of President Obama, *supra* note 211 ("Keep in mind that of the seven Americans treated for Ebola so far, most of them while serving in West Africa, all seven have survived.").

219. *CSTE Urges States to Heed CDC's Ebola Quarantine Guidance*, PR NEWSWIRE (Oct. 28, 2014), http://www.prnewswire.com/news-releases/cste-urges-states-to-heed-cdcs-ebola-quarantine-guidance-280674052.html ("Recent decisions by governors to enforce quarantines on health professionals and other individuals returning from Ebola-affected countries in West Africa are not rooted in science and provide a serious disincentive for health professionals to fight this disease at its source.").

220. *See, e.g.*, Jeffrey M. Drazen et al., *Ebola and Quarantine*, 371 NEW ENG. J. MED. 2029, 2029 (2014).

221. *E.g.*, Barbisch et al., *supra* note 42, at 3.

222. *Id.* (quoting *IDSA Statement on Involuntary Quarantine of Healthcare Workers Returning from Ebola-Affected Countries*, IDSA, http://www.idsociety.org/2014_ebola_quarantine/#sthash.NPEyXnPE.dpuf (last visited by Barbisch et al. Nov. 8, 2014)).

working on the frontlines to stop Ebola."[223]

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

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

President Obama expressed his concerns:

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

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

223. *CSTE Urges States to Heed CDC's Ebola Quarantine Guidance*, *supra* note 219.

224. Statement of President Obama, *supra* note 211. The media, such as CNN, have also reported the Executive's concerns with state quarantines:

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

Eric Bradner, *Obama Hits Governors for 'Hiding Under the Covers' from Ebola*, CNN POLITICS (Oct. 29, 2014, 5:29 PM), http://www.cnn.com/2014/10/29/politics/obama-ebola-hiding/index.html.

225. *E.g.*, Drazen et al., *supra* note 220, at 2029.

226. *Id.*

227. Lauren Vogel, *Call for Ebola Medics Falls on Deaf Ears: MSF*, 186 CANADIAN MED. ASS'N J. E669, E669 (2014).

228. *Id.*

229. Flegenheimer et al., *supra* note 15.

230. Statement of President Obama, *supra* note 211.

owing to concerns about restrictions upon their return."[231] For example, Ryan Boyko, a student at the Yale University School of Public Health, was quarantined by order of Connecticut's Governor upon returning from West Africa as a healthcare volunteer, and commented that such quarantines would discourage health workers from volunteering.[232] Beyond discouraging volunteers, the states' quarantine policies disable health workers because "[i]f everyone who cares for an Ebola patient must be quarantined for a long period of time, we may run out of new workers."[233] Because there is currently no vaccine for Ebola, the only means of stopping the spread of Ebola is through the provision of health services to the affected, which relies more than ever on the availability of health workers.[234] Therefore, although states might defend their Ebola quarantine regulations as supplementing federal regulations, state law could still be preempted for frustrating federal objectives.

V. FIELD PREEMPTION

A. Pervasive Federal Scheme

Even if state Ebola quarantine regulations were to survive a challenge based on obstacle preemption, they could be preempted through field preemption. States could argue that their quarantine laws are harmonious with federal regulations. But this argument is of no avail when the inquiry concerns field preemption because the Court has consistently construed the field preemption doctrine to override state laws that "'curtail or complement' federal law or . . . 'enforce additional or auxiliary regulations.'"[235] The Court has unequivocally prohibited states from "enter[ing], in any respect, an area the Federal Government has reserved for itself."[236]

231. Barbisch et al., *supra* note 42, at 3 (citing Christie Duffy, *Ebola Volunteers Down After Quarantine Rules Imposed*, NJTV NEWS (Nov. 19, 2014), http://www.njtvonline.org/news/video/groups-blame-ebola-quarantine-for-fewer-volunteers/).

