Center for Bio-Ethical Reform, Inc. v. City & County of Honolulu: Demonstrating the Need to Abandon the Field Preemption Doctrine

I. INTRODUCTION

Since this country's inception, the balance of power between federal and state governments has been a source of tension.[1] This jurisprudential debate was brought home with significant results in the 2006 Ninth Circuit decision *Center for Bio-Ethical Reform, Inc. v. City & County of Honolulu*.[2] In this case, the City and County of Honolulu fought to preserve a local ordinance that prohibited signs and banners towed aloft by aircraft over the island of Oahu.[3] Challenging the ordinance was the Center for Bio-Ethical Reform, an anti-abortion organization that sought to spread its message by flying 30-by-100 foot banners depicting aborted fetuses across the famous Waikiki skyline.[4] The Federal Aviation Administration granted the organization permission to fly, but the Honolulu ordinance barred its banners.[5] The outcome of the case turned on whether federal aviation law preempted the field of banner towing, or whether Honolulu retained the right to regulate its airspace.[6] The Ninth Circuit analyzed three preemption doctrines: field preemption, which exists when preemption may be implied based on pervasive federal regulation in the field; conflict preemption, which exists when a state law directly conflicts with a federal law; and express preemption, which exists when a federal statute or regulation explicitly supersedes state regulations.[7] The court concluded that federal law did not preempt the Honolulu ordinance under any of these doctrines.[8]

---

[1] *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively . . . ."); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (holding that federal law prevails in shipping waterways because of the need for uniform, consistent regulations).

[2] 455 F.3d 910 (9th Cir.), *cert. denied*, ___ U.S. ___, 127 S. Ct. 730 (2006).

[3] *See* discussion *infra* Part III.

[4] *Center*, 455 F.3d at 915-16.

[5] *See* discussion *infra* Part III.

[6] *Center*, 455 F.3d at 917-19 (analyzing the preemption question prior to addressing the free speech and equal protection claims).

[7] *Id.* at 917; *see* discussion *infra* Parts II.A, III.

[8] *Center*, 455 F.3d at 918.

In *Center*, the Ninth Circuit correctly held that federal law did not preempt the Honolulu ordinance.[9] Nevertheless, *Center* illustrates the need for reform of the preemption doctrine. This Casenote contends that the doctrine of field preemption should be abandoned in favor of express and conflict preemption. Whereas field preemption is impractical in application and undermines federalism principles, express and conflict preemption are workable doctrines that provide the appropriate distribution of state and federal power.

Part II of this Casenote provides an overview of the preemption and federalism doctrines. Part III provides the context for the Ninth Circuit's decision in *Center*. Part IV analyzes the failings of the field preemption doctrine as exemplified in *Center*, and compares *Center* to two cases[10] with contrary holdings. Part IV further asserts that *Center* reveals field preemption to be inconsistent with federalism principles. This Casenote concludes that the difficulty the *Center* court and Hawai'i lawmakers had in determining whether Honolulu's ordinance was preempted is best resolved by abandoning the field preemption doctrine entirely.

II. OVERVIEW OF THE PREEMPTION AND FEDERALISM DOCTRINES

A. *Preemption Doctrine*

Federal law is the "supreme Law of the Land."[11] This guiding precept is grounded in the Supremacy Clause of the United States Constitution.[12] It is from this principle that the United States Supreme Court has recognized the derivative doctrine of preemption.[13] Under this doctrine, once the federal

---

[9] *See id.*

[10] Banner Adver., Inc. v. City of Boulder, 868 P.2d 1077 (Colo. 1994) (en banc); State v. Santoriello, 702 N.Y.S.2d 539 (Crim. Ct. 1999).

[11] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . .").

[12] *Id.*; *see also* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (observing that the Supremacy Clause gives the federal government "a decided advantage in [the] delicate balance" the Constitution strikes between state and federal power, but assuming that Congress does not exercise the power lightly).

[13] CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 676 (1993) (holding that, based on the Supremacy Clause, regulation of train speed was preempted by the Federal Railway Safety Act); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 530 (1992) (acknowledging that preemption is derived from the Supremacy Clause and that the Public Health Cigarette Smoking Act of 1969 preempted some common law tort damages claims); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992) (holding that state regulation of safety was preempted by the federal Occupational Safety and Health Act); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (holding that national uniformity in waterway regulations requires uniform federal regulation). *But see* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768-69 (1994) (arguing that the preemption doctrine is not completely based on the Supremacy Clause).

government has preempted an area of law, "any state law . . . which interferes with or is contrary to federal law, must yield."[14] Federal agency regulations have the power to preempt state and local laws just as federal statutes do.[15] The doctrine of preemption, therefore, is a powerful tool for the federal government to supersede a state's sovereign police powers.

Ultimately, federal preemption of a state law or regulation revolves around the finding of congressional intent.[16] Preemption analysis begins with the assumption that federal law may not encroach upon the police powers of the states "unless that [is] the clear and manifest purpose of Congress."[17] An initial presumption is made by the courts that the state law is valid.[18] This presumption holds unless the state has regulated an area historically within the province of the federal government.[19]

There are three generally recognized categories of preemption: express, conflict, and field.[20] These categories can be amorphous and overlapping, and there is no set test for determining whether a federal law preempts a state law.[21] Express preemption exists when a federal statute or regulation contains

---

[14] *Gade*, 505 U.S. at 108 (quoting Felder v. Casey, 487 U.S. 131, 138 (1988)).

[15] *E.g.*, Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985) ("We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes."); United States v. Locke, 529 U.S. 89, 109-10 (2000) (holding that Coast Guard regulations preempted state law). For a general discussion on aviation law and preemption, see Ann Thornton Field & Frances K. Davis, *Can the Legal Eagles Use the Ageless Preemption Doctrine to Keep American Aviators Soaring Above the Clouds and into the Twenty-First Century?*, 62 J. AIR L. & COM. 315 (1996).

