



Preemption as an Alternative to Section 1983

By Lauren K. Saunders

Lauren K. Saunders
Directing Attorney,
Herbert Semmel Federal
Rights Project

National Senior Citizens Law Center
1101 14th St. NW, Suite 400
Washington, DC 20005
202.289.6976
Lsaunders@nslc.org

The cause of action supplied by 42 U.S.C. § 1983 has long been the primary vehicle for challenging state or local governmental activities under federal laws that do not contain an explicit right of action. Yet in the past few years, and especially since *Gonzaga University v. Doe*, the U.S. Supreme Court has made it more and more difficult to assert claims under Section 1983.¹ In this article I discuss preemption causes of action under the supremacy clause of the U.S. Constitution as an alternative to Section 1983.

Preemption is typically invoked, both defensively and offensively, by business trying to avoid state regulation or state-law causes of action. Public interest advocates can also use the doctrine that forbids state or local laws standing “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²

Skeptics may question whether conservative judges will allow plaintiffs to avoid the restrictions on Section 1983 by bringing preemption claims. However, for both doctrinal and policy reasons, those restrictions are inapplicable in the preemption context. Preemption claims also contain their own limits. Damages and attorney fees are not available, and whether preemption is available to challenge unwritten practices, inaction, or isolated violations of federal law is not clear.

Preemption can, however, be used to enforce statutes, regulations, or other agency actions that do not give a plaintiff “rights” enforceable under Section 1983. Preemption claims also allow courts to consider whether a state law conflicts with Congress’ overall purposes, whereas Section 1983 analysis focuses the court on narrower rights under discrete statutory provisions. Therefore preemption claims are a useful alternative or backup to Section 1983 claims for enforcing federal law.

I. Preemption Claims

The preemption doctrine arises from the supremacy clause of the Constitution. If the provisions of a state law are “inconsistent with an act of Congress, they are void, as far as that inconsistency extends.”³

¹ *Gonzaga University v. Doe*, 536 U.S. 273 (2002) (Clearinghouse No. 54,643).

² *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 37273 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

³ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 31 (1824).



A. Types of Preemption

Preemption is used not only defensively but also offensively to enjoin enforcement of invalid state laws. The three general categories of preemption are (1) *express* (a federal statute explicitly overrides state law); (2) *field* (a federal law "occupies the field" and ousts even consistent state laws); and (3) *conflict* (state legislation is permissible but only if it does not conflict with federal law).⁴ Conflict preemption encompasses both direct conflicts and situations where state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁵

Although all three categories are theoretically available to public interest advocates, express and field preemption are less likely to arise under statutes that protect low-income persons. Yet we can easily imagine a conflict preemption claim that a state Medicaid or welfare regulation frustrates the purpose of the Medicaid or Social Security Acts. Conflict preemption can occur even if the ultimate goal of both federal and state law is the same.⁶

B. The Preemption Cause of Action

Although the Supreme Court has never explicitly addressed the source of the preemption cause of action, it has upheld federal-question jurisdiction over preemption claims. In *Shaw v. Delta Air Lines* the Court stated:

It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights.... A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.⁷

The Court quoted *Shaw* recently to uphold jurisdiction in *Verizon Maryland Incorporated v. Public Service Commission*.⁸ Although *Shaw* and *Verizon* did not directly address the plaintiffs' cause of action, courts must find at least an "arguable" cause of action to uphold jurisdiction.⁹ Moreover, in *Shaw*, the Court proceeded to rule on the merits. In *Verizon* the defendant

⁴See *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525, 541 (2001); *Crosby*, 530 U.S. at 373.

⁵*Crosby*, 530 U.S. at 373 (quoting *Hines*, 312 U.S. at 67).

⁶*International Paper Company v. Ouellette*, 479 U.S. 481, 494 (1987); *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 103 (1992) ("A state law is also pre-empted if it interferes with the methods by which the federal statute was designed to reach the goal.").

⁷*Shaw v. Delta Air Lines*, 463 U.S. 85 (1983) at 96 n.14 (citations omitted).

⁸*Verizon Maryland Incorporated v. Public Service Commission*, 535 U.S. 635 (2002).

⁹*Id.* at 642.

asserted lack of a cause of action under the Telecommunications Act, yet the Court breezed over the issue and found “no doubt” that there was jurisdiction to entertain a suit seeking relief ““on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail....””¹⁰

The Supreme Court has routinely addressed preemption cases on their merits. As one commentator discovered, between 1996 and 2003 the Supreme Court decided nine cases in which plaintiffs sought to enjoin state or local laws or regulations that allegedly conflicted with federal law. “In all nine ... cases, the Supreme Court reached the merits of plaintiffs’ claims without considering whether the allegedly preemptive federal statute accorded plaintiffs a private right of action,” either directly under the statute or through Section 1983.¹¹ This trend has continued.¹²

Many commentators have concluded that “the Supremacy Clause creates an implied right of action for injunctive

relief against state officers who are threatening to violate the federal Constitution or laws.”¹³ Several lower courts have followed the commentators’ lead and explicitly recognized the cause of action.¹⁴ Given the extensive body of affirmative preemption cases from the nineteenth century to the present, we can hardly imagine the Supreme Court questioning the cause of action today.¹⁵

C. Preemption Cases Not Limited to Business Regulation

Although a typical preemption claim involves a business seeking to prevent enforcement of state or local regulations, the Supreme Court has entertained numerous preemption cases that did not involve business regulation. These include rulings that

- Arkansas’ constitutional amendment prohibiting state funding for abortions except to save the life of the “mother,” and challenged by abortion providers, could be enjoined as preempted by the Medicaid Act only to the extent that the amendment applied to Medicaid-funded abortions;¹⁶

¹⁰*Id.* (quoting *Shaw*, 463 U.S. at 96 n.14).

¹¹David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA LAW REVIEW 355, 366 (2004) (citing *Pharmaceutical Research and Manufacturers v. Walsh*, 538 U.S. 644 (2003); *Kentucky Association of Health Plans v. Miller*, 538 U.S. 329 (2003) (Clearinghouse No. 53,267); *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424 (2002); *Lorillard*, 533 U.S. at 525; *Crosby*, 530 U.S. at 363; *United States v. Locke*, 529 U.S. 89 (2000); *Foster v. Love*, 522 U.S. 67 (1997); *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806 (1997); and *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316 (1997)).

¹²See *Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246 (2004).

