Preemption Revisited: Title VII and State Tort Liability After International Union v. Johnson Controls

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PREEMPTION REVISITED: TITLE VII AND STATE TORT LIABILITY AFTER INTERNATIONAL UNION v. JOHNSON CONTROLS

In their efforts to "umpire the relations between the states and the federal government," courts have wrestled with the doctrine of preemption since Gibbons v. Ogden. Preemption deci-


2 The doctrine of preemption is based on the supremacy of the Federal Constitution and its laws as indicated in the Supremacy Clause. See U.S. Const. art. VI, cl. 2. At its most basic level, the doctrine requires federal law to override state law wherever the federal law has "occupied the field" or the laws conflict. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 9.1, at 311-12 (4th ed. 1991). Preemption decisions are questions of statutory interpretation requiring the court to determine the congressional intent regarding preemption. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-25, at 480-81 (2d ed. 1988); see also infra notes 19-26 and accompanying text (discussing pre-emption standards).


3 22 U.S. (9 Wheat.) 1 (1824). Gibbons is the landmark case in which the Supreme Court invalidated a New York statute that granted an individual a monopoly to use navigable waters within the State. Id. at 221. The Court found that this law contradicted the power granted to Congress to regulate commerce and to issue licenses to those individuals they determine are permitted to navigate the waters. Id. In denying enforcement of the conflicting state law, the Court maintained that the framers' intent was for the Constitution and its law to prevail. Id. "The nullity of any act, inconsistent with the constitution, is
sions involve the resolution of conflicts between federal and state law. Although general principles have been developed by the courts to provide a basis for preemption determinations, these standards are difficult to apply and increasingly require a case-by-case analysis. Employment discrimination under Title VII of the

produced by the declaration, that the constitution is the supreme law.” Id. at 210-211.

Scholars have noted the import of Gibbons. See, e.g., Tribe, supra note 2, § 6-25, at 479 (Gibbons recognized hierarchy of Federal System); Hirsch, supra note 1, at 515 (noting Gibbons was first significant case in which the Court ordered relations between state and federal government). The Court in Gibbons believed it was merely declaring what were clearly established principles. Gibbons, 22 U.S. at 222. “The conclusion . . . depends on a chain of principles . . . thought nearly self-evident, [but] the magnitude of the question . . . demanded that we should assume nothing.” Id. The issue of preemption, however, has remained a significant one; its continuing importance probably would have surprised the framers of the Constitution. Hirsch, supra note 1, at 515.

See Hirsch, supra note 1, at 515; see also Ronald D. Rotunda et al., 1 Treatise on Constitutional Law: Substance and Procedure § 12.1, at 623 (1986) (introduction to federal preemption).

See Rotunda et al., supra, note 4, § 12.1, at 624. Commonly cited standards for determining preemption include: whether the state statute “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” Hines v. Davidowitz, 312 U.S. 52, 67 (1941), and whether both regulations can be enforced without impairing the federal superintendence of the field,” Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). Other tests indicate that state law will only be preempted when the congressional intent is unmistakably clear, id., or the “scheme of the federal regulation [is] so pervasive . . . that Congress left no room for the [state] to supplement it,” Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). However, when the field allegedly preempted is one which has traditionally been occupied by the states, the powers of the state will not be disturbed unless it is the clear and manifest purpose of Congress. See Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

These standards are categorized as broad or specific. See Hirsch, supra note 1, at 522. If a test is specific to a particular field, courts are likely to exaggerate fine details between state and federal laws to find (or not find) a conflict. Id. Similarly, if a standard is broad enough to apply to all preemption decisions, it will likely be of little value in a specific case.

See Rotunda et al., supra note 4, § 12.1, at 624. “There is no simplistic constitutional standard for defining preemption parameters.” Id. Most preemption questions fall somewhere in the middle of the clear standards. Hirsch, supra note 1, at 520. Justice Black aptly remarked that “[n]one of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.” Hines, 312 U.S. at 67. One commentator has noted that there are essentially three obstacles which prevent preemption decisions from being easily resolved: (i) the relationship between state and federal law ranges from conflict to irrelevancy, (ii) decisions are made on a case-by-case basis, and (iii) a wide diversity of laws is involved. Hirsch, supra note 1, at 553. Other scholars have attributed the difficulty to the “diversity and complexity” of preemption questions. Nowak & Rotunda, supra note 2, § 9.1, at 312.