[16] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001) ("Congressional purpose is the 'ultimate touchstone' of our inquiry." (quoting *Cipollone*, 505 U.S. at 516)); *Gade*, 505 U.S. at 96 ("'The question [of] whether a certain state action is pre-empted by federal law is one of congressional intent.'" (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985))). The Supreme Court has explained that:

> Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the "statutory framework" surrounding it. Also relevant, however, is the "structure and purpose of the statute as a whole," as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1996) (internal citations omitted).

[17] *Cipollone*, 505 U.S. at 516 (alteration in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[18] *See* New York State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 413 (1973) (holding there was insufficient evidence to assume that the Social Security Act preempted state employment statute).

[19] United States v. Locke, 529 U.S. 89, 108 (2000). One such example of the federal government's domain is the regulation of alien naturalization. *See* Hines v. Davidowitz, 312 U.S. 52, 66 (1941).

[20] *Gade*, 505 U.S. at 98; English v. Gen. Elec. Co., 496 U.S. 72, 78-79 & n.5 (1990).

[21] *Hines*, 312 U.S. at 67.

preemptive language that explicitly displaces state authority in a given area.[22] Conflict preemption exists when either compliance with both the state and federal rule is a "physical impossibility,"[23] or the state law, though not directly incompatible, "stands as an obstacle" to the achievement of the federal objectives.[24] If a federal law "contemplates coexistence" between federal and state regulatory schemes, then, providing that the state law does not interfere with the "underlying federal purpose," there is no conflict preemption.[25]

Field preemption occurs when the federal interest in the field is "so dominant that the federal system will be *assumed* to preclude enforcement of state laws on the same subject."[26] As a result, even without explicit preemptive language or direct conflict, field preemption may be found by a court if congressional intent to supersede state law is "implicit" from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[27] Thus, preemption is an extreme exercise of supremacy, because it may obliterate a state's ability to supplement federal law.[28]

B. Federalism Doctrine

The term "federalism" refers to the balance of power between the federal and state governments. The federal government is granted a limited,[29] although superior,[30] scope of authority by the Constitution. Those powers not

---

[22] *English*, 496 U.S. at 78-79. For example, the Employee Retirement Income Security Act of 1974 ("ERISA") states that it "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (1999 & Supp. 2006). The Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) (1997 & Supp. 2006), provides: "[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart."

[23] Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143 (1963).

[24] *Hines*, 312 U.S. at 67.

[25] Skysign Int'l, Inc. v. City & County of Honolulu, 276 F.3d 1109, 1117, 1118 n.5 (9th Cir. 2002) (holding that federal regulations contemplated coexistence with state regulations of aerial banner towing and therefore did not preempt local laws).

[26] Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983) (emphasis added).

[27] *Id.* at 203-04.

[28] *See* Gardbaum, *supra* note 13, at 771 (suggesting that federal preemption doctrine presents a much greater threat to the principles of state sovereignty and federalism than does the Supremacy Clause).

[29] *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."); *see also* discussion *supra* Part II.A.

[30] U.S. CONST. art. VI, cl. 2; *see also* discussion *supra* Part II.A.

granted to the federal government are reserved to the states by the Constitution.[31] This explicit guarantee of power to the states manifests the importance of states' rights as the bedrock of the nation.

Under the federalism doctrine, states are recognized as "independent sovereigns in [the] federal system."[32] As such, courts are generally hesitant to divest states of their police powers.[33] The Supreme Court has observed that "'[t]he exercise of federal supremacy is not lightly to be presumed," and therefore Congress "should manifest its intention [to preempt state and local laws] clearly."[34]

III. *CENTER* FACTS AND PROCEDURAL HISTORY

The Center for Bio-Ethical Reform ("CBR") is a California-based organization that engages in national anti-abortion campaigns.[35] Its advocacy arsenal includes flying 100-foot long aerial banners with images of aborted fetuses over densely populated areas.[36] Desiring to fly one such banner over Waikiki beach, CBR applied for and received a "Certificate of Authorization"

---

[31] U.S. CONST. amend. X; *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985), *superseded by statute*, Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150 §§ 2-3, 99 Stat. 787, 787-90 (codified as amended at 29 U.S.C. § 207(o)-(p) (1998)) ("The States unquestionably do '[retain] a significant measure of sovereign authority.' They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." (alteration in original) (internal citation omitted)).

[32] Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

[33] *See, e.g.*, City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 389 (1991) ("'In a dual system of government in which, under the Constitution, the states are sovereign, . . . an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.'" (quoting Parker v. Brown, 317 U.S. 341, 351 (1943))).

[34] New York State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 413 (1973) (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952)); *see also Medtronic*, 518 U.S. at 485.

[35] *See* Center for Bio-Ethical Reform, http://abortionno.org (last visited Feb. 23, 2007).

Center for Bio-Ethical Reform ("CBR") terms its program the "Reproductive Choice Campaign." CBR/Abortion Trucks, http://abortionno.org/RCC.html (last visited Mar. 17, 2007). CBR "operates on the principle that abortion represents an evil so inexpressible that words fail us when attempting to describe its horror." Center for Bio-Ethical Reform, http://www.abortionno.org/about_us.html (last visited Mar. 17, 2007).

[36] Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 455 F.3d 910, 915-16 (9th Cir.), *cert. denied*, ___ U.S. ___, 127 S. Ct. 730 (2006).