¹³13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURAL JURISDICTION 2d § 3566 (2d. ed. 1983 & Supp. 2004); accord RICHARD FALLON JR. ET AL., HART AND WESCHLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 903 (5th ed. 2003) (finding that “the rule that there is an implied right of action to enjoin state or local regulation that is preempted by a federal statutory or constitutional provision ... is well-established”).

¹⁴See, e.g., *Local Union No. 12004 v. Massachusetts*, 377 F.3d 64, 75 & n.8 (1st Cir. 2004) (quoting FALLON JR. ET AL., *supra* note 13, at 903); *Guaranty National Insurance v. Gates*, 916 F.2d 508, 512 (9th Cir. 1990) (quoting 13B WRIGHT & MILLER, *supra* note 13, § 3566, at 102); *Pharmaceutical Research and Manufacturers v. Concannon*, 249 F.3d 66, 73 (1st Cir. 2001) (same), *aff’d sub nom. Pharmaceutical Research and Manufacturers v. Walsh*, 538 U.S. 644 (2003); *Burgio & Compofelice v. New York State Department of Labor*, 107 F.3d 1000, 1006 (2d Cir. 1997) (same); *Joseph A. v. Ingram*, 275 F.3d 1253, 1265 (10th Cir. 2002) (same) (Clearinghouse No. 54,011); *League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823, 827–28 (N.D. Ohio 2004) (same) (Clearinghouse No. 55,781); *Sprint Corporation v. Evans*, 818 F. Supp. 1447, 1453 (M.D. Ala. 1993). Note that the Supreme Court affirmed *Pharmaceutical Research*, 538 U.S. at 644. *But cf. Legal Environmental Assistance Foundation v. Pegues*, 904 F.2d 640 (11th Cir. 1990). The *Pegues* court made two mistakes. First, it relied on irrelevant cases holding that the supremacy clause could not be the source of the “right” needed under Section 1983 or its related jurisdictional statute. See II.A. Preemption Claims Distinct from Section 1983 and note 67 *infra*. Second, it concluded incorrectly that *Shaw* and other Supreme Court cases supported only jurisdiction, not a cause of action, under the supremacy clause. See *Sprint Corporation*, 818 F. Supp. at 1453 n.6.

¹⁵See, e.g., *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 350 (1855); see I.G. Types of Relief Available, discussing why the Supreme Court’s reluctance to recognize new *Bivens* causes of action does not apply to preemption claims.

¹⁶*Dalton v. Little Rock Family Planning Services*, 516 U.S. 474 (1996).

- the California labor commissioner's policy not to enforce state labor law when the complaining employee is covered by an arbitration clause frustrated federal labor law;¹⁷
- Florida's denial of unemployment benefits to an individual who filed an unfair labor practice charge against her employer conflicted with federal labor law;¹⁸
- Louisiana's open primary law, challenged by voters, conflicted with the federal election statute;¹⁹ and
- Pennsylvania's alien registration law, challenged by immigrants, was preempted by federal alien registration law.²⁰

Similarly, in a line of cases in the 1960s and 1970s, the Court applied preemption principles to enjoin state welfare laws that conflicted with federal welfare statutes. Although most of the welfare cases do not use the term "preemption," they explicitly rest on the finding that a state law that conflicts with federal law is "invalid under the Supremacy Clause."²¹ Indeed, on occasion, the Court used the language of preemption.²² These cases

continue to be relied upon in more recent lower-court decisions.²³

The Supreme Court has found that spending clause legislation is entitled to supremacy just like other federal legislation:

There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid.²⁴

The Court also heard preemption claims based on spending clause legislation in more recent cases.²⁵

In several more recent cases, the Court entertained preemption claims brought by businesses that sought not freedom from regulation but affirmative benefits denied to them under state rules:

- In *Pharmaceutical Research and Manufacturers v. Walsh* the plaintiff drug companies wanted the benefit of

¹⁷*Livadas v. Bradshaw*, 512 U.S. 107 (1994).

¹⁸*Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967). In 1994, in *Livadas*, 512 U.S. at 116–17, the Court discussed *Nash* with approval.

¹⁹*Foster v. Love*, 522 U.S. 67 (1997).

²⁰*Hines*, 312 U.S. 52.

²¹*Townsend v. Swank*, 404 U.S. 282, 286 (1971) (characterizing *King v. Smith*, 392 U.S. 309 (1968)); *Carleson v. Remillard*, 406 U.S. 598, 601 (1972). Although these cases were brought under Section 1983, there is overlap between Section 1983 and the supremacy clause cause of action. See *Golden State Transit Corporation v. City of Los Angeles*, 493 U.S. 103, 107–8 (1989). The Court's analysis is in supremacy clause language, and the cases are useful to show that the supremacy clause prevents conflicts with federal law beyond the traditional context of business regulation.

²²See *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 407 (1973); *Hagans v. Lavine*, 415 U.S. 528, 550 (1974). The Court in *Dublino* made the caveat that the term "preemption" was used "in a rather special sense" because the state and federal legislation was part of the same welfare program. 413 U.S. at 411 n.9. There is no indication that this "caveat" makes any difference. See *Planned Parenthood Association v. Dandoy*, 810 F.2d 984, 988 (10th Cir. 1987).

²³See, e.g., *Jackson v. Rapps*, 947 F.2d 332 (8th Cir. 1991), cert. denied, 503 U.S. 960 (1992); *Planned Parenthood Federation v. Heckler*, 712 F.2d 650, 663–64 (D.C. Cir. 1983); *Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995).

²⁴*King v. Smith*, 392 U.S. at 333 n.34; accord *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295 (1958).

²⁵See *Pharmaceutical Research*, 538 U.S. 644 (Medicaid Act); *Crosby*, 530 U.S. 363 (Foreign Appropriations Act). Justices Scalia and Thomas would disallow preemption claims based on spending clause statutes; see *Pharmaceutical Research*, 538 U.S. at 675 (Scalia, J., concurring in the judgment); *id.* at 683 (Thomas, J., concurring in the judgment). The seven other justices had no problem addressing the merits of *Pharmaceutical Research's* preemption claim based on the Medicaid Act, and Chief Justice Rehnquist and Justices O'Connor and Kennedy would have upheld the district court's injunction. See *id.* at 684.

Medicaid-funded drug purchases that were restricted by state preapproval requirements.²⁶

- In *Crosby v. National Foreign Trade Council* companies that did business in Burma wanted state contracts that the Massachusetts Burma Law denied them.²⁷
- In *Engine Manufacturers Association v. South Coast Air Quality Management District*, car engine manufacturers wanted the benefit of car sales for vehicle fleets governed by local emission rules.²⁸

In none of these cases did the plaintiffs assert a liberty interest in being free from state regulation. Rather, they sought benefits that state rules denied them. Analytically these cases are no different from cases brought by individuals seeking welfare benefits.