See Nowak & Rotunda, supra note 2, § 9.1, at 312. Preemption decisions are particularly fact sensitive because two sets of laws and policies are being weighed against each other. Hirsch, supra note 1, at 521. Each case presents unique problems of statutory interpretation, and rationales in one area are not easily applied to another area. See Daryl R.
Civil Rights Act of 19648 ("Title VII") is one area in which the preemption question has not been easily resolved.9

In *International Union v. Johnson Controls, Inc.*,10 the Supreme Court recently held that a corporate fetal protection policy11 that excluded fertile women from working in a battery factory, where they would be exposed to high levels of lead, was a violation of Title VII's prohibition against sex discrimination.12 However,
the Court did not determine whether state tort actions brought by children injured *in utero*, as a result of their working mothers' exposure to hazardous substances, would be preempted by Title VII. While the *Johnson Controls* decision makes it "clear that sex discrimination is not a legal solution to workplace hazards," the Court left the preemption question unanswered in stating that "[w]hen it is impossible for an employer to comply with both state [tort law] and federal [Title VII] requirements, ... federal law preempts that of the States." The extent of this preemption remains unclear and until the question is resolved, workers, employers, and courts will continue to struggle with the issue of liability for fetal injuries to children of women exposed to hazardous work areas during pregnancy.

This Note will analyze the preemption of state tort claims by Title VII where an employer is prohibited from implementing a fetal protection policy in a hazardous work site and conclude that there should be no preemption of state tort actions against the employer. Part One will discuss the doctrine of preemption, focusing on the methods and standards employed by courts in preemption decisions. Part Two will examine the purposes of Title VII and state tort law according to these preemption guidelines and conclude that there is no conflict warranting preemption. Finally, Part Three will advance the policies supporting this conclusion and offer alternative solutions to workplace injury liability.

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the courts than ... for ... employers to decide whether a woman's reproductive role is more important to herself ... than her economic role.

*Id.* at 1210.

13 See *Johnson Controls*, 111 S. Ct. at 1209. "Because Johnson Controls has not argued that it faces any costs from tort liability ... the preemption question is not before us." *Id.*

14 See *Johnson Controls*, 111 S. Ct. at 1209. "Because Johnson Controls has not argued that it faces any costs from tort liability ... the preemption question is not before us." *Id.*

15 See *Johnson Controls*, 111 S. Ct. at 1209. The Court inferred that if state tort law was found to inhibit Title VII's objectives, it would be preempted and noted that the concurrence's preemption concerns were remote. *Id.* at 1208. In his concurrence, Justice White noted the import of the issue of preemption of state tort liability. *See id.* at 1211 (White, J., concurring). He stated that "[w]arnings ... will not preclude claims by injured children because the general rule is that parents cannot waive causes of action on behalf of their children, and the parents' negligence will not be imputed to the children." *Id.* Indeed, the concurrence admonished the Court for dismissing the preemption question and indicated, as this note will argue, that tort actions would probably not be preempted. *Id.*

16 See *Johnson Controls*, 111 S. Ct. at 1211 (White, J., concurring). "[I]t is far from clear that compliance with Title VII will pre-empt state tort liability." *Id.*
I. Preemption Doctrine Generally

The doctrine of preemption is rooted in the Supremacy Clause of the Federal Constitution. Basically, it holds that where a state law conflicts with a federal law, the federal law prevails. Congressional intent to preempt an area of state law may be express or implied. Where the intent is implied, there are essentially two grounds on which state law may be preempted. First, the federal law may “occupy the field,” thus precluding state legislation in that area, whether or not a conflict exists. Discerning congressional intent to occupy an area is a question of statutory interpretation based on an examination of the pervasiveness of the federal statute. Second, a state law will be preempted if it conflicts with a federal law or interferes with its purpose. In this respect, the state law will be invalidated where it is “impossible to comply”
with both state and federal requirements or where the state law frustrates the objective of the federal law.

Through the process of "statutory interpretation," courts are able to shape preemption policy. Despite this power modern courts have been reluctant to invalidate state statutes in the absence of a clear legislative intent. When the federal statute is ambiguous, courts weigh numerous factors and require exacting evidence before finding legislative intent to preempt state law.

25 See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). Where compliance with both regulations is impossible, the court is not required to examine congressional intent prior to a determination that federal law will prevail. Id. at 142-43.

26 See Hines, 312 U.S. at 67. The court's role is to review the two sets of legislation and determine whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id.


28 See Note, Preemption as a Preferential Ground: A New Canon of Construction, 12 STAN. L. REV. 208, 224 (1959). "Preemption can never be the product of statutory construction alone since the Court and only the Court can make the final judgment of incompatibility required by the supremacy clause." Id. at 224; see also Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 531-33 (1947) (recognizing that judges have broad area of "free judicial movement" in construing statutes).

The expansive power of the court to decide preemption questions and frame preemption policy is not, however, without its critics. See Tribe, supra note 2, § 6-29, at 510 ("[P]reemption analysis . . . should be a matter of statutory construction rather than free-form judicial policymaking."); Hirsch, supra note 2, at 558 (proposing new analytical framework to encourage court to establish legitimate limits on policymaking role).

29 NOWAK & ROTUNDA, supra note 2, § 9.4, at 314-15; see also Ronald D. Rotunda, Sheathing the Sword of Federal Preemption, in 5 CONST. COMMENTARY 311, 312 (1988) (noting trend is to move away from preemption).