See CBR/Anti-Abortion Planes, http://www.abortionno.org/RCC/planes/plane_photos.html (last visited Mar. 17, 2007), for photographs of CBR's aerial banners. CBR has flown its aerial banners in California, Florida, Georgia, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, and Wisconsin. Appellant's Petition for Writ of Certiorari at 3, *Center*, 455 F.3d at 915-16 (No. 06-479).

from the Federal Aviation Administration ("FAA").[37] This waiver was necessary because federal law provided that "[n]o pilot of a civil aircraft may tow anything with that aircraft . . . except in accordance with the terms of a certificate of waiver issued by the [FAA]."[38] The certificate expressly permitted CBR to engage in "aerial advertisement banner towing" in Hawai'i.[39] Significantly, CBR's certificate of waiver contained a "note" stating that it "[did] not constitute a waiver of any State law or local ordinance."[40]

The local ordinance standing between CBR and Hawai'i's friendly skies was Revised Ordinances of Honolulu section 40-6.1, which prohibited the use of aircraft to display "any sign or advertising device" for "any purpose whatsoever."[41] On April 4, 2003, CBR filed suit against the City and County of Honolulu, seeking declaratory and injunctive relief to prevent enforcement of the ordinance.[42]

CBR challenged the constitutionality of Honolulu's ordinance. CBR contended that the ordinance was preempted by federal law and the FAA's certificate of waiver, and that it violated CBR's rights under the First and Fourteenth Amendments to the United States Constitution.[43] CBR's motion for preliminary injunction was denied by the United States District Court for the District of Hawai'i, and the Court of Appeals for the Ninth Circuit affirmed the district court's ruling.[44] Honolulu and CBR then filed cross-motions for summary judgment, and on November 9, 2004, the district court granted summary judgment in favor of Honolulu and held that the ordinance was not

---

[37] *Center*, 455 F.3d at 916.

[38] 14 C.F.R. § 91.311 (2006).

[39] *Center*, 455 F.3d at 916. CBR's certificate authorized it to fly banners in "the contiguous United States of America, Alaska, Hawaii, and Puerto Rico." *Id.*

[40] *Id.*

[41] Revised Ordinances of Honolulu section 40-6.1 (1996) provides in relevant part:

> Except as allowed under subsection (b), no person shall use any type of aircraft or other self-propelled or buoyant airborne object to display in any manner or for any purpose whatsoever any sign or advertising device. For the purpose of this section, a "sign or advertising device" includes, but is not limited to, a poster, banner, writing, picture, painting, light, model, display, emblem, notice, illustration, insignia, symbol or any other form of advertising sign or device.

HONOLULU, HAW., REV. ORDINANCES § 40-6.1(a) (1996), *available at* http://www.honolulu.gov/refs/roh/40.htm.

[42] *Center*, 455 F.3d at 916; Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 345 F. Supp. 2d 1123, 1126 (D. Haw. 2004), *aff'd*, Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 448 F.3d 1101 (9th Cir. 2006), *amended & superseded by*, *Center*, 455 F.3d 910.

[43] *Center*, 455 F.3d at 916.

[44] Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 84 Fed. Appx. 779, 779 (9th Cir. 2003) (mem.).

preempted and was not unconstitutional.[45] On July 6, 2006, the Ninth Circuit affirmed with an amended opinion.[46] On December 4, 2006, CBR's petition for certiorari was denied by the Supreme Court.[47]

When the Ninth Circuit, in an opinion written by Judge McKeown, upheld Honolulu's ordinance, the court concluded that the FAA had not exerted its authority to fully field preempt banner towing regulations.[48] The court ultimately readopted[49] the reasoning it articulated in *Skysign International, Inc. v. City & County of Honolulu*,[50] a controlling case involving a nearly identical preemption challenge to the same aerial advertising ordinance.[51] In *Skysign*, the court quickly dispelled the plaintiff's argument that Honolulu's ordinance was either conflict preempted or expressly preempted.[52] The preemption issue turned on whether the FAA had regulated banner tow operations to an extent that the court could infer intent to preempt state law.

To determine whether the FAA had field preempted banner tow operations, the *Skysign* court considered evidence from a range of sources.[53] The court evaluated opinion letters written by the FAA to Hawai'i lawmakers in favor of preemption, an amicus brief submitted by the United States opposing preemption, and language from the FAA Handbook and certificate of waiver, all in light of Supreme Court precedent.[54] The *Skysign* court held that Congress, through the FAA, did not exclusively occupy the entire field of banner tow regulation.[55] When making its decision, the *Skysign* court gave little deference to the FAA opinion letters and instead relied heavily on the

---

[45] *Ctr. for Bio-Ethical Reform, Inc.*, 345 F. Supp. 2d at 1139. The district court held that the FAA had not preempted local regulations on aerial banners and that the ordinance did not violate the First or Fourteenth Amendments. *Id.*

[46] *Center*, 455 F.3d at 915, 925. The Ninth Circuit denied CBR's request for a rehearing. *Id.* at 914-15.

[47] Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, ___ U.S. ___, 127 S. Ct. 730 (2006).

[48] *Center*, 455 F.3d at 917-18; *see* discussion *infra* Part IV.A.2.

[49] *Center*, 455 F.3d at 917-18.

[50] 276 F.3d 1109 (9th Cir. 2002).

[51] *Center*, 455 F.3d at 918 ("[W]e are bound by *Skysign*'s no preemption conclusion."). In *Skysign*, plaintiff aerial advertising company Skysign International was cited for violating Revised Ordinances of Honolulu section 21-3.90-2, subsections (b), (c), and (e), which prohibited, *inter alia*, portable signs, flashing signs, and signs not located on the property for which they were advertising. 276 F.3d at 1113. Skysign International claimed that both sections 21-3.90-2 and 40-6.1 were preempted by federal law. *Id.* at 1115-16.

[52] *Skysign*, 276 F.3d at 1116-17 (holding that there was no express preemption because the FAA and Congress had never declared banner towing preempted, and finding no conflict preemption because the certificate contemplated coexistence of federal and state laws).

[53] *See* discussion *infra* Part IV.A.2.

[54] *Skysign*, 276 F.3d at 1113, 1116-18.

[55] *Id.* at 1116.

United States' amicus brief and the FAA Handbook and certificate of waiver.[56] The language of the Handbook and certificate, and prior Supreme Court case law preempting only certain facets of airspace, indicated that "the FAA ha[d] not exerted its statutory authority to a degree that warrant[ed] a holding that it ha[d] preempted the entire field."[57] Despite the *Skysign* court's firm conclusion against preemption, however, the evidence available to the court to make this judgment was by no means clear. When the issue resurfaced in *Center*, the Ninth Circuit did not depart from its reasoning in *Skysign*, but the court did note that "[t]he FAA's position on banner towing is difficult to divine."[58]

IV. *CENTER* DEMONSTRATES THAT THE FIELD PREEMPTION DOCTRINE SHOULD BE ABANDONED

A. *The Field Preemption Doctrine Is Impractical in Application*

The field preemption doctrine does not provide practical guidance to judges and state and local lawmakers attempting to determine the balance of federal and state authority. This problem is demonstrated in *Center* by the amount of guesswork required to ascertain if federal law preempted Honolulu's aerial banner ordinance. A survey of other aviation cases illustrates that field preemption has facilitated the proliferation of inconsistent preemption holdings and has compromised the uniformity of airspace regulation.