232. Lips, *supra* note 16.

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

234. *See* Casey, *supra* note 1, at 24. Several vaccines have been developed but are still in the investigational phase. Memorandum from the Majority Staff, Comm. on Energy and Commerce, to the Subcomm. on Oversight and Investigations, *supra* note 24, at 3; Press Release, Office of the White House Press Sec'y, Fact Sheet: Update on the Ebola Response (Dec. 2, 2014), https://www.whitehouse.gov/the-press-office/2014/12/02/fact-sheet-update-ebola-response [hereinafter White House Press Release on the Ebola Response].

235. Arizona v. United States, 132 S. Ct. 2492, 2502 (2012) (quoting Hines v. Davidowitz, 312 U.S. 52, 66–67 (1940)); *see also* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 249 (1984).

236. *Arizona*, 132 S. Ct. at 2502. For an additional example of field preemption invalidating state law, see *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983), in which the Court held that the Federal Gas Act occupied the field of "wholesale sales of natural gas in interstate commerce." 462 U.S. 176, 184 (1983).

For examples of circumstances where the Court has upheld state law against a field preemption challenge, see *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), in which the Court found that state law employment practices favoring pregnant women were not preempted by Title VII, as amended by the Pregnancy Discrimination Act; *Silkwood v. Kerr-McGee Corp.*, 464 U.S.

Arizona v. United States provides the most current example of both species of field preemption.[237] Arizona passed an immigration bill, Arizona Senate Bill 1070, which criminalized noncompliance with federal alien-registration requirements[238] and the seeking of employment by unauthorized aliens.[239] It authorized police officers to arrest anyone, without a warrant but with probable cause, believed to be removable[240] and required officers to verify an arrestee's immigration status with the federal government.[241] The Court concluded that the "extensive[ness] and complex[ity]"[242] of federal legislation governing immigration carved out immigration law as federal domain.[243] Congress's dominancy was made clear by its passage of a vast array of immigration legislation, defining lawful entry and federal crimes,[244] registration requirements,[245] public benefits,[246] and sanctions on employers.[247] Congress's authority to make uniform laws for naturalization, as conferred by Article I, Section 8, clause 4 of the Constitution, further buttressed congressional governance over immigration.[248]

Of course, whether the federal government successfully exerts field preemption depends on how narrowly or broadly the field is defined.[249] Looking broadly, the Court in *Arizona* defined the field as encompassing "immigration

238, 239 (1984), in which the Court concluded that the Price-Anderson Act did not preempt a state court's award of punitive damages for a laboratory analyst's injuries resulting from plutonium contamination; *Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54*, 468 U.S. 491, 502 (1984), in which the Court stated that the National Labor Relations Act neither contained any indication of congressional intent to occupy the entire field of labor-management relations nor preempted state regulation of union officials' qualifications; *Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Board*, 467 U.S. 461, 469 (1984), in which the Court found that the Federal Agricultural Fair Practices Act did not preempt state laws also regulating agricultural product marketing.

237. *Arizona*, 132 S. Ct. at 2492.

238. ARIZ. REV. STAT. ANN. § 13-1509 (2010), *invalidated by* Arizona v. United States, 132 S. Ct. 2492 (2012).

239. *Id.* § 13-2928, *invalidated by* Arizona v. United States, 132 S. Ct. 2492 (2012).

240. *Id.* § 13-3883(A)(5), *invalidated by* Arizona v. United States, 132 S. Ct. 2492 (2012).

241. *Id.* § 11-1051, *invalidated by* Arizona v. United States, 132 S. Ct. 2492 (2012).

242. *Arizona*, 132 S. Ct. at 2499.

243. *Id.* at 2501–02.

244. *See* 8 U.S.C. §§ 1325, 1326 (2012).

245. *See id.* §§ 1301–1306.

246. *See id.* § 1622.

247. *See id.* § 1324(a).

248. *Arizona*, 132 S. Ct. at 2498.