30 See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). To conclude that federal regulations preempt state regulatory powers, Congress' intent must be unmistakable or the nature of the subject matter must permit no other conclusion. Id.; see also New York Dep't of Social Servs v. Dublino, 413 U.S. 405, 413 (1973) (requiring a "clear manifestation of intent" to preempt).

31 See, e.g., Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). In Rice, the Court was asked to determine whether the United States Warehouse Act superseded the authority of the Illinois Commerce Commission to regulate public grain and other warehouses. Id. at 222. To reach its conclusion, the opinion articulated a number of factors to be considered, including: whether Congress had legislated in an area traditionally reserved for the states; whether traditional state police powers would be preempted in the absence of a clear and obvious purpose of Congress; whether the federal scheme was so pervasive as to offer no opportunity for supplemental state legislation; whether federal interest was domi-
example, if the area of regulation is one traditionally reserved for
the states, courts may be inclined to conclude there is no preemp-
tion.32 By contrast, if the subject matter is one which necessarily
requires national uniformity, courts will likely favor preemption.33
In sum, the process involves a kind of “judicial ad hoc balancing”
of competing interests,34 resulting in preemption decisions in which
outcomes are policy driven and fact specific.35

II. Analysis of Title VII’s Preemptive Effect

Each preemption question “presents unique problems of con-
gressional intent and statutory construction; pre-emption ration-
ales in one area do not translate easily to another.”36 The ques-
tion presented by Johnson Controls is whether Congress intended
that Title VII, as amended by the Pregnancy Discrimination Act
(“PDA”), should preempt state tort actions brought by female em-
ployees’ offspring injured as a result of an employer’s hazardous
worksite.37

Although the broad scope of Title VII may imply an intent to
preempt state tort actions," Congress expressly disavowed any broad preemptive effect by enacting specific "savings" clauses\(^3\) which expressly validate state laws to the extent they do not conflict with Title VII's purpose and effect.\(^4\) Therefore, Title VII will preempt state tort actions only if it is impossible for the employer to comport simultaneously with Title VII's requirements and state tort liability standards\(^4\) or if the objectives of the two laws conflict.\(^4\) Resolution of this preemption question involves an analysis of Title VII and state tort law and their underlying objectives to determine if a conflict exists.\(^4\)

A. Title VII—History and Purpose

Title VII of the Civil Rights Act of 1964\(^4\) was enacted to create equal employment opportunities by removing barriers that have historically favored one class of employees over another.\(^4\) For women, this meant an end to protectionist legislation which had

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\(^3\) See supra notes 20-23 and accompanying text.

\(^4\) See supra notes 20-23 and accompanying text.

\(^5\) See NOWAK & ROTUNDA supra note 2, § 9.1, at 311. "Savings clauses" are a way in which Congress can expressly preserve concurrent state legislation. Id. In contrast, preemption clauses indicate Congressional intent to invalidate state laws in the same area. Id. However, one commentator has cautioned against literal application of savings or preemption clauses because Congress cannot foresee all possible situations that will arise. See Hirsch, supra note 1, at 540.


The specific “savings clause” in Title VII provides in pertinent part:

Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.


\(^7\) See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) ("[F]ederal exclusion of state law is inescapable . . . where compliance with both federal and state regulations is a physical impossibility.").


\(^9\) See NOWAK & ROTUNDA, supra note 2, § 9.1, at 312; see also Hirsch, supra note 1, at 534. Only after a full examination of the purpose and intent of each law can one proceed with any analysis of the relation between the two laws according to preemption doctrine. Id.


been upheld in the early 1900s based on a societal interest in preserving the traditional role of women as mothers. However, the Supreme Court's narrow interpretation of Title VII in General Electric Co. v. Gilbert, reaffirming the view of women as marginal workers, prompted Congress to enact the PDA in 1978. The PDA expressly defines discrimination based on pregnancy as sex discrimination. Its objective is to "guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life." In the late 1970s, however, many companies, like Johnson Controls, instituted restrictive fetal protection policies which excluded women from positions involving excessive exposure to hazardous substances which posed a risk to unborn children. Courts again regressed to the protectionist era by upholding these exclusionary policies under the guise of protecting future genera-
The Supreme Court's decision in Johnson Controls was a tremendous vindication of the rights of working women which reaffirmed the goals of Title VII and the PDA by permitting women to have their jobs and families, too.

B. State Tort Law—Goals and Purpose

Tort law is based on a state's concern for compensating victims of injury. Where an employer's negligence in failing to adequately maintain a safe work environment or failure to properly warn employees of known hazards results in injury to an individual, the employer will be liable in tort. Moreover, most states permit a child injured in utero to assert an action against the party responsible for the injury.

Traditionally the domain of the states, tort law has been accorded great deference by the courts in the absence of a clear congressional intent to preempt. In English v. General Electric Co., the court noted that tort law is based on a state's concern for compensating victims of injury. The historical reduction of women's role in life to a single dimension—vessel and nurturer for the next generation—resulted in the sacrifice of tremendous human diversity of talent, predilection, and personal aspiration. To the extent restrictions are imposed today upon the normal, routine choices about women's work and non-work lifestyles, such historical limitations upon women's lives are reimposed.