1. Field preemption is a poorly-defined doctrine

The confusion surrounding field preemption is rooted in the doctrine itself. At a fundamental level, field preemption is vague and imprecise. Field preemption exists when there is a dominant federal presence, or when there is a pervasive scheme of federal regulation that precludes state laws on the same subject.[59] But, what does "dominant" mean? What does "pervasive" mean? What is the "same subject"?

Criteria developed by the courts for finding preemption are little more than general guideposts, and the Supreme Court has recognized that there is no "infallible constitutional test" or "distinctly marked formula"[60] for finding field

---

[56] *Id.* at 1118 n.6 (contrasting the Colorado Supreme Court's heavy reliance on a FAA opinion letter in Banner Adver., Inc. v. City of Boulder, 868 P.2d 1077 (Colo. 1994)).

[57] *Id.* at 1116; *see* discussion *infra* Part IV.A.2.

[58] Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 455 F.3d 910, 918 n.2 (9th Cir.), *cert. denied*, ___ U.S. ___, 127 S. Ct. 730 (2006).

[59] *E.g.*, Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983).

[60] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

preemption. Historically, criteria that have been determinative for field preemption include: whether the federal government has traditionally played a unique or prominent role in the area,[61] whether allowing local regulations would interfere with necessary comprehensive national regulation,[62] and whether there is an important or traditional state interest in the regulation.[63] Over time, even these general principles have become more flexible as judges increasingly infer legislative intent on a case-by-case basis rather than determine the need for national uniformity.[64]

Even when a court has determined that Congress has selectively regulated one aspect of a field, it is difficult to divine how far the federal government reaches into related areas.[65] This is exemplified in the unpredictable collection of case holdings dealing with preemption in federal aviation law. Courts have found certain facets of local airspace regulation to be preempted by the FAA, including: airplane noise regulations,[66] parachute jumping regulations,[67] curfews and limitations on landing patterns,[68] certain load-lifting regulations,[69]

---

[61] *E.g.*, *id.* at 66 (noting that regulation of aliens is preempted because the federal government has exclusive authority over international relations).

[62] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[63] For example, regulation and zoning restrictions on advertising have traditionally been within the states' domains. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 551-52 (2001); Skysign Int'l, Inc. v. City & County of Honolulu, 276 F.3d 1109, 1115 (9th Cir. 2002) (stating that "advertising is an area traditionally subject to regulation under the states' police power" (citation omitted)).

Courts have also found that aesthetics are an important state interest. *E.g.*, Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance esthetic values."); One World One Family Now v. City & County of Honolulu, 76 F.3d 1009, 1013 (9th Cir. 1996) (holding that "[c]ities have a substantial interest in protecting the aesthetic appearance of their communities").

[64] Field & Davis, *supra* note 15, at 324-25.

[65] *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230-31 (1947). It is a "perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed." *Id.* (citations omitted).

[66] *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (holding that federal law preempted the field of airplane noise but not finding that it preempted airspace generally); Minnesota Pub. Lobby v. Metro. Airports Comm'n, 520 N.W.2d 388 (Minn. 1994) (finding preemption of state agency's maximum noise levels); *see also* Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918 (2000 & Supp. 2006); Luis G. Zambrano, Comment, *Balancing the Rights of Landowners with the Needs of Airports: The Continuing Battle over Noise*, 66 J. AIR L. & COM. 445, 463-64 (2000).

[67] Blue Sky Entm't, Inc. v. Town of Gardiner, 711 F. Supp. 678, 694 (N.D.N.Y. 1989) (holding that local ordinance regulating parachute jumping was preempted, and deferring to the FAA's own interpretation that its authority was pervasive as evidenced in 14 C.F.R. § 105.1).

[68] Pirolo v. City of Clearwater, 711 F.2d 1006, 1009 (11th Cir. 1983) (preempting air traffic pattern ordinance); Harrison v. Schwartz, 572 A.2d 528, 535 (Md. 1990) (holding that local zoning restrictions were preempted by the FAA's occupation of the field because they impinged

regulation of radio broadcast towers,[70] airline fares and fees,[71] and airplane safety generally.[72] Courts have stopped short of declaring all airspace regulation preempted.[73]

Courts have found other facets of airspace to be within a state's power to regulate, including the decision to build an airport,[74] aerial advertising,[75] certain facets of airline safety,[76] plane landing sites,[77] land or water use zoning,[78] and

---

on aircraft operation); Gary Leasing, Inc. v. Town Bd. of Pendleton, 485 N.Y.S.2d 693, 694-95 (Sup. Ct. 1985) (preempting curfews and restrictions on the number of planes that could be used at an airport because they were attempts to control air navigation, an area under the exclusive authority of the FAA).

[69] Command Helicopters, Inc. v. City of Chicago, 691 F. Supp. 1148, 1151 (N.D. Ill. 1988) (finding field and conflict preemption of a local ordinance because it more stringently regulated helicopter load-lifting operations than did the FAA's regulations).

[70] Big Stone Broad., Inc. v. Lindbloom, 161 F. Supp. 2d 1009, 1019-20 (D.S.D. 2001) (relying in part on an FAA amicus brief when holding that the Federal Aviation Act preempted states' authority to veto an FAA "no hazard" determination in connection with radio broadcast towers).

[71] Morales v. Trans World Airlines Inc., 504 U.S. 374, 384 (1992) (holding that federal statute explicitly preempted any state law related to rates, routes or services of any air carrier).