Several lower courts have also heard preemption claims in cases brought by public interest advocates outside of the business regulatory context. Examples include challenges to

- state Medicaid rules prohibiting funding for abortions or family planning services or for organizations that provide privately financed abortions;²⁹

- state restrictions on Medicaid eligibility and other Medicaid cutbacks;³⁰
- state nursing home regulations that conflict with the federal Nursing Home Reform Law;³¹
- state directives limiting the right to a provisional ballot in violation of the Help America Vote Act;³² and
- state policy denying state college admission to undocumented aliens based on standards that conflict with federal immigration laws.³³

Thus ample authority makes the preemption cause of action available to public interest advocates, as it is to businesses seeking to avoid state law that conflicts with federal law.

D. Types of Federal Laws with Preemptive Force

The supremacy clause of course gives the U.S. Constitution and federal statutes preemptive force. Moreover, “[p]reemption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation.”³⁴ That is, “[f]ederal regulations have no less preemptive effect than federal statutes.”³⁵ Therefore, preemption may be used to

²⁶*Pharmaceutical Research and Manufacturers v. Walsh*, 538 U.S. 644 (2003). Although the Court found that the state law was not preempted, it did so on the merits. See *supra* note 25

²⁷*Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

²⁸*Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246 (2004).

²⁹See, e.g., *Camacho v. Texas Workforce Commission*, 326 F. Supp. 2d 803, 811 (W.D. Tex. 2004); *Planned Parenthood v. Sanchez*, 280 F. Supp. 2d 590, 596–602 (W.D. Tex. 2003); *Planned Parenthood Affiliates v. Engler*, 73 F.3d 634 (6th Cir. 1996); *Dandoy*, 810 F.2d 984; *Blackwell*, 61 F.3d 170.

³⁰*Camacho*, 326 F. Supp. 2d 803; *Association of Residential Resources v. Minnesota Commissioner of Human Services*, No. CUV, 03-2438 JRT/FLN, 2004 WL 2066822, at *8, Med & Med GD (CCH) P 301,521 (D. Minn. Aug. 18, 2004). Courts also reviewed on their merits preemption claims brought by medical providers claiming that state Medicaid rules violated various provisions of the Medicaid Act. See, e.g., *Pharmaceutical Research and Manufacturers Association v. Thompson*, 362 F.3d 817, 819 n.3 (D.C. Cir. 2004); *Pharmaceutical Research and Manufacturers Association v. Meadows*, 304 F.3d 1197 (11th Cir. 2002) (Clearinghouse No. 54,880).

³¹*Newman v. Kelly*, 848 F. Supp. 228 (D.D.C. 1994).

³²See *League of Women Voters*, 340 F. Supp. 2d 823 (N.D. Ohio 2004); *Sandusky Company v. Blackwell*, 339 F. Supp. 2d 975 (N.D. Ohio), *aff'd in part, rev'd in part on other grounds*, 386 F.3d 815 (6th Cir. 2004).

³³*Equal Access Education v. Merten*, 305 F. Supp. 2d 585, 593–94, 608 (E.D. Va. 2004).

³⁴*Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 370 (1986).

³⁵*Fidelity Federal Savings and Loan Association v. De la Cuesta*, 458 U.S. 141, 153–54 (1982); accord *Capital Cities Cable v. Crisp*, 467 U.S. 691, 699 (1984).

enforce regulations that may not be enforceable under Section 1983 or an implied right of action.³⁶

Federal agency orders similarly may preempt state or local action.³⁷ Thus we may bring a preemption claim based on federal orders made in the context of federal review of state plans or of state compliance with federal spending statutes.

Federal agency action notably may be the basis for a conflict preemption claim even if the federal statute does not conflict with or preempt the challenged state action.³⁸ In analyzing the preemptive effect of federal agency action, a "narrow focus on Congress' intent ... is misdirected" because an agency's ability to preempt "does not depend on express congressional authorization to displace state law."³⁹ Rather, the court applies traditional, deferential *Chevron* analysis to determine whether the agency acted within the scope of its authority.⁴⁰

Consistent with this approach, at least two lower courts found, in the Medicaid context, that even mere letters from a federal agency interpreting an ambiguous statute could preempt state law.⁴¹ Deferring to agency action under an ambiguous statute is a far cry from the

unambiguous right- or duty-creating language that *Gonzaga* requires before a statute may be enforced through Section 1983.⁴² Of course, even with preemption, the farther one strays from formal rule making, the less deference is given to federal agency statutory interpretations or directives.⁴³

In sum, the federal Constitution, federal statutes, regulations, agency orders, and even informal federal agency action all can have preemptive effect over conflicting state law.

E. Types of State Action that Can Be Preempted

State or local laws or regulations are clearly void if they conflict with federal law. The Supreme Court has also applied preemption to invalidate state agency orders.⁴⁴ Preemption is less commonly used to challenge state action other than laws, regulations, or agency orders.

Official written policies appear to be subject to preemption. In *Livadas v. Bradshaw* the Supreme Court upheld a preemption challenge to a state policy not to enforce state labor law in certain situations.⁴⁵ The Court also characterized its earlier decision in *Nash v. Florida Industrial Commission* as "holding pre-

³⁶See, e.g., *Wachovia Bank v. Burke*, 319 F. Supp. 2d 275 (D. Conn. 2004).

³⁷See, e.g., *Entergy Louisiana Incorporated v. Louisiana Public Service Commission*, 539 U.S. 39, 47 (2003); *Verizon*, 535 U.S. at 642.

³⁸See *City of New York v. Federal Communications Commission*, 486 U.S. 57, 63 (1988).

³⁹*Fidelity Federal*, 458 U.S. at 154; accord *City of New York*, 486 U.S. at 63.

⁴⁰*New York v. Federal Energy Regulatory Commission*, 535 U.S. 1, 16, 18 (2002) (citing *Chevron U.S.A. Incorporated v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984)); *City of New York*, 486 U.S. at 63.

⁴¹See *Estate of F.K. v. Division of Medical Assistance and Health Service*, 2005 WL 13252 (N.J. Super. Ct. App. Div. Jan. 4, 2005) (finding that federal Medicaid Act as interpreted in U.S. Department of Health and Human Services' letter preempted conflicting state regulation counting spouse's annuity as an asset of plaintiff); *Blackwell*, 61 F.3d 170 (3d Cir. 1995) (finding that Hyde Amendment as interpreted by federal Medicaid bureau director's letter preempted state regulation restricting Medicaid funding for certain abortions).