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56 See Becker, supra note 11, at 1229. Although based primarily on a concern for unborn children, fetal protection policies have the same detrimental effects as traditional sex protective laws. Id. at 1220-21. Such policies reinforce the view of women as reproductive entities, limit women's employment opportunities and intensify the view that women are not capable of making decisions regarding their future. Id. at 1231-35; see also Wendy W. Williams, Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII, 69 GEO. L.J. 641, 653 (1981) (discussing stereotyped role of women).

57 See Johnson Controls, 111 S. Ct. at 1210; see also The Supreme Court, 1990 Term—Leading Cases, 105 HARV. L. REV. 177, 379-89 (1991) (discussing import of Johnson Controls decision) [hereinafter Leading Cases]. The Johnson Controls decision was an important step in halting gender segregation in the work force. Id.

58 See Cecil A. Wright, Introduction to the Law of Torts, 8 CAMBRIDGE L.J. 238, 238 (1944) ("purpose of the law of torts is to . . . afford compensation for injuries sustained by one person as the result of the conduct of another"); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 6-7 (5th ed. 1984) (noting law of torts consists of allocation of losses).

59 Keeton et al., supra note 57, at 510-11.


the Supreme Court exemplified this deference in holding that a state tort claim for intentional infliction of emotional distress was not preempted by the whistleblower provision of the Energy Reorganization Act ("ERA"). The Court reasoned that the tort action, unlike the ERA, was not based on a concern for safety, but on providing a remedy for persons who suffer intentional injury, and thus was not within the field Congress intended to preempt. Similarly, the compensatory aim of tort law differs from the anti-discrimination goals of Title VII, further supporting the conclusion that preemption is unwarranted.

C. Conflict or Interference

Title VII expressly precludes preemption of state law "other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under [Title VII]." The Supreme Court recently stated in Cipollone v. Liggett Group, Inc. that when Congress expressly addresses the preemptive effect of a statute, a court's task is to "fairly but—in light of the strong presumption against pre-emption—narrowly..."

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62 Id. at 2281. In English, a laboratory technician at a nuclear power plant, operated by respondent, repeatedly complained to management about violations of nuclear safety standards at the facility, including “failure of her co-workers to clean up radioactive spills.” Id. at 2273. When she received no response, she deliberately failed to clean contaminants from the work site, outlined the contaminated areas with tape, and brought the spill to her supervisor's attention when the work site was still not cleaned several days later. Id. Petitioner was later fired for knowing failure to clean her contaminated work area. Id. After petitioner's initial suit charging retaliatory discharge in violation of the ERA “whistle blower” provision was dismissed on procedural grounds, id. at 2274, petitioner commenced a diversity action, stating a claim under North Carolina law for intentional infliction of emotional distress alleging severe depression resulting from respondent's “extreme and outrageous” conduct. id.
63 Id. at 2278 (noting effect of state tort law on decisions concerning radiological safety not sufficiently direct or substantial to place claim in preempted field).
64 See id. at 2278; see also Silkwood, 464 U.S. at 256. Given the results in Silkwood and English, it would seem inconsistent to deem state tort law within the field preempted by Title VII since the relation and effect is even more remote than the effect of the state law on the federal nuclear safety regulations implicated in Silkwood and federal whistle-blower laws implicated in English.
65 42 U.S.C. § 2000e-7 (1988). The complete provision states: Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.
66 Id. at 2275.
construe the precise language of [the pre-emption clause] and . . . look to each . . . common law claim[] to determine if it is in fact preempted." Under this narrow reading, the language of Title VII's "savings clause" arguably resolves the preemption issue presented by Johnson Controls in that state tort law does not require an employer to engage in unlawful employment practices.

The import of Title VII's anti-preemption provision was examined in California Federal Savings & Loan Association v. Guerra, in which the Supreme Court held that a California statute requiring employers to provide pregnancy leave and rein...

67 Id. at 2621. In Cipollone, an action was brought against several cigarette manufacturers by a smoker who had contracted lung cancer. Id. at 2613. After the plaintiff's death, the estate of the decedent continued the action asserting several grounds for recovery including strict liability, negligence and intentional tort. Id. at 2614. The defendants argued that the federal statute, which required the defendants to put a warning label on the cigarette packages, preempted any common law tort liability. Id. The Court rejected the argument except as to the duty to warn claim. Id. at 2625.

68 See California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 295-96 (1987) (Scalia, J., concurring). Applying the plain meaning of the statute in California Federal, Justice Scalia admonished the Court for analyzing the purpose and effect of the PDA when all that was necessary was an application of the language of the provision. Id. at 296. "No more is needed to decide this case." Id. For a similar view, see Tribe, supra note 2, § 6-26, at 482, n.8. Tribe argues that an examination of underlying objectives is improper where the language of such an anti-preemption provision purports to resolve the question. Id. Tribe and Scalia approve of the result in California Federal, but not the approach followed by the Court. Id.