[72] Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 367 (3d Cir. 1999) (holding that "federal law establishes the applicable standards of care in the field of air safety").

[73] *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633-34, 638 (1973) (holding that airplane noise regulations were preempted, but noting that "each case turns on the peculiarities and special features of the federal regulatory scheme in question"); Monroe v. Cessna Aircraft Co., 417 F. Supp. 2d 824, 829, 836 (E.D. Tex. 2006) (concluding that the Federal Aviation Act and the FAA's broadly written regulations do not evidence an intent by Congress to preempt either the field of aviation safety or state defective design schemes).

[74] Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 197 (D.C. Cir. 1991) (relying on an FAA statement that "[i]n the present system of federalism, the FAA does not determine where to build and develop civilian airports, as an owner/operator"); Wright v. County of Winnebago, 391 N.E.2d 772, 777-78 (Ill. App. Ct. 1979) (holding that FAA does not preempt local zoning authority from determining whether or not to have an airport); Lucas v. People's Counsel for Baltimore County, 807 A.2d 1176, 1199-1200 (Md. Ct. Spec. App. 2002) (refraining from preempting land use regulations).

[75] Skysign Int'l, Inc. v. City & County of Honolulu, 276 F.3d 1109, 1116-18 (9th Cir. 2002).

[76] *See Monroe*, 417 F. Supp. 2d at 829, 836 (holding that there was insufficient evidence of congressional intent to preempt entire field of aviation safety).

[77] Gustafson v. City of Lake Angelus, 76 F.3d 778, 788-90 (6th Cir. 1996) (holding that FAA designation of plane landing sites is not pervasively regulated by federal law, and instead is a matter for local control because different states have different needs).

[78] Blue Sky Entm't, Inc. v. Town of Gardiner, 711 F. Supp. 678, 683 (N.D.N.Y. 1989) (relying on FAA statement that "[t]o the extent the ordinance regulates land use in the Town of Gardiner, it is not preempted by federal regulation of aviation"); *In re* Commercial Airfield, 752 A.2d 13, 15 (Vt. 2000) (explaining that the federal government "has not preempted land use issues").

breach of contract claims.[79]

Thus, there is no clear rule articulated by the collection of airspace case holdings. Many courts that found preemption for one facet of airspace relied on an explicit statute or regulation; some courts held that because the FAA clearly preempted one area, the whole field was preempted, while others declined to extend preemption until a similarly clear action was taken by the agency; some courts have noted the differing needs of states to restrict preemption, while others have cited the need for national uniformity.[80] By this piecemeal approach, the field preemption doctrine renders preemption untenable to judges and lawmakers.

2. Center *exemplifies the failings of field preemption*

As demonstrated by *Center* and the collection of airspace case law, it is difficult for judges and state and local lawmakers to determine if, when, and to what extent a state or city is free to regulate a certain facet of airspace. To determine if there is a pervasive scheme of federal regulation in the field of banner towing, the court may look to the FAA's own regulations in order to infer whether the agency intends to allow concurrent state and local regulation. But, even this has proven to be unreliable.

Internal agency confusion abounds in *Center*. As early as 1987, more than sixteen years prior to the district court's 2004 decision for Honolulu in *Center*, the City and County of Honolulu had inquired whether the FAA believed that Honolulu's proposed amendments to its aerial banner regulations would be preempted by federal law.[81] Even this direct inquiry to the FAA did not provide a reliable answer. In a 1987 opinion letter (which was repeated by a similar letter in 1996), regional counsel for the FAA indicated that "any local attempt to restrict the way in which aircraft operate within that airspace would be preempted."[82] The FAA's counsel justified this opinion based on the agency's "statutory grant of exclusive control of navigable airspace" and the "comprehensive and pervasive scheme of federal regulation."[83] Additionally,

---

[79] *See* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228-29 (1995) (finding that a claim for breach of contract was not preempted because the action was based on the airline's own promises and not duties imposed by the state government).

[80] *See supra* notes 66-78 and accompanying text.

[81] Appellants' Excerpts of Record at 81-82, Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 455 F.3d 910 (9th Cir. 2006) (No. 04-17496) [hereinafter Appellants' Excerpts R.] (letter from DeWitte T. Lawson, Regional Counsel, U.S. Dep't of Transp., to Dennis O'Connor, Chair, Honolulu City Council (June 29, 1987)).

[82] Skysign Int'l, Inc. v. City & County of Honolulu, 276 F.3d 1109, 1113 (9th Cir. 2002). In 1996, the FAA reiterated the 1987 opinion in a letter to a member of the Honolulu City Council. *Id.*

[83] Appellants' Excerpts R. *supra* note 81, at 82.

he warned that "an effort to preserve the aesthetic appearance and 'atmosphere beauty' of [Honolulu], through an aerial advertising ordinance would likely not withstand a constitutional court challenge."[84]

When the ordinance came under legal attack for the first time in *Skysign*, rather than endorsing the FAA opinion letters, the United States government submitted an amicus brief controverting the FAA's conclusions.[85] The Government wrote in favor of upholding the Honolulu ordinance, and its brief contained statements that "appear[ed] to contemplate permissible, non-preempted state regulation of banner tow operations."[86] The Government explained that one reason to preserve Honolulu's ordinance was the "unique and isolated geographic setting involved, where similar laws of other jurisdictions are unlikely to apply to the activity at issue."[87] Thus, the court and the City and County of Honolulu received FAA opinion letters indicating that the FAA preempted Honolulu's ordinance and a brief submitted by the United States stating that the FAA did not preempt Honolulu's ordinance.[88] Both used Hawai'i's geographic isolation and the city's aesthetic interests to support their contrary positions.[89]

Four years later, the Ninth Circuit revisited the preemption issue in *Center*. Thoroughly confusing the matter was a 2003 letter from FAA Deputy Chief Counsel James Whitlow to United States Senator Daniel Inouye that contained internally conflicting statements about preemption.[90] When Senator Inouye inquired whether proposed regulatory changes would preempt Honolulu's ordinance, the FAA's response indicated that the agency itself was confused.[91] Whitlow's letter began with a seemingly unequivocal conclusion that, "[t]he FAA does not interpret these changes . . . to preempt [Honolulu's

---

[84] *Id.* (citations omitted).