249. *See, e.g.*, Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987) (defining ERISA's preemption provision narrowly to encompass only state laws relating to employee benefit *plans*, rather than simply *benefits*, and consequently upholding state severance pay law); Young, *The Ordinary Diet of the Law*, *supra* note 93, at 336 ("In most cases, the relevant 'field' can be characterized in multiple ways.").

and alien status"[250] and concluded that Congress intended to occupy this field.[251] Even when it focused on each of the contested provisions of Arizona's legislation, narrowing the field from "immigration" to "alien registration," the Court nonetheless found field preemption.[252]

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

The federal government might argue that the CDC regulations controlling communicable diseases are comprehensive and demonstrate a pervasive federal scheme. But that argument would be ineffective because the Court looks to the pervasiveness of the federal *legislation*—not the comprehensiveness of the federal *regulation*—to identify field preemption.[253] In *Hillsborough County v. Automated Medical Laboratories, Inc.*, the Court explicitly "reject[ed] the argument that an intent to pre-empt [could] be inferred from the comprehensiveness of the FDA's regulations."[254] As the Court explained,

> We are even more reluctant to infer pre-emption from the comprehensiveness of *regulations* than from the comprehensiveness of *statutes*. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive.[255]

Therefore, unless an agency is explicit about whether its regulation has preemptive effect, the Court will "pause before" concluding that "the mere volume and complexity of [an agency's] regulations indicate that the agency did in fact intend to pre-empt."[256] A subject matter's complexity will necessarily entail a comprehensive federal scheme and, therefore, cannot be the sole indicator of congressional intent to exclude state laws: "Given the complexity of

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

251. *Arizona*, 132 S. Ct. at 2502.

252. *Id.* at 2502–03.

253. *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 626-27 (1973) (relying on a provision in section 1108(a) of the Federal Aviation Act, 49 U.S.C. § 1508(a), that declared "[t]he United States of America . . . possess[es] and exercise[s] complete and exclusive national sovereignty in the airspace of the United States . . . ." to find preemption regarding aircraft noise).

254. 471 U.S. 707, 716 (1985).

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

256. *Id.* at 718.

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

B. Dominant Federal Interest

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

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

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

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

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

257. DeCanas v. Bica, 424 U.S. 351, 359–60 (1976) (quoting N.Y. Dept. of Soc. Servs. v. Dublino, 413 U.S. 405, 415 (1973)).

258. 471 U.S. at 719.

259. *Id.*

260. Hines v. Davidowitz, 312 U.S. 52, 63 (1941).

261. 299 U.S. 304 (1936).

262. *Curtiss-Wright Export Corp.*, 299 U.S. at 312.

263. *Id.* at 314.

the colonies ceded from the Crown.[264] As a result, the Court explains, the individual states never possessed international powers.[265] Moreover, the power to negotiate with foreign countries lies solely with the President:

> [T]he President alone has the power to speak or listen as a representative of the nation. . . . Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. . . . "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[266]

Although *Curtiss-Wright* did not involve preemption, subsequent preemption cases have recognized the President's plenary power in foreign affairs as a foundation for preempting state law.[267] In *Zschernig v. Miller*, Oregon's probate law concerning nonresident aliens' claim to personal or real property was preempted because it intruded upon federal prerogatives in foreign policy.[268] Specifically, the state law conditioned inheritance by a nonresident alien upon a showing that his home country would not confiscate the property and would provide reciprocal rights of inheritance for Americans.[269] The Court held that "state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the

264. *Id.* at 316–17.

265. *Id.* at 316.

266. *Id.* at 319 (quoting 10 ANNALS OF CONG. 613 (1800) (statement of Rep. John Marshall)).