69 See California Fed., 479 U.S. at 296 (Scalia, J., concurring) (citations omitted). The law at issue "does not remotely purport to require or permit any refusal to accord federally mandated equal treatment to others similarly situated." Id. at 296; see also Tribe, supra note 2, §§ 6-26, at 482-83 n.8 (discussing scope of anti-preemption provision). The provision restricts its own preemptive effect. Id. at 483 n.8. It only preempts those state laws that require or permit violations of Title VII. Id.


71 Cal. Gov't Code Ann. § 12945(b)(2) (West 1980). The statute provides in relevant part:

It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:

. . .

(b) For an employer to refuse to allow a female employee affected by pregnancy, childbirth or related medical conditions . . .

. . .

(2) To take a leave on account of pregnancy for a reasonable period of time; provided, the period shall not exceed four months. . . . Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions.

Id.
statement was not preempted by Title VII. The Court examined the purpose and history of the PDA and concluded that there was no conflict warranting preemption. The Court reasoned that the state law supplemented the federal objectives and expanded the protection of the PDA. Furthermore, the Court determined that the California statute did not require any act that would be unlawful under the PDA. Similarly, it is suggested that there is no conflict between Title VII and state tort law because it is not physically or legally impossible for an employer like Johnson Controls to comply simultaneously with Title VII's mandates and state tort liability standards. Moreover, if "the employer fully informs the woman of the risk, and ... has not acted negligently, the basis for holding an employer liable seems remote at best." It is thus

72 California Fed., 479 U.S. at 292. The Court reasoned that a finding of preemption was not warranted because the state statute did not have a purpose inconsistent with Title VII nor was it physically impossible to comply with both the state statute and Title VII. Id.

73 See id. at 283-84.

74 Id.

75 Id. at 288-89. In fact, the Court recognized that the two statutes "share a common goal." Id. at 288. Consistent with the goal of the PDA, the California statute sought to achieve equal employment opportunities for pregnant women by requiring their reinstatement after pregnancy leave. Id. at 289. The objects did not conflict and, further, compliance with both was not an impossibility. Id. at 290-91.

76 Id. at 283-84. The California statute did not require employers to treat pregnant employees better than other disabled employees, only to treat them similarly. Id. at 291. The PDA was intended to be a minimum level of protection. Id. at 285. Congress was aware, when it enacted the PDA, that states like California had statutes which provided for greater protection for pregnant employees and it conveyed no "clear and manifest" purpose to preempt such statutes. Id. at 287-88. But see id. at 297-304 (White, J. dissenting) ("Congress' silence in its consideration of ... preferential treatment of pregnant workers cannot be fairly interpreted to abrogate the plain ... language of the statute.").

77 See id. at 283 n.14 (citing legislative history of PDA). "[T]itle VII does not pre-empt state laws which would not require violating [T]itle VII." Id.

78 See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963). There must be a demonstrated "impossibility of dual compliance." Id. at 143. An employer can comply with Title VII's equal opportunity requirements and provide a safe work environment, thus precluding the finding of "impossibility" needed to preempt state tort law. See id.; see also CTS Corp. v. Dynamics Corp., 481 U.S. 69, 78 (1987) (refusing to find Indiana corporation law regulating takeovers preempted by Williams Act). "[I]t is entirely possible for entities to comply with both the Williams Act and the Indiana Act." Id. at 79. The Court is not likely to find preemption where dual compliance is less than physically impossible. See Rotunda, supra note 29, at 317.

79 Johnson Controls, 111 S. Ct. at 1208; see also Becker, supra note 11, at 1246. "[T]he lack of firm evidence linking maternal occupational exposure to fetal injury ... make[s] ... causation ... difficult to prove." Id. Further, where the employer has complied with government standards, it will be difficult to prove gross negligence. Id.; see also Johnson Controls, 111 S. Ct. at 1208 (noting that liability will be difficult to establish where employer fully informs woman of known risks and does not act negligently). Indeed, employers' concerns
entirely possible to promote equal employment opportunities for women and at the same time create a safe work environment.\(^8\)

Lastly, state tort law will be preempted if it interferes with the purpose and execution of the objectives of Title VII.\(^8\) Although potential tort liability will increase the costs of employer compliance with Title VII,\(^2\) this additional burden does not directly inhibit the goals of Title VII.\(^8\) Furthermore, it is proposed that any tension created by tort law with Title VII's equal employment goals is insufficient to preempt state law.\(^8\) In summary, applica-

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for increased costs resulting from tort liability appear to be unfounded. Id. “There has yet to be a single award regarding prenatal injuries from maternal exposure to toxins at the workplace.” Hamlet,\(^*\) supra note 11, at 1126. One commentator has suggested that employers' meritless concerns for tort liability may be a pretext for the implementation of exclusionary policies. See Williams,\(^*\) supra note 55, at 646 n.25.