⁴²The Supreme Court has not yet determined whether regulations may create rights enforceable under Section 1983, but many lower courts have ruled that they may not. See *infra* note 94.

⁴³See *Estate of F.K.*, 2005 WL 13252, at *8 (citing, *inter alia*, *Skidmore v. Swift and Company*, 323 U.S. 134, 140 (1944)).

⁴⁴See, e.g., *Nash*, 389 U.S. 235; *Entergy Louisiana*, 539 U.S. 39; *Verizon*, 535 U.S. 635.

⁴⁵*Livadas v. Bradshaw*, 512 U.S. 107 (1994). Although *Livadas's* claim was also brought under Section 1983, the Court treated the preemption claim and the Section 1983 claim as separate and distinct issues. See *id.* at 132 ("Having determined that the Commissioner's policy is in fact pre-empted by federal law, we find strong support ... for the position ... that *Livadas* is entitled to seek relief under 42 U.S.C. § 1983.")

empted an administrative policy interpreting presumably valid state unemployment insurance law."⁴⁶

Some lower courts have also considered preemption challenges to state or local policies that are codified in written form. For example, courts have reviewed on the merits challenges to state directives implementing voting procedures alleged to violate the Help America Vote Act.⁴⁷ Similarly a court held that preemption might be used to challenge a state attorney general policy memorandum that allegedly conflicted with federal immigration law in the criteria used to deny state college admission to undocumented aliens.⁴⁸ The court noted that "a state policy related to immigration is subject to the same analysis as a statute."⁴⁹

A state policy that is codified in a regulation does not differ analytically from one that is codified in some other form.⁵⁰ Although the case law is sparse, both should be subject to federal preemption. However, advocates should shy away from asserting preemption challenges based on *unwritten* policies unless, as in *Livadas*, there is clear written evidence of the policy.⁵¹

We also may phrase a challenge to a policy as a challenge to the law or regulation under whose authority the agency is acting. That is, the lawsuit would seek to invalidate or ban enforcement of the law or regulation to the extent that it is

interpreted to permit or authorize the challenged policy.⁵²

Whether preemption can be used to challenge governmental inaction, unwritten practices, customs, usage, or isolated violations is less clear. Although *Livadas* involved inaction—a nonenforcement policy—it was based on an affirmative policy reflected in writing, and the relief sought was typical preemption relief: invalidating the policy. Until the case law develops further, we should not assert preemption claims in nontraditional contexts.

In cases where no specific law or regulation is being challenged, one alternative is to look for an agency order that can be attacked. For example, if a state Medicaid agency or public housing authority denies an individual's benefits based on policy that is not codified in a regulation or state law, the order could be challenged as in conflict with and therefore preempted by federal law.⁵³ Of course, in those situations the individual may also appeal the determination directly on the same grounds.

F. Defendants Subject to Preemption

Like Section 1983, preemption generally applies only to governmental officials or entities, although it might be used in isolated situations in actions against private parties. In the defensive context, preemption issues arise routinely in dis-

⁴⁶*Livadas*, 512 U.S. at 119 (citing *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967)); see also *Livadas* at 119 n.13 (finding "grounds for federal relief ... when ... misinterpretation [of state law] results in conflict with federal law" (quotations and citation omitted)).

⁴⁷*League of Women Voters*, 340 F. Supp. 2d at 827–28; *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404 (E.D. Mich. 2004).

⁴⁸*Equal Access Education*, 305 F. Supp. 2d at 585.

⁴⁹*Id.* at 601 n.14 (citing *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), overruled on other grounds by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999), as "analyzing city policy").

⁵⁰See Sloss, *supra* note 11, at 427–40.

⁵¹In *Livadas* the policy was reflected in the letter sent to the plaintiff explaining why no action would be taken.

⁵²That is essentially what the Court did in *Nash*. See text accompanying *supra* note 18, but see text accompanying *supra* note 46.

⁵³See *supra* note 44 and III Preemption in Practice, discussing *Johnson v. Housing Authority*.

putes between private parties when the defendant alleges that federal law preempts the plaintiff's state-law cause of action. One can imagine affirmative cases in which the plaintiff challenges conduct that the defendant justifies on the basis of state or local law. Just as state action can be found occasionally, but not frequently, in a Section 1983 suit against a private party, so preemption is likely available against a private party in the rare instance of "state action" in the sense that the invalidity of a state law or regulation justifying the defendant's conduct is a central element of the case.⁵⁴

G. Types of Relief Available

The major drawback is that the preemption cause of action is available only for injunctive and declaratory relief; it cannot be used to secure damages or attorney fees. Section 1983, of course, explicitly provides for damages.⁵⁵ But there is no source of authority to award damages under the supremacy clause.⁵⁶ *Bivens* is the only context in which the Supreme Court implied a damages remedy under the Constitution, and, in the years since that decision, the Court has been extremely reluctant to extend the remedy.⁵⁷

Similarly the general "American rule" is that parties bear their own litigation costs.⁵⁸ For Section 1983 actions, the companion statute 42 U.S.C. § 1988

specifically permits attorney fees. There is no such authority to award fees in preemption claims under the supremacy clause.

The silver lining to this limitation, however, is the increased likelihood of the Supreme Court's eventual explicit recognition of an implied cause of action under the supremacy clause. Although the Court has shown a reluctance to imply causes of action in more recent *Bivens* cases, *Bivens* and its progeny—as well as the Section 1983 and implied-right-of-action cases—involved causes of action that permitted damages.⁵⁹ In its most recent decision declining to extend *Bivens*, the Court made clear that, "unlike the *Bivens* remedy, which we have never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally."⁶⁰ Thus the preemption cause of action's weakness—lack of damages—is also its strength.

With respect to injunctive relief, the typical relief in a preemption case is invalidation of the preempted state or local law, regulation, or agency order and an injunction against enforcing it.⁶¹ Advocates should carefully consider how to formulate requests for relief and should attempt to phrase relief in typical preemption terms. Advocates should use caution when seeking affirmative relief or injunctions other than inval-

⁵⁴Compare *Lugar v. Edmondson Oil Company*, 457 U.S. 922 (1982), with *Golden State*, 493 U.S. at 113–14 (Kennedy, J., dissenting) (noting that a litigant has standing to contend that federal supremacy "requires a particular outcome in a dispute, and this is so whether the dispute is between individual parties ... or the dispute involves a State or its subdivisions") (citing cases).