[85] *Skysign*, 276 F.3d at 1117.

[86] *Id. See generally* Brief for the United States as *Amicus Curiae* Supporting Affirmance, Skysign Int'l, Inc. v. City & County of Honolulu, 276 F.3d 1109 (9th Cir. 2002) (No. 99-15974) [hereinafter United States as *Amicus Curiae*].

The *Skysign* Amicus Brief was later used to support the City and County of Honolulu's argument in *Center*. Defendants-Appellees' Supplemental Excerpts of Records at 119-68, *Center*, 455 F.3d 910 (No. 04-17496) [hereinafter Appellees' Supplemental Excerpts R.].

[87] United States as *Amicus Curiae*, *supra* note 86, at 154.

[88] *See supra* notes 83-87 and accompanying text.

[89] *See* discussion *supra* notes 81-87 and accompanying text. On balance, the *Skysign* court chose to give greater weight to the amicus brief and upheld Honolulu's ordinance. 276 F.3d at 1117. The Ninth Circuit concluded that the FAA opinion letters were merely "a tentative conclusion on a proposed ordinance." *Id.*

[90] *See Center*, 455 F.3d at 918 n.2.

[91] Senator Inouye's letter referred to Notice N 8700.16, which proposed to delete the portions of the FAA Handbook that disclaimed preemption of state and local regulations. Appellants' Excerpts R., *supra* note 81, at 17-19. The Notice expired by its own terms on October 7, 2003 and was not considered by the Ninth Circuit. *Center*, 455 F.3d at 918.

ordinance],"[92] because Honolulu's ordinance did not "dictate[] or interfere[] with . . . the FAA's plenary authority and responsibility to ensure the safe and efficient use of the nation's airspace."[93] Curiously, two paragraphs later, Whitlow belies his initial assertion, maintaining that "[s]tate or local regulations that have the effect of totally banning . . . banner towing would also be preempted since such regulations have the practical effect of barring aircraft operations that have been authorized . . . by the FAA."[94] Since Honolulu's ordinance completely proscribed aerial banner towing, the FAA's stance on the preemption question is unascertainable.

Further, analysis of the FAA Handbook and certificate of waiver language does not reveal congressional or agency intent because there is contradictory wording within both documents. Chapter 45, section 91.311 of the FAA's General Aviation Operations Inspector's Handbook pertains to the issuance of certificates of waiver for banner towing.[95] The stated objective of these regulations is to "determine if an applicant is eligible for issuance of a [waiver] for banner tow operations."[96] The default FAA rule regarding aerial banners is that they are not allowed.[97]

---

[92] Letter from James Whitlow, Deputy Chief Counsel, U.S. Dep't of Trans., to Senator Daniel Inouye, U.S. Senate (July 31, 2003), *in* Appellees' Supplemental Excerpts R., *supra* note 86, at 117. Whitlow's letter continues in relevant part:

> We realize that [Honolulu] is attempting to address advertising, a traditional area of local regulation, rather than regulate the navigable airspace. One important factor is that Honolulu has enacted comprehensive land use regulations, directed to many forms of signage and advertising. For example, in addition to [the Ordinance], Honolulu regulates signage generally under sec. 21-7.30 and prohibits vehicular advertising under sec. 41-14.2. We would have a concern if a State or local government singled out aerial advertising for prohibition while permitting similar ground-based advertising since this could be interpreted as an attempt to control the navigable airspace.
>
> [The Ordinance] would not be considered to be preempted because it would not constitute a State or local law that dictates or interferes with aircraft equipment, or impacts in any other way the FAA's plenary authority and responsibility to ensure the safe and efficient use of the nation's airspace.

Id.

[93] *Id.*

[94] *Id.* at 118.

[95] The revised FAA Handbook can be found in its entirety on the FAA website. Federal Aviation Administration, General Aviation Operations Inspector's Handbook, Order 8700.1, http://www.faa.gov/library/manuals/examiners_inspectors/8700/ (follow "Table of Contents by Chapter" hyperlink; then follow "Chapter 45" hyperlink) (last visited Jan. 21, 2007). Chapter 45 is available in the document filed with the court of appeals. Appellants' Excerpts R., *supra* note 81, at 250-65.

[96] Appellants' Excerpts R., *supra* note 81, at 250.

[97] "No pilot of a civil aircraft may tow anything with that aircraft . . . except in accordance with the terms of a certificate of waiver issued by the Administrator." Special Flight Operations, 14 C.F.R. § 91.311 (2006). To issue a waiver, the FAA need only find "that the

In *Skysign*, Skysign International's FAA certificate of waiver contained a clause indicating: "The operator, by exercising the privilege of this waiver, understands all local laws and ordinances relating to aerial signs, and accepts responsibility for all actions and consequences associated with such operations."[98] CBR's certificate contained a similar note stating that it "does not constitute a waiver of any State law or local ordinance."[99] Furthermore, a provision in the Handbook provided that the operator was responsible for "acquiring knowledge of State and local ordinances that may prohibit or restrict banner tow operations."[100]

In 2004, however, the FAA amended the Handbook. The updated section 5(B)(2)(c) states that the "note" language is "boilerplate," has "no legal effect," "should be disregarded by inspectors," and is simply a "disclaimer of responsibility by the FAA for the enforcement of State or local ordinances."[101] This addition might be interpreted to relieve CBR of complying with Honolulu's ordinance. Other language, however, conveys an intention to preserve Honolulu's regulatory authority. The Handbook retains a section 5(B)(2) provision that requires operators to acquire knowledge of local laws "that may prohibit or restrict banner tow operations."[102] Read together, the revised Handbook is another example of the FAA's unascertainable position on banner tow operations. As with the letter to Senator Inouye, the FAA fails to consistently indicate its preemption position.