\(^8\) See, e.g., Becker,\(^*\) supra note 11, at 1246 n.121 (citing example of company maintaining a safe and nondiscriminatory work environment). Dov Chemical is illustrative of a corporation which has no female exclusionary policies and has succeeded in maintaining safe fetal exposure levels for all chemicals. See id. (citations omitted). Dov indicated that it would be reluctant to use a chemical which had “no safe exposure level for fetal toxicity.” Id. 0

\(^*\) See supra notes 24-26 and accompanying text.

\(^*\) See Johnson Controls, 111 S. Ct. at 1209. Congress imposed the requirements of Title VII upon employers despite the social costs involved. Id.; see also Leading Cases,\(^*\) supra note 56, at 387 (discussing transitional costs associated with creating integrated workplace).

\(^\star\) See CTS Corp. v. Dynamics Corp., 481 U.S. 69, 86 (1987); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143 (1963). In CTS Corp., the Supreme Court upheld an Indiana Law that severely inhibited successful takeovers of Indiana corporations by conditioning takeovers on an approval of a majority of certain shareholders. Id. at 73-74. Respondents claimed the state law was preempted by the Williams Act whose purpose was to impose disclosure requirements on potential buyers and establish rules regulating tender offers. Id. at 79. The Court recognized that the law would delay takeovers, but reasoned that this delay was insufficient to warrant its preemption by the Williams Act. Id. at 86.

Florida Lime involved a California statute that imposed a strict maturity standard on avocados before allowing distribution in the state in contrast to federal marketing requirements which required a lower maturity standard. Id. at 137-38. Despite an apparent conflict in the two standards, the Court held there was no interference with the federal purpose of maintaining minimum standards of quality, nor was dual compliance impossible. Id. at 143. The Court concluded that the California statute was not preempted. Id. at 152.

\(^\star\) See supra notes 32 & 83 (noting cases exemplifying tension between state and federal law); see also Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984) (recognizing that “there is tension between” state and federal law). The punitive damages claim allowed in Silkwood was premised on tort law's concern of compensating victims of injury. Id. at 255. This law was found not to be preempted, even where the purpose of the federal statute was primarily one of safety. Id. at 256. The Court narrowed the objectives of the federal law in order that state tort action would not satisfy the “actual conflict” requirement for preemption. Id. at 251-52; see also Texas,\(^*\) supra note 2, at 487 (arguing no preemption where “most that can be said is that the direction in which state law pushes someone's actions is in general tension with broad . . . goals” of federal law); Rotunda,\(^*\) supra note 29, at 318 (“ob-
tion of preemption principles and the Court’s reluctance to invalidate state statutes indicate that state tort law should not be preempted by Title VII.  

### III. POLICY CONSIDERATIONS AND ALTERNATIVE SOLUTIONS

Policy considerations are often considered in preemption decisions despite many commentators’ admonitions. First, respect for federalism, which favors the upholding of state law, is an important concern. The Supreme Court’s reluctance to find state laws preempted connotes a policy to require Congress to expressly indicate its intent to restrain state power to regulate.

Second, potential tort liability encourages employers to main-

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88 See supra notes 29-31 and accompanying text.
89 See, e.g., California Fed., 464 U.S. at 284-85 (examining the policy objectives of Title VII); Exxon v. Governor of Maryland, 437 U.S. 117, 133 (1978) (recognizing larger policy objectives of Sherman Act as fostering economic liberty).
67 See TRIBE, supra note 2, § 6-29, at 510. Some courts approach the preemption decision as “essentially one of policy” rather than statutory construction. Id., § 6-29, at 511. The court’s task is one of interpreting, not lawmaking. Id.; see also Hirsch, supra note 1, at 556-58 (courts do not acknowledge discretion to define preemption policy); supra note 28.
89 See Cipollone v. Ligget Group, Inc., 112 S.Ct. 2608, 2618 (1992); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Courts should be concerned not to upset the “federal-state balance” by finding preemption where it is not warranted. Id.; see also Rotunda, supra note 29, at 321 (discussing reasons for Supreme Court’s reluctance to infer preemption). The Court’s recent decisions refusing to find preemption are “out of a respect for federalism.” Id. This indicates a deference to Congress to make vital decisions affecting the power of the states. Id.; TRIBE, supra note 2, § 6-26, at 481. Reluctance to infer preemption is consistent with the courts’ decision in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (holding that the legislative power should restrict state sovereignty).
90 See Cipollone v. Liggett Group, Inc., 112 S. Ct 2608 (1992) (deferring to Congress to clarify its intent concerning preemptive effect of statutes); see also supra notes 37-42 and accompanying text.
91 See Garcia, 469 U.S. at 556-57 (Congress’ power under Commerce Clause must respect role of states in federal system); see also Rotunda, supra note 29, at 321 (“more democratic branches of the central government should be preferred to make the primary decisions limiting the power of the states”). Since it is the intent of Congress that guides preemption decisions, Congress should use exacting language to convey its desired effect. Id. If the courts interfere with Congress’ purpose, Congress is free to reverse. Id.; see ROTUNDA ET AL., supra note 4, § 12.1, at 624.
tain safer work environments. Companies will be compelled to clean up work sites, improve inspection and testing, and educate employees about safety. Conversely, allowing employers to escape liability is a disincentive resulting in work environments that are safe only for men. In fact, before the Court invalidated fetal protection policies, they were implemented only in male dominated industries, not in “pink collar” areas. Surely Congress did not intend to achieve equal employment opportunity at the expense of workplace safety.