267. One criticism that can be lodged against preemption predicated on federal dominance in foreign affairs is that globalization increases the interconnectivity of foreign and domestic activities, making it difficult to distinguish between the two. Professor Goldsmith points out,

> As the world becomes more interconnected—as international law increasingly regulates traditional "local" issues, as the category of "foreign affairs" expands to include traditional domestic "concerns," as local activities increasingly have foreign effects, and as state and local governments increasingly participate on the foreign stage in response to the growing influence of external activities on local communities—this overlap in the canons will only grow.

Goldsmith, *supra* note 93, at 196 (footnote omitted); *see also*, Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 141 (2001) ("[I]t is no longer possible in an age of globalization to draw a bright line between 'foreign' and 'domestic' affairs."). Professor Goldsmith provides several examples where a matter concerning foreign affairs can be framed as an intrusion into state traditional police power: Angel Breard's execution, rather than viewing it as implicating an alien's rights, was essentially an exercise of state police power over criminal punishment for murder; the dispute over unpaid New York parking tickets by foreign diplomats involved the state's power over traffic violations, rather than diplomatic immunity; and California's method of calculating corporate franchise tax based on a worldwide combined reporting was a state tax issue, rather than foreign commerce. Goldsmith, *supra* note 93, at 196–97 (first citing Breard v. Greene, 523 U.S. 371 (1998); then citing Clifford J. Levy, *Giuilani May Again Trim Diplomatic Parking*, N.Y. TIMES (Apr. 20, 1997), http://www.nytimes.com/1997/04/20/nyregion/giuliani-may-again-trim-diplomats-parking.html; and then citing Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994)); *see also* Young, *The Ordinary Diet of the Law*, *supra* note 93, at 337 (discussing the problem of overlap between traditional state regulation and federal regulation).

268. 389 U.S. 429, 439–41 (1968).

269. *Zschernig*, 389 U.S. at 430–31.

state law, and hence without any showing of conflict."[270] Thereby, the Court conceived of the President's "dormant foreign affairs power."[271]

In *Arizona*, the Court was sensitive to the potential effects of Arizona's law on foreign policy, noting, "It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States."[272] The Court recognized the federal government's "inherent power as sovereign to control and conduct relations with foreign nations,"[273] recounting the Framers' support of federal power for fear that "'bordering States . . . under the impulse of sudden irritation, and a quick sense of apparent interest or injury' might take action that would undermine foreign relations."[274]

Also, the Court in *American Insurance Ass'n v. Garamendi* relied on the foreign affairs power and a dominant federal interest to preempt state law.[275] In that case, California's Holocaust Victim Insurance Relief Act required insurers to disclose information regarding policies sold in Europe from 1920 to 1945.[276] The federal government, having established a system for Holocaust-era insurance claims to be processed by the German Foundation in conjunction with the International Commission on Holocaust Era Insurance Claims,[277] grew concerned over the impact of California's law on the federally negotiated system.[278] The Court concluded that the state law undermined the President's discretion to use "economic pressure" as a "tool of diplomacy."[279] The Court reiterated the federal government's prerogative over foreign affairs:

> There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the "concern for uniformity in this country's dealings with foreign nations" that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.[280]

The Court declared, "Although the source of the President's power to act in

270. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 418 (2003).

271. Chemerinsky, *supra* note 63, at 1323.

272. Arizona v. United States, 132 S. Ct. 2492, 2498 (2012); *see also* Hines v. Davidowitz, 312 U.S. 52, 64 (1941) ("One of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own *nationals* when those nationals are in another country." (emphasis added)).

273. *Arizona*, 132 S. Ct. at 2498.

274. *Id.* (omission in original) (quoting THE FEDERALIST NO. 3, at 39 (John Jay) (Clinton Rossiter ed., 2003)).

275. 539 U.S. 396, 420–23 (2003).

276. *Garamendi*, 539 U.S. at 408–10.

277. *Id.* at 406–07.

278. *Id.* at 411–12 (discussing statements that California's actions "have already threatened to damage the cooperative spirit which the [ICHEIC] requires to resolve the important issue for Holocaust survivors").

279. *Id.* at 423–24.