The incongruence within the FAA shows that basing preemption on assumed intent is fallacious. In actuality, the FAA was unsure of, or poorly articulated, its own position on the preemption question. Even though a court may look to an administrative agency's interpretation of regulations for

---

proposed operation can be safely conducted under the terms of that certificate of waiver." Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 345 F. Supp. 2d 1123, 1128 (D. Haw. 2004) (citation omitted).

[98] Skysign Int'l, Inc. v. City & County of Honolulu, 276 F.3d 1109, 1113 (9th Cir. 2002).

[99] Ctr. for Bio-Ethical Reform v. City & County of Honolulu, 455 F.3d 910, 918 (9th Cir.), *cert. denied*, ___ U.S. ___, 127 S. Ct. 730 (2006).

[100] Federal Aviation Administration, General Aviation Operations Inspector's Handbook, Order 8700.1, at 45-3, http://www.faa.gov/library/manuals/examiners_inspectors/8700/ (follow "Table of Contents by Chapter" hyperlink; then follow "Chapter 45" hyperlink) (last visited Jan. 21, 2007). *See also Skysign*, 276 F.3d at 1118.

[101] Appellants' Excerpts R., *supra* note 81, at 252. Additionally, section 5(B)(2)(b) directs an inspector to not insert any language relating to the application of state or local law into the "Special Provisions" section of the certificate. *Id.*

[102] *Id.*

guidance,[103] a judge will find no help if the agency has never contemplated whether or not its regulations preempt state law.

The conflicting FAA statements, the United States amicus brief, and the confusing Handbook language were not the manifest clear intention the Supreme Court was contemplating for field preemption.[104] Therefore, the *Skysign* and *Center* courts correctly determined that there was no field preemption. But, not all courts have reached this conclusion.

3. Case comparison: field preemption yields inconsistent holdings

The result in *Center* is contrary to that of two state cases, which further demonstrates the unreliability of the field preemption doctrine. In *Banner Advertising, Inc. v. City of Boulder*,[105] the Supreme Court of Colorado held that the City of Boulder's aerial banner law was preempted by federal law.[106] In that case, Banner Advertising was charged with violating a municipal code that prohibited commercial signs towed by aircraft.[107] Similar to the situation in *Center*, Banner Advertising obtained a FAA certificate of waiver to tow banners, and a clause stated that the certificate did not waive state or local ordinances "'not otherwise preempted by the United States Constitution or Federal Statute or Regulation.'"[108]

Banner Advertising submitted an opinion letter written by the FAA's chief counsel stating that the Boulder ordinance "'represent[ed] an impermissible attempt to regulate in an area preempted by the Federal Government.'"[109] Despite acknowledging that the FAA letter was not binding, the Colorado court gave the agency's opinion more deference than did either the *Skysign* or *Center* courts.[110] Furthermore, the Colorado court was not persuaded that the

---

[103] *See, e.g.*, Barnhart v. Walton, 535 U.S. 212, 217 (2002) ("Courts grant an agency's interpretation of its own regulations considerable legal leeway." (citing Auer v. Robbins, 519 U.S. 452, 461 (1997))); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (stating that determination of the scope of an agency's own authority is entitled to great deference by the courts). *But see Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

[104] *See* New York State Dep't. of Soc. Servs. v. Dublino, 413 U.S. 405, 413 (1973).

[105] 868 P.2d 1077 (Colo. 1994).

[106] *Id.* at 1079 (finding that Banner Advertising violated Boulder Revised Code Section 10-11-3).

[107] *Id.* at 1078.

[108] *Id.* at 1079 (citation omitted in original).

[109] *Id.* (citation omitted in original).

[110] *Id.* at 1083 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)). The *Skysign* court distinguished its holding from *Banner* in an off-hand manner, and disregarded the *Banner* court's decision to place greater weight on the opinion letters. 267 F.3d 1109, 1117 n.6 (9th Cir. 2002).

"local ordinance" clause left room for a state ban on aerial banners, and instead interpreted this language to merely state the "fundamental principle of the doctrine of federalism" that the federal government could not exempt an individual from a "proper state or local law."[111] Contrary to the Ninth Circuit's conclusion in both *Skysign* and *Center*, the Colorado court concluded that the federal government had occupied the entire field of navigable airspace regulation because of its "pervasive" role in airspace management.[112]

In *People v. Santoriello*,[113] a boat operator was charged with violating a municipal law that prohibited towing banners from an aircraft,[114] despite operating under the authority of a FAA certificate of waiver that expressly allowing the proscribed activity.[115] The New York City Criminal Court held that the ordinance was unconstitutional, because it "entirely prohibit[ed], not regulat[ed], what the Federal government has authorized."[116] The court relied on Supreme Court precedent for the proposition that, since it was a physical impossibility to comply simultaneously with both the FAA certificate and the city code, the code was preempted.[117]

Collectively, *Center*, *Skysign*, *Banner*, and *Santoriello* underscore the capriciousness of field preemption as a doctrine. All three courts analyzed the same federal regulations and similar fact patterns, but resolved the cases differently. This is troublesome because a finding of field preemption should, in theory, apply equally across the country. The inconsistent conclusions illustrate a fundamental deficiency with the field preemption doctrine itself.

B. Field Preemption Undermines Federalism Principles

Not only has the field preemption doctrine proven to be unworkable, but its expansive reach over state government interests undermines federalism. First, the doctrine grants the federal government overbroad powers. As long as field preemption is a viable doctrine, a state may lose its rights to exercise police powers entirely, even when it is possible for a person to abide by both state and federal laws concurrently.[118] This can lead to over-inclusive findings of preemption and the reduction of states' authority in areas never actually

---

[111] *Banner*, 868 P.2d at 1082 (citation omitted).

[112] *Id.* at 1081 (citing Nw. Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944)); *see* discussion *supra* Part III.

[113] 702 N.Y.S.2d 539 (Crim. Ct. 1999). At issue in *Santoriello* was the 1985 Administrative Code of the City of New York Section 10-126(d)(1). *Id.* at 540.

[114] *Id.* at 540.

[115] *Id.* at 541.

[116] *Id.* at 544.

[117] *Id.* at 542 (citing Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963)); Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941).