⁵⁵See 42 U.S.C. § 1983 (providing liability "in an action at law").

⁵⁶See *Golden State Transit Corporation v. City of Los Angeles*, 857 F.2d 631, 636 (9th Cir. 1988), rev'd on other grounds, 493 U.S. 103 (1989). In *Golden State* the Supreme Court reversed the Ninth Circuit's holding that the plaintiff had not shown a Section 1983 violation. However, both the majority and, especially, the dissenting opinion implicitly assume the correctness of the Ninth Circuit's finding that damages were not awardable based on the supremacy clause alone.

⁵⁷*Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971); see, e.g., *Correctional Services Corporation v. Malesko*, 534 U.S. 61 (2001) (Clearinghouse No. 54,279); *infra* note 60.

⁵⁸See *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975).

⁵⁹See, e.g., *Malesko*, 534 U.S. at 67 n.3, declining to extend *Bivens*.

⁶⁰*Id.* at 74; compare also *id.* at 75 (Scalia, J., concurring) (decrying *Bivens* as a "relic of the heady days in which this Court assumed common-law powers to create causes of action—decreasing them to be 'implied' by the mere existence of a statutory or constitutional prohibition") with *Verizon*, 535 U.S. at 642–43 (unanimous opinion by Scalia, J., upholding jurisdiction over claim for injunctive relief under supremacy clause against state regulation preempted by federal law, despite argument that the federal statute does not create a cause of action).

⁶¹See, e.g., *Crosby*, 530 U.S. at 371.

idation of or a ban on enforcement or implementation of the challenged law, regulation, or order.

Nevertheless, as shown in *Johnson v. Housing Authority*, the Section 8 example discussed below, plaintiffs effectively may secure affirmative relief through a negative injunction invalidating the challenged law.⁶² In the area of utility rate regulation, for example, when the Supreme Court invalidates a state utility commission rate order on the grounds that the order conflicts with federal law, the utility is not left without rates. Rather, the case is remanded, and the state agency reforms its order (and increases the rates authorized) consistent with federal law.⁶³ Thus the power to invalidate a law, regulation, or administrative order may in the end give the plaintiffs the relief they seek. Again, advocates should be careful to phrase their pleadings in classic preemption terms so that courts will be comfortable using this line of cases in public interest cases.

II. Relationship Between Section 1983 and Preemption Claims

We must recognize that the preemption cause of action is distinct from Section 1983, not a different way of using the statute. Therefore, cases interpreting Section 1983 or examining its requirements are not applicable to preemption claims.

A. Preemption Claims Are Distinct from Section 1983

Back in the days when the federal-question jurisdictional statute contained an amount-in-controversy requirement, plaintiffs sometimes tried to blur the distinction between Section 1983 and

supremacy clause claims in order to fit within the civil rights jurisdictional statute.⁶⁴ Today's defendants sometimes raise Supreme Court decisions rejecting these efforts in an attempt to defeat preemption causes of action or to impute Section 1983 requirements to the supremacy clause. However, those cases are completely irrelevant to the existence of the independent preemption cause of action.

The Supreme Court holds that "the Supremacy Clause, of its own force, does not create rights enforceable under § 1983" and "is not a source of any federal rights."⁶⁵ Similarly "a Supremacy Clause claim based on a statutory violation is enforceable under § 1983 only when the statute creates 'rights, privileges, or immunities' in the particular plaintiff."⁶⁶ These statements merely indicate that the supremacy clause may not be the source of the constitutional "right" needed under Section 1983 or its related jurisdictional statute.⁶⁷

These holdings say nothing about the scope of the supremacy clause or of an independent preemption cause of action. Like Section 1983, the supremacy clause itself has no substance; both are empty causes of action that may be used to enforce other federal statutes or constitutional provisions. For that reason, a plaintiff seeking to sue *under Section 1983* cannot look to the supremacy clause for the "rights, privileges, or immunities" needed for a Section 1983 cause of action.

Conversely the Supreme Court's decisions construing the scope of Section 1983 and related jurisdictional statutes are irrelevant to the scope of supremacy clause preemption claims that are not based on Section 1983. Of course, there is

⁶²See III. Preemption in Practice.

⁶³Compare *Nantahala Power and Light Company v. Thornburg*, 476 U.S. 953 (1986) (invalidating state commission rate-making order that misallocated costs and remanding case), with *In re Nantahala Power and Light Company*, 87 P.U.R. 4th 217, 1987 WL 257989 (N.C. Util. Comm'n Nov. 13, 1987) (recalculating utility rates in light of Supreme Court decision).

⁶⁴See, e.g., *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 612-13 (1979).

⁶⁵*Golden State*, 493 U.S. at 107; *Chapman*, 441 U.S. at 613.

⁶⁶*Golden State*, 493 U.S. at 107 n.4.

⁶⁷See *Chapman*, 441 U.S. 600; *Golden State*, 493 U.S. at 107 (characterizing *Chapman*).

some overlap because both causes of action may be used in a suit to enforce a federal statute that creates individual rights. But that the supremacy clause may not be the source of a "right" for Section 1983 purposes does not mean that a "right" is needed for a supremacy clause claim unrelated to Section 1983.

B. No "Right" or "Right of Action" Is Needed for a Preemption Claim

Because Section 1983 and preemption claims are distinct, independent causes of action, there is no basis to impute a Section 1983 "right" requirement to preemption claims. Currently the primary obstacle to bringing a Section 1983 claim based on violation of a federal statute is the need to show that the individual has "an unambiguously conferred right" as shown by "right- or duty- creating language" in the statute.⁶⁸ A preemption plaintiff, by contrast, need not have any rights under the federal statute that the plaintiff seeks to enforce. The cause of action comes from the supremacy clause, which makes no mention of "rights," and not from Section 1983, which does.

Although the Supreme Court has never directly held that a "right" is not needed for a preemption claim, it has so indicated in dicta. In *Golden State Transit Corporation v. City of Los Angeles*, in a dissent from the majority opinion upholding the plaintiff's Section 1983 claim under the National Labor Relations Act, Justice Kennedy (joined by Chief Justice Rehnquist and Justice O'Connor) observed:

By concluding that [plaintiff] Golden State may not obtain relief under § 1983, we would not leave the company without a remedy. Despite what one might think from the increase of litigation under the statute in recent years, § 1983 does not provide the exclusive relief that the federal courts

have to offer.... [P]laintiffs may vindicate ... pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes. These statutes do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983.⁶⁹

The majority opinion in *Golden State* also made this point, in a slightly less direct fashion: "Given the variety of situations in which preemption claims may be asserted, in state and federal court, it would obviously be incorrect to assume that a federal right of action pursuant to § 1983 exists every time a federal rule of law pre-empts state regulatory authority."⁷⁰ That is, the preemption claims may be pursued, the majority agreed, even if the plaintiff does not have a cause of action under Section 1983.