280. *Id.* at 413.

foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'"[281] Additionally, the Court recognized presidential power to make executive agreements with foreign countries, which are effective without congressional approval.[282] The Court pointed out that had the President issued an executive agreement that expressly preempted state regulation in *Garamendi*, the Court would have straightforwardly applied the general recognition that executive agreements can preempt state law.[283] Due to the lack of an express preemption provision, the Court relied on interference with foreign affairs as a basis for invoking field preemption to invalidate California's law.[284]

Moreover, even areas of state traditional police powers may implicate foreign affairs and be susceptible to preemption through a dominant federal interest. In *McCarty v. McCarty*, a federal interest prevailed over the state's traditional prerogatives in family law.[285] In that case, the state community property law allowed for military retired pay to be divided in a divorce proceeding. The Court identified a federal interest in maintaining a "youthful and vigorous" military to preclude application of the state's community property law.[286] The federal interest dominated in *McCarty* because federal authority to maintain a military force is grounded in the Constitution's grant to Congress[287] "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces."[288]

281. *Garamendi*, 539 U.S. at 414 (Frankfurter, J., concurring) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952)). The Vesting Clause in Article II provides that "[t]he executive Power shall be vested in a President of the United States," U.S. CONST. art. II, § 1, cl. 1, while Article I provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," *id.* art. I, § 1, cl. 1. Professors Curtis Bradley and Martin Flaherty have challenged arguments, premised on historical and textual grounds, that the Article II Vesting Clause implicitly grants the President broad residual powers, particularly in foreign affairs. Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004). On the other hand, some theorize that the textual differences between the two articles support an inference that the President maintains broad residual powers beyond those stated in Article II. *See id.* at 546–49 (recounting the scholars who support the Vesting Clause Thesis). *See generally* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001) (discussing the source and allocation of foreign affairs power).

282. *Garamendi*, 539 U.S. at 414; Dames & Moore v. Regan, 453 U.S. 654, 657 (1981) ("[T]here has . . . been a longstanding practice of settling . . . claims [of its nationals against foreign countries] by executive agreement without the advice and consent of the Senate, and this practice continues at the present time.").

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

284. *Id.* at 417.

285. 453 U.S. 210 (1981).

286. *McCarty*, 453 U.S. at 234–35.

287. *Id.* at 232.

288. U.S. CONST. art. I, § 8, cls. 12–14.

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

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

289. 529 U.S. 89 (2000).

290. *Locke*, 529 U.S. at 97 (citing WASH. REV. CODE. § 88.46.040(3) (1994)).

291. The Court explained,

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

Id. at 99.

292. Goldsmith, *supra* note 93, at 191.

293. White House Press Release on the Ebola Response, *supra* note 234.

294. Statement of Heather Higginbottom, *supra* note 191. For a detailed account of the funds allocated for the U.S. Ebola response, see House Appropriations Comm., *Federal Ebola Response: Preventing and Battling Ebola on American Soil*, HOUSE REPUBLICANS, http://www.gop.gov/app/uploads/2014/10/Appropriations-Committee-Federal-Ebola-Response.pdf (last updated Oct. 8, 2014).

295. Statement of President Obama, *supra* note 211.

296. White House Press Release on the Ebola Response, *supra* note 234.

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

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

In *Garamendi*, California argued that despite its interference with the Executive's foreign relations, its law was authorized under the McCarran-Ferguson Act's anti-preemption clause.[297] The Court interpreted the McCarran-Ferguson Act as Congress's self-imposed limitation of its commerce power to allow states to regulate insurance within their borders, but it was not necessarily a limit on executive foreign affairs powers: "[A] federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs."[298] Therefore, the President's assertion of the foreign affairs power could overcome the anti-preemption provision in the Public Health Service Act and invalidate state Ebola quarantine regulations.

CONCLUSION

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

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

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

297. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 427 (2003).

298. *Id.* at 428.

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