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92 See Buss, supra note 11, at 591. “[E]mployers will have to improve working conditions . . . in order to avoid tort liability.” Id. Buss favors a “protective impulse” that serves safety interests of all employees. Id. “[T]he system of incentives created by the courts will strongly influence the quality of . . . [working] conditions in years to come.” Id. at 590. This Note asserts that refusing to preempt employers' state tort liability provides such an incentive to create safer workplaces.

93 Id.

94 Id. at 592-93 (urging enforcement of monitoring and testing requirements under Toxic Substances Control Act).

95 See Becker, supra note 11, at 1262. Employers are required to give all employees information about reproductive hazards. See id. at 1241 n.105 (citations omitted).

96 See Buss, supra note 11, at 596. Courts should encourage long term solutions to fetal hazards. Id. Excluding employers from tort liability is a short-term solution in the same way that fetal protection policies were. Id.

97 See id. But see Gary Z. Nothstein & Jeffrey P. Ayres, Sex-Based Considerations of Differentiation in the Workplace: Exploring the Biomedical Interface Between OSHA and Title VII, 26 Vill. L. Rev. 239, 243-48 (1980-81). Nothstein and Ayres discuss the technical effects of toxins on the reproductive organs of each sex. Id. at 244-45. However, they conclude that policies based on an increased susceptibility of women are unsupported. Id. at 246. Several commentators have noted the lack of complete evidence regarding the health effects of various chemicals. See, e.g., Buss, supra note 11, at 579-80 (noting data concerning reproductive risks of toxins is limited); Williams, supra note 55, at 660-62 (discussing problems involved with reliance on existing evidence). Many studies focus only on the effects on women, which results in the implementation of unfair exclusionary policies. See Becker, supra note 11, at 1235 (arguing fetal protection policies have been implemented without substantiating evidence); see also Williams, supra note 55, at 660 (proposing that employers base exclusionary policies on inaccurate stereotype that women are exclusively subject to transmitting birth defects).

98 See Becker, supra note 11, at 1238-40. In industries that consist primarily of women workers (“pink collar” industries), exclusionary policies have never been implemented despite the danger of fetal injury. Id. This is so primarily because of the need for female workers in certain cases. Id. at 1238-39; see also Hamlet, supra note 11, at 1125 (women are only excluded when they are considered “marginal members of the workforce”).

99 See Linda G. Howard, Hazardous Substances in the Workplace: Implications for the Employment Rights of Women, 129 U. Pa. L. Rev. 798, 854-55 (1981). Resolution of the problem of workplace hazards involves a balance of competing interests that will favor health and equal employment opportunity. Id. at 854. “[C]ourts should require employers to reduce the reproductive hazards . . . rather than allow them to circumvent the national policy of equality of employment opportunities.” Id. at 854-55; see also Becker, supra note 11, at 1246 (arguing solution to potential tort liability not exclusion of women from
Third, although "potential tort liability is an added cost of employing women," eradicating gender discrimination is an important national goal. No sound reason exists to require women and their offspring to bear the cost of promoting equal employment opportunities.

The decision not to preempt state law may seem unduly burdensome for employers who, for example, engage in unreasonably dangerous activities that may subject them to strict liability. However, through legislation, there are several potential alternatives to protect these employers. For example, diversification of the cost of fetal injuries among all employers by restructuring the workers' compensation system to cover these injuries would result in an increased cost to the employer but offer a practical long-term solution. Additionally, the Occupational Safety and Health Act

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100 Becker, supra note 11, at 1247; see also Johnson Controls, 111 S. Ct. at 1209 (acknowledging that employers may be burdened with additional costs).

101 See, e.g., Johnson Controls, 111 S. Ct. at 1203 (recognizing import of PDA in prohibiting sex discrimination); Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983) (recognizing that Congress unambiguously prohibited pregnancy discrimination as sex discrimination).

102 Newport News, 462 U.S. at 678. Employers can pass on the additional cost of fetal injury liability by increasing the costs of their products. Id., see Hamlet, supra note 11, at 1130 n.100 (citations omitted).