The Supreme Court has also entertained numerous preemption claims on the merits under statutes that do not confer "rights" on plaintiffs within the sense of Section 1983. For example, in *Pharmaceutical Research*, the Court considered the plaintiff's preemption claim on the merits, even though the Court would highly unlikely have found post-*Gonzaga* that the Medicaid Act conferred on drug companies an enforceable right to sell their drugs to Medicaid recipients. Indeed, the First Circuit opinion that the Supreme Court affirmed in *Pharmaceutical Research* explicitly held that the plaintiff was not attempting "to enforce rights under the Medicaid Statute ... but rather a preemption-based challenge under the Supremacy Clause.... [R]egardless of whether the Medicaid statute's relevant provisions were designed to benefit [Pharmaceutical Research], [Pharmaceutical Research] can invoke the statute's preemptive force."⁷¹

⁶⁸*Gonzaga*, 536 U.S. at 283, 284 n.3 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 690 n.13 (1979)).

⁶⁹*Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting) (citations omitted).

⁷⁰*Id.* at 107.

⁷¹*Pharmaceutical Research*, 249 F.3d at 73. The First Circuit quoted *Saint Thomas-Saint John Hotel and Tourism Association v. U.S. Virgin Islands*, 218 F.3d 232, 241 (3d Cir. 2000), discussed *infra*.

Similarly, in *Crosby*, the Court allowed private companies to enforce the Burma sanction provisions of the Foreign Appropriations Act. That Act certainly was not intended to confer on companies an enforceable right to do business in Burma.⁷²

Several lower courts have directly addressed the issue. Plaintiffs may pursue preemption claims, those courts have concluded, even absent a statutory right of action under Section 1983 or directly under the federal statute at issue.⁷³ As the Third Circuit stated,

[w]e know of no governing authority to the effect that the federal statutory provision which allegedly preempts enforcement of local legislation by conflict must confer a right on the party that argues in favor of preemption. On the contrary, a state or territorial law can be unenforceable as preempted by federal law even when the federal law secures no individual substantive rights for the party arguing preemption.⁷⁴

Some of these courts merge subject-matter jurisdiction and the existence of a cause of action and find jurisdiction without saying explicitly that there is a cause of action. Nevertheless, courts that

uphold preemption claims where Section 1983 or implied causes of action fail actually move beyond the question of jurisdiction to find a preemption cause of action. The court has federal-question jurisdiction over a Section 1983 claim or implied federal statutory claim even if the cause of action ultimately fails for lack of a "right" or implied right of action. Moreover, these courts go beyond jurisdiction to rule on the merits of the preemption claim.⁷⁵

For both doctrinal and policy reasons, a "right" in the Section 1983 sense is not needed to enforce a federal statute under a preemption claim. Most obvious, Section 1983 itself secures only "rights, privileges, or immunities," and courts therefore must consider what Congress meant by a "right."

The preemption cause of action, however, arises from the Constitution's supremacy clause, not from a statute, and thus congressional intent is irrelevant to the existence of the cause of action: "In this type of action, it is the interests protected by the Supremacy Clause, not by the preempting statute, that are at issue."⁷⁶ Preemption under the supremacy clause "concerns the federal structure of the Nation rather than the securing of rights, privileges, and immunities to individuals."⁷⁷

⁷²See *Sloss*, *supra* note 11, at 394–401 (analyzing *Crosby*); see also *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272 (1987) (considering on the merits employer's claim that Pregnancy Discrimination Act preempted state law requiring pregnancy leave).

⁷³*Qwest Corporation v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004); *Local Union No. 12004*, 377 F.3d at 75; *Illinois Association of Mortgage Brokers v. Office of Banks*, 308 F.3d 762, 765 (7th Cir. 2002) (Clearinghouse No. 54,339); *Pharmaceutical Research*, 249 F.3d at 73 (in the context of rejecting the defendant's challenge to the plaintiff's prudential standing); *Saint Thomas*, 218 F.3d at 241; *Self-Insurance Institute v. Koriath*, 993 F.2d 479, 481–83 (5th Cir. 1993); *Western Air Lines v. Port Authority*, 817 F.2d 222, 225–26 (2d Cir. 1987) (upholding claim of preemption by Airline Deregulation Act despite prior finding that the Act could not be enforced through an implied right of action or Section 1983), cert. denied, 485 U.S. 1006 (1988); see also *Indian Oasis–Baboquivari Unified School District v. Kirk*, 91 F.3d 1240, 1256 (9th Cir. 1996) (Reinhardt, J., dissenting on other grounds) ("[A] plaintiff may sue directly under the Supremacy Clause even if the assertedly preemptive federal statute does not provide a cause of action or give rise to enforceable rights that could serve as the basis for a § 1983 suit on preemption grounds."); *Wright Electric Incorporated v. Minnesota State Board of Election*, 322 F.3d 1025, 1028–29 (8th Cir. 2003); *Wachovia Bank*, 319 F. Supp. 2d 275; *Sanchez*, 280 F. Supp. 2d at 599–602; *Sprint Corporation*, 818 F. Supp. at 1453.

⁷⁴*Saint Thomas*, 218 F.3d at 241; see also *Qwest Corp.*, 380 F.3d at 1266 ("A federal statutory right or right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law. A party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a right of action.")

⁷⁵See *Saint Thomas*, 218 F.3d at 242–46; *Illinois Association of Mortgage Brokers*, 308 F.3d at 768–68; *Self-Insurance Institute*, 993 F.2d at 481 (directing lower court to address the merits); *Wright Electric*, 322 F.3d at 1028; *Sanchez*, 280 F. Supp. 2d at 602–6.

⁷⁶*Pharmaceutical Research*, 249 F.3d at 73.

⁷⁷*Golden State*, 493 U.S. at 117 (Kennedy, J., dissenting).