[118] *See* discussion *supra* Part II.A.

envisioned by Congress to be preempted.[119] This does not sit comfortably with federalism principles.

The Supreme Court has expressed concern about the doctrinal inconsistencies between field preemption and modern federalism principles. The Court cautioned that courts should be reluctant to infer field preemption merely because there is a strong federal agency presence in the subject area:

> 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. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.[120]

Second, the doctrine grants too much discretionary power to the courts. The very idea that judges may make an *inference of preemption* does not comport with federalism. The "doctrine of field preemption is inconsistent with modern federalism and its presumption that states retain concurrent powers."[121]

Broad statutory language may be appropriate in some instances, but it is not appropriate when the states' very rights to exercise their police powers are at risk. A judge's analysis is impeded by the unavoidable reality that the decision may come down to interpretation of clumsily written, unofficial, ad hoc opinion letters by federal agencies. The markedly different holdings of *Banner*, *Santoriello*, and *Center* are not inconceivable considering the vagueness of the field preemption doctrine. *Banner* and *Santoriello* are examples of the collateral damage that can occur to peripheral areas of law: courts extending the scope of state law preempted further than had ever been intended by Congress or the FAA.

Finally, state and local legislative bodies are put in the precarious positions of questioning their lawmaking authority in fields merely tangentially regulated by the federal government. Such uncertainty stifles short- and long-term city planning. Accordingly, state legislators are left with preemption outcomes with the predictability of tarot cards.

---

[119] *See* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 644 (1973) (Rehnquist, J., dissenting) (arguing that Congress, in enacting legislation, had not been concerned with preempting air traffic noise regulations).

[120] Hillsborough County v. Automated Med. Labs. Inc., 471 U.S. 707, 717 (1985) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

[121] Gardbaum, *supra* note 13, at 812 (relying on Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230-31 (1947)).

C. Field Preemption Can Be Abandoned Without Undermining the Preemption Doctrine

Once the field preemption doctrine is eliminated, the remaining doctrines of express preemption and conflict preemption will adequately maintain the balance of power between the federal and state governments. In other words, field preemption is a superfluous complication to the analysis. Express and conflict preemption have the capacity to stand alone.

Express preemption eliminates most of the problems stemming from the uncertainty of field preemption. Under express preemption, state legislators can be assured that if there is no explicit congressional statement, no judge will "infer" congressional intent to deprive the state of its authority.[122] If the federal government wishes to flex its preemptive muscles, then why not trump state laws outright? Such a transparent display of intention will put states on notice, and if the federal government is truly acting within its constitutional authority to preempt states laws in a certain field, then it will not be accountable to the states.[123] If it is determined that the federal government did not have the authority to preempt states' rights outright, then the federalism doctrine will be upheld, and states' rights preserved, when a court finds that the federal government has overstepped the constitutional limitations on its power.

Requiring Congress and federal agencies to affirmatively determine preemption each time a law is passed may seem too burdensome. This is not so. Performing this task encourages Congress to seriously contemplate the significant repercussions of its actions before depriving the states of their sovereign and independent powers.[124] Indeed, in *Center*, a finding of preemption would have been dispositive to the question of whether Honolulu could regulate its own airspace.

---

[122] It is important to note that an express preemption clause does not, by itself, foreclose an implied conflict preemption analysis for areas of law peripheral to the field that has been explicitly preempted. Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000).

[123] Congress has already demonstrated its ability to explicitly preempt state power in FAA matters. *E.g.*, Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) (1997 & Supp. 2006).

[124] Invariably, even when preemptive intent is clear, judicial interpretation is necessary to ascertain how broadly or narrowly to construe the goal of the federal statute. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 540-41 (2001). In these instances, a court may examine the surrounding "statutory framework," including legislative history and other matters, to ascertain the operative preemptive scope of a given statute. Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1996) (citing Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111-12 (1992) (Kennedy, J., concurring in judgment and concurring in part)).

Although peripheral issues may still be litigated, express preemption does not detract from the great advantage to be had from the otherwise definitiveness of an explicit statement by Congress pinpointing which particular aspect of a field is preempted.

Conflict preemption will resolve any problems arising from vague federal statutes and regulations. In the event that Congress makes no explicit determination, the doctrine of conflict preemption settles the state-federal tension in favor of the state government unless coexistence of the laws is a physical impossibility. Conflict preemption is preferable to field preemption because the reach of the doctrine is more limited and state legislators can be assured that their laws will be valid unless they actually conflict with federal laws.

V. CONCLUSION

When the *Center* court held there was no field preemption of Honolulu's aerial banner ordinance, the judicial system struck the appropriate balance between state and federal authority. In doing so, the court allowed the City and County of Honolulu to exercise control over its own airspace and determine whether Hawai'i residents and Waikiki visitors should have to endure enormous banners pulled across their view of the sunset. Although in theory field preemption would preempt a state law only when congressional and agency intent is clear, *Center* and the other aviation cases[125] show that, in practice, judges, state legislators, and city officials are left to make their best guess. Courts are forced to navigate through convoluted, disparate clues towards intent. Judges cannot clairvoyantly divine the intent of federal lawmakers. The result—however noble the inquiry—is necessarily a finding of perceived, rather than actual, congressional intent.

Express and conflict preemption do justice to the federalism doctrine embodied in our Constitution. Field preemption, and its tolerance for inferences of intent, does away with state power too carelessly. It is this doctrine, not states' rights, that should be abandoned.

Kimberly K. Asano & Kamaile A. Nichols[126]

---

[125] Skysign Int'l, Inc. v. City & County of Honolulu, 276 F.3d 1109, 1113 (9th Cir. 2002); Banner Adver., Inc. v. City of Boulder, 868 P.2d 1077 (Colo. 1994); State v. Santoriello, 702 N.Y.S.2d 539 (Crim. Ct. 1999).

[126] J.D. Candidates 2008, William S. Richardson School of Law, University of Hawai'i at Manoa. We would like to express our gratitude to Professor Jon M. Van Dyke for his generous assistance. We would also like to thank our families for their continued encouragement.