103 See Hamlet, supra note 11, at 1146-47. In certain instances, it is technologically impossible or too costly to eliminate all hazardous substances from workplace. Id. However, employers will have to establish that there are no available alternatives to exclusion. See Williams, supra note 55, at 698-99; see also Hannah A. Furnish, Prenatal Exposure to Fataly Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964, 66 Iowa L. Rev. 63, 117 (1980) (proposing that employer has burden to show no reasonable alternatives exist). It seems clear, at least, that where the employer is negligent in some manner, he will be liable for fetal injuries even where he was required to offer equal employment opportunities to fertile women. See Johnson Controls, 111 S. Ct. at 1208.

104 See Buss, supra note 11, at 591. Courts are not as qualified as the legislature or an agency to regulate industries, conduct research and evaluate scientific evidence to formulate policies. Id. Employers are not equipped to make decisions regarding acceptable fetal protection policies because employer concerns are largely self-serving, despite their apparent concern for future generations. See Johnson Controls, 111 S. Ct. at 1210. Congress is in the best position to resolve the conflicts because it is a neutral party. See Becker, supra note 11, at 1264; see also Furnish, supra note 103, at 116 (proposing that legislative solution is best alternative). Further, women would be able to apply political pressure, to have their needs addressed. See Becker, supra note 11, at 1264.

105 See infra notes 106-12 and accompanying text.

106 See Becker, supra note 11, at 1246. Modification of the worker's compensation system is a fair solution that could preclude tort actions against employers and extend existing rate schedules to include compensation for fetal injuries. Id.
“(OSHA”) and the Toxic Substances Control Act (“TSCA”) are intended to promote the maintenance of safe workplaces. However, because these statutes are presently ineffective and poorly enforced, Congress would need to overhaul them or create a new statutory framework to replace them. The aforementioned statutory alternatives would promote equal opportunity and safer work environments without shifting the cost entirely to women and their families. Until such revised legislation is implemented, courts should allow the institution of state tort actions against employers.

109 See Hamlet, supra note 11, at 1144. The purpose of both of these Acts was to establish safe work environment standards. Id. OSHA is directed towards maintaining acceptable standards for safe workplaces. See Furnish, supra note 103, at 67. It authorizes the establishment of feasible standards with a view to preventing worker health problems due to exposure to certain hazards. See 29 U.S.C. § 655(b)(5) (1988). OSHA also has a broad provision which requires employers to “furnish to . . . employees . . . a place of employment . . . free from recognized hazards that . . . cause death or serious physical harm.” Id. § 654(a)(1) (1988). See generally Nothstein & Ayres, supra note 97, at 264-99 (discussing sex-based considerations under OSHA framework).
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The TSCA is primarily concerned with the regulation of the use of toxic substances. See Buss, supra note 11, at 593. It requires employer testing of chemicals used or produced in the work site and approval of the Environmental Protection Agency (“EPA”) who is charged with implementation and enforcement of regulations concerning the use of these chemicals. See 15 U.S.C. § 4(b)(3)(b) (1976); id. § 2603(b)(3) & (c) (1988). See generally Buss, supra note 11, at 592-95 (discussing the framework of TSCA and appropriateness as regulatory legislation in area of fetal hazards).
110 See Hamlet, supra note 11, at 1144-45. “Both OSHA and the TSCA have met with limited success in effectively regulating toxic exposure for workers.” Id. OSHA appears hopelessly inadequate to deal with fetal protection issues. Id. at 1145. Furthermore, case law has diluted any import of OSHA by establishing minimal standards and not forcing economically infeasible standards upon employers. See Nothstein and Ayres, supra note 97, at 274-80.
111 See Hamlet, supra note 11, at 1144. “Ideally, OSHA and the EPA (as empowered by the TSCA) should pass tougher regulations and vigorously enforce both new and existing standards.” Id. at 1147.
112 See id. at 1146-50 (proposing new statute). One suggestion is a proposed statutory scheme that would, among other things, protect the rights of workers to make informed decisions. Id. Another alternative is the creation of a damage fund in which industries would contribute to a pool that would pay injured parties. Id. at 1127. A third alternative urges the creation of a compensation system that would give women excluded from certain jobs priority in other non-hazardous positions, disability coverage during pregnancy in the event they have to give up their position, and reinstatement after pregnancy. See Becker, supra note 11, at 1265-66.
113 See Becker, supra note 11, at 1266. The costs of fetal safety should not be shouldered entirely by women. Id. at 1246. This alternative legislation would not result in “an advantage for men and a disadvantage for women.” Id. at 1266.
"The division of [American] government, while simple in theory, frequently presents practical complexities which . . . are difficult to harmonize." The difficult preemption question presented by Johnson Controls will have resounding implications for the labor world. Courts should adhere to established preemption doctrine and hesitate to invalidate state law in the absence of a real conflict. In considering policy, courts should strive for a decision that will achieve the goals of both Title VII and state tort law. Preemption of state tort law is not the solution to workplace hazards. Refusing to preempt state tort liability and leaving to Congress the task of finding a permanent solution will promote a safer and more equitable workplace.

Leta L. Fishman

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114 People v. Daly, 105 N.E. 1048, 1050 (N.Y. 1914).