Policy reasons also underlie courts' willingness to recognize preemption claims where they would not permit claims under Section 1983 or under the statute directly. Because damages and attorney fees are not available, courts have less concern about imposing preemption claims on state actors.⁷⁸

The policy concerns are similar to those that led the Supreme Court to adopt the *Ex Parte Young* exception to sovereign immunity for claims seeking prospective injunctive relief against state officers: "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law."⁷⁹ Thus, in its decision holding that sovereign immunity prohibited certain damage suits against states under the Americans with Disabilities Act, the Court dropped a footnote indicating no concern that injunctive relief was still available against states under *Ex Parte Young*.⁸⁰ Similarly the injunctive relief available under a preemption claim is necessary to vindicate the federal interest in the supremacy of federal law, even if a damages suit under Section 1983 is unavailable.

Accordingly, for reasons stemming from differences in the source of the Section 1983 and preemption causes of action, and for policy reasons, courts are willing to entertain preemption claims for injunctive relief in a broad array of situations in which there is no express or implied cause of action—under the statute or through Section 1983—that would authorize damages. As one court observed, "the option to sue for injunctive relief under the Supremacy Clause . . . is almost always available."⁸¹

C. Congressional Purpose Construed More Broadly Under Preemption

Although a preemption plaintiff need not show congressional intent to create individual rights, congressional intent is relevant—but only on the merits, not at the cause-of-action stage. Moreover, important differences in the way congressional intent is analyzed may make preemption claims advantageous. In preemption claims, courts consider the statute's broader purpose, based on the statute as a whole, rather than focusing narrowly on "right- or duty-creating language" in a discrete subsection. Preemption claims may present a more favorable context than Section 1983 for alleging that state or local governmental officials violated federal law.

In the Section 1983 context, congressional intent to create individual rights must be found in the particular subsection of the statute at issue. Plaintiffs may not claim rights in the statute "as an undifferentiated whole."⁸² Rather, the claims must be broken down into "manageable analytic bites" so that the court can determine whether "the provision in question" creates rights.⁸³ Claims based on Congress' overall purpose as expressed in the statute's introductory provisions generally fail.⁸⁴ Moreover, Congress' intent to create rights must be "unambiguous."⁸⁵

In the preemption context, however, when deciding whether a state law presents an obstacle to federal objectives, a court's inquiry is much broader:

What is a sufficient obstacle is a matter of judgment, to be informed by examining the feder-

⁷⁸See I.G. Types of Relief Available.

⁷⁹*Green v. Mansour*, 474 U.S. 64, 68 (1985).

⁸⁰See *Board of Trustees v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (Clearinghouse No. 52,744); accord *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 759 (2003) (Kennedy, J., dissenting, joined by Scalia, J., and Thomas, J.) (Clearinghouse No. 54,329).

⁸¹*Sprint Telephony PCS Limited Partnership v. County of San Diego*, 311 F. Supp. 2d 898, 914 (S.D. Cal. 2004).

⁸²*Blessing v. Freestone*, 520 U.S. 329, 342 (1997) (Clearinghouse No. 50,109).

⁸³*Id.* (quoting *Golden State*, 493 U.S. at 106).

⁸⁴See, e.g., *Blessing*, 520 U.S. 329; *M.A.C. v. Betit*, 284 F. Supp. 2d 1298, 1306 (D. Utah 2003).

⁸⁵*Gonzaga*, 536 U.S. at 290.

al statute as a whole and identifying its purpose and intended effects: "For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power."⁸⁶

That is, congressional intent is determined from the entire statute, and preemption may be inferred from ambiguous statutory language.

The Supreme Court applied these principles in *Nash v. Florida Industrial Commission*, when it held that a Florida unemployment insurance statute conflicted with the National Labor Relations Act, even though the Act was directed at employers, not states, and the Florida law did not conflict with any specific provision of the Act.⁸⁷ The Court focused instead on the Act's general goal of protecting individuals who charged unfair labor practices. A state law could not "impede resort to the Act" or "defeat or handicap a valid national objective."⁸⁸ The Court found that in "holding that this

Florida law as applied in this case conflicts with the Supremacy Clause of the Constitution we but follow the unbroken rule that has come down through the years."⁸⁹

Of course, litigants should be careful not to base preemption claims solely on vague statutory policies. Courts may be reluctant to preempt state law in the absence of clear conflict.⁹⁰ The point here is simply that, even when one gets to the merits stage, a preemption claim may hold certain advantages over Section 1983, as it allows the plaintiff to go beyond narrow statutory provisions and to look at the entire statute to show that the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁹¹

III. Preemption in Practice

Thinking about how to phrase a Section 1983 case in preemption terms may not be intuitively obvious. The following examples show how cases that failed under Section 1983 or an implied right of action could possibly have been brought under a preemption theory.⁹²

Regulations forbidding disparate impact discrimination cannot be enforced through an implied right of action because only statutes, and not regulations, can create implied rights of action, the Supreme Court held in *Alexander v. Sandoval*.⁹³ Many lower courts have

⁸⁶*Crosby*, 530 U.S. at 373 (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)); accord *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 98 (1992); *Pharmaceutical Research*, 538 U.S. at 684 (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., concurring in part and dissenting in part).

⁸⁷*Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967).

⁸⁸*Id.* at 239.

⁸⁹*Id.* at 239–40.

⁹⁰The Court has been unclear whether there is any presumption for or against preemption. Compare *Engine Manufacturers*, 124 S. Ct. at 1765–66 (Souter, J., dissenting) (arguing that the majority ignores the presumption against preemption), with *id.* at 1763 (majority opinion) (acknowledging that the Court did not invoke any "presumption against pre-emption" ... [a] method[] on which not all Members of this Court agree"); see also *Free v. Bland*, 369 U.S. 663, 666 (1962) ("The relative importance to the State of its own law is not material when there is a conflict with a valid federal law," for "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."); accord *Felder v. Casey*, 487 U.S. 131, 138 (1988) (same).

⁹¹*Crosby*, 530 U.S. at 373 (citation omitted).

⁹²Preemption can substitute for an implied right of action when the defendant is a governmental actor.

⁹³*Alexander v. Sandoval*, 532 U.S. 275 (2001) (Clearinghouse No. 51,706).

foreclosed Section 1983 claims based on regulations as well.⁹⁴ Instead the plaintiffs could have claimed that federal regulations preempted and rendered invalid the “English-only” provision of the Alabama Constitution and the state’s official written policy of forbidding driver’s license examinations in any other language.⁹⁵ The state therefore could have been enjoined from enforcing the constitutional provision and any policies implementing it.

In *Johnson v. Housing Authority* the district court held that neither the Housing Choice Voucher Program nor its implementing regulations could be enforced in a Section 1983 challenge to a public housing authority’s failure to make annual adjustments to utility allowances used in calculating Section 8 tenant subsidies.⁹⁶ Instead the plaintiffs could have sought to invalidate the housing authority’s utility allowance schedule as in conflict with the federal regulations. Alternatively the plaintiffs could have sought an injunction invalidating any housing authority decisions calculating individual Section 8 subsidies based on the invalid schedule. Either approach would effectively force the agency to update the schedule.⁹⁷

In *Ebert v. Braddock* the district court relied on *Gonzaga* to dismiss the plaintiffs’ Section 1983 challenge to Washington State

regulations that, through budgetary gimmicks, eliminated state supplemental payments to elderly, blind, or disabled individuals in violation of the “maintenance-of effort” requirement of the federal Supplemental Security Income statute.⁹⁸ The plaintiffs also claimed that the state regulations were invalid under the supremacy clause. The district court dismissed that claim on the plainly irrelevant ground that plaintiffs were alleging violations of statutory rather than constitutional law.⁹⁹ The supremacy clause theory is currently on appeal to the Ninth Circuit.¹⁰⁰

These are just a few examples of how preemption can be applied in cases that would typically be brought under Section 1983.¹⁰¹ The core principle is to focus on finding a state or local law, regulation, official written policy, or agency order that is invalid because it conflicts with a federal statute or frustrates Congress’ objectives. Relief then revolves around invalidating the state or local action to the extent that it conflicts with federal law and enjoining the state or local government from implementing it.

IV. Conclusion

Public interest lawyers inevitably expect that conservative judges will not let plaintiffs “get around” the limitations imposed on Section 1983 by using preemption claims. However, there are several rea-

⁹⁴See, e.g., *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771 (3d Cir.2001), cert. denied, 536 U.S. 939 (2002) (Clearinghouse No. 53,759); *Harris v. James*, 127 F.3d 993, 1008-9 (11th Cir.1997) (Clearinghouse No. 50,797).

⁹⁵This approach might have led the *Sandoval* Court to find that the Title VI regulation was invalid. The Court noted the “considerable tension” between the regulation and the statute, which the Court had interpreted to prohibit only intentional discrimination. *Sandoval*, 532 U.S. at 282. However, when there is not the same “tension” between the statute and the regulation, preemption should be a useful way of enforcing regulations that are not directly enforceable through Section 1983 or an implied right of action.

⁹⁶*Johnson v. Housing Authority*, No. Civ. A. 04-1128, 2004 WL 2414095, at *8 to *10 (E.D. La. Oct. 28, 2004).

⁹⁷This is what happens when courts invalidate state utility commission rate orders that are improperly applied and are in conflict with federal agency orders. See *supra* note 63.

⁹⁸*Ebert v. Braddock*, No. C03-5027 JKA (W.D. Wash. Oct. 28, 2003).

⁹⁹*Id.*, slip op. at 6.

¹⁰⁰The National Senior Citizens’ Law Center is cocounsel on the case.

¹⁰¹Another example is *Price v. Stockton*, 390 F.3d 1105 (9th Cir. 2004), which dismissed the plaintiffs’ Section 1983 claims against the city for violating the Housing and Community Development Act’s provisions requiring replacement of affordable housing units. Instead the plaintiffs may be able to claim that the antidisplacement and relocation assistance plan that the city adopted under the Act is invalid because it conflicts with the Act’s requirements.

sons why those limitations are simply inapplicable in the preemption context and why courts should not fear unleashing an unrestricted avenue for public interest litigation.

First, the text of Section 1983 requires a "right," whereas the "rights" analysis is completely foreign to the supremacy clause.¹⁰² The preemption cause of action originates in the Constitution, making congressional intent irrelevant at the cause-of-action stage. The Supreme Court's implicit recognition of the preemption cause of action is well entrenched and would be difficult to reverse.

Second, courts still have the opportunity to consider Congress' intent, but at the merits stage rather than the cause-of-action stage. A hostile judge can dismiss a case on the merits almost as easily as on the existence of cause of action. However, the court must pay attention to Congress' broader purposes and may not rest the decision on the phrasing of a particular subsection.

Third, damages and attorney fees are not available for preemption claims. Thus public interest plaintiffs, like businesses, lack an incentive to bring cases of questionable merit, and the consequences of allowing preemption suits are more limited. Just as the Supreme Court is comfortable with injunctive relief against states when sovereign immunity bars damages, so recognizing preemption claims for injunctive relief does not send up the same alarms as Section 1983 suits do.

Fourth, plaintiffs must still meet jurisdictional and standing requirements, including causation and redressability. These are real limitations on preemption claims by public interest litigants seeking injunctive relief, just as they are on businesses.¹⁰³

Fifth, whether preemption is available against the full range of conduct that can be

addressed through Section 1983—including isolated violations, practices that are not codified in writing, or governmental inaction—is unclear. Preemption may be difficult to use in situations other than challenges to a state or local law, regulation, written policy, or administrative order.

And, sixth, like Section 1983 (but unlike implied-rights-of-action claims, which have been restricted much more severely than Section 1983 claims), preemption claims may generally be brought only against government officials. With perhaps some rare exceptions, preemption claims are unlikely to offer a vehicle for enforcing federal law against private parties.

Preemption claims consequently already contain several built-in limitations, and they are neither a full substitute for Section 1983 nor a threat that should concern courts. But if the courts are truly equally open to all, public interest litigants should be allowed to use preemption claims in their proper context in the same way that large corporations may.

Author's Note

As directing Attorney of the Herbert Semmel Federal Rights Project, I dedicate this article to Herb, whose ship passed mine only briefly in the night but who inspired the groundwork for this article. The Federal Rights Project works to ensure access to federal court to enforce federal laws prohibiting unjust discrimination and protecting individuals' economic, social, and health needs. The project runs an e-mail list-serve and website of case developments, assists in litigation, and promotes public awareness of the importance of federal rights in the judicial nomination process. I encourage readers who are interested in pursuing preemption causes of action to contact me to discuss the issue further or to obtain a longer version of this article.

¹⁰²See *Western Air Lines*, 817 F.2d at 225 (noting the "potential anomaly of rejecting a private right of action to enforce a statute while allowing a claim under the Supremacy Clause," but observing the different function of a supremacy clause claim).

¹⁰³See *Self-Insurance Institute*, 993 F.2d at 482 (noting that "well-settled principles of standing serve to guard against [the] concern" that permitting a preemption claim would render limitations in the statute meaningless).

