Everything Is Presumed in Texas

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I. INTRODUCTION

The presumption against preemption is a well-known canon of statutory interpretation. The presumption arises from the structure of federalism—a judicial warning sign that cautions against crossing the inherently blurry line separating federal and state sovereignty. Though the courts have recognized the presumption for several decades, the Supreme Court’s irregular application of the presumption precludes any reliable means by which to predict how the courts will treat the presumption in the future.

Wyeth v. Levine suggested a new resolve to apply a more straightforward presumption against preemption analysis, but the Court’s preemption cases since then have muddied the presumption’s application. Several cases make no mention of the presumption; others only acknowledge its restraints. Further complicating matters, the PLIVA, Inc. v. Mensing majority similarly omitted any reference to the doctrine, instead premising part of its holding on a novel construction of the Supremacy Clause—the same clause that the Court has traditionally cited to justify the presumption. The PLIVA dissenter, perplexed by this omission, ridiculed the majority’s failure to invoke the standard preemption doctrine. Though PLIVA arguably rejected the presumption, the courts that have since been confronted with a preemption issue have appeared to ignore the Court’s opinion.

2 See Robert N. Weiner, The Height of Presumption: Preemption and the Role of Courts, 32 Hamline L. Rev. 727, 727 (2009) (“Few aspects of Supreme Court jurisprudence are as contradictory and convoluted as the so-called ‘presumption against preemption.’”).
4 See, e.g., Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131 (2011); Mut. Pharm. Co. v. Bartlett, 133 S. Ct. 2466, 2483 & n.1 (2013) (Sotomayor and Ginsburg, J.J., dissenting) (noting that the presumption against preemption was “conspicuously absent” from the majority’s opinion). In Arizona v. United States, the Court noted that the “historic police powers of the States” are “assumed” to be valid, but it did not appear to apply this assumption to any of the provisions that were challenged in that case. Arizona v. United States, 132 S. Ct. 2492, 2501 (2012).
5 See, e.g., Hillman v. Maretta, 133 S. Ct. 1943 (2013) (recognizing the limits of the presumption within the family law context); Tarrant Reg’l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2132 n.10 (2013) (refusing to invoke the presumption when Congress merely approves a compact that was drafted and approved by the states).
7 Id. at 2586–89 (Sotomayor, J., dissenting).

Since PLIVA, the Court has appeared to reinstate the presumption. In Inter Tribal, for example, the Court acknowledged that the presumption still applies to situations where Congress is intruding on an area of traditional state concern. See Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2256-57 (2013). But see id. at 2260-61 (Kennedy, J., concurring) (suggesting that the Court should either apply the presumption “across the board,” or not apply it all).
Despite the Court’s recent failures to apply the presumption, it seems safe to say that the presumption persists in preemption jurisprudence.\(^9\) When the presumption is properly applied, a court requires a party urging preemption to show that Congress expressed a “clear and manifest” intent to preempt state law.\(^10\) Absent such a showing, state law will control.\(^11\) Federal laws can preempt state laws\(^12\) in several different fashions, though they are generally divided into two categories: (1) express preemption, and (2) implied preemption.\(^13\) Implied preemption cases, in turn, are divided into two categories as well: (1) field preemption, and (2) conflict preemption.\(^14\) Finally, courts have found conflict preemption either when it is impossible for a party to comply with both federal and state law or when the state law stands as an obstacle to achieving the federal goal.\(^15\)

Express preemption arises when Congress includes a preemption clause within a piece of legislation.\(^16\) That provision will express Congress’s intent to preempt state laws that are in variance with the federal law or regulation.\(^17\) Express preemption analysis, therefore, involves determining the scope of Congress’s intended preemption.\(^18\) Unlike express preemption, which contains Congress’s preemptive command within the text of the statute, implied preemption requires courts to look to the statute’s “structure and purpose.”\(^19\) Determining if a state law is impliedly preempted thus requires a court to assess both what the federal and state laws prescribe, as well as the goals that Congress intended to achieve in creating the federal law.\(^20\)

As this Article will reveal, the Fifth Circuit has traditionally been loath to apply the presumption against preemption in most cases. Texas courts, on the other hand, have consistently employed a particularly strong application of the presumption to all types of preemption cases. This inconsistency between these two jurisdictions creates an incentive for forum shopping.\(^21\) Generally, the courts rely on a defendant’s ability to remove a case to the federal courts to counteract the plaintiff’s exclusive power to decide the forum.\(^22\) This ability,

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\(^9\) See supra note 8 (citing post-PLIVA decisions that have continued to apply the presumption when presented with a preemption issue).


\(^11\) Id.

\(^12\) Both federal statutes and federal regulations can preempt state law. Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta, 458 U.S. 141, 154 (1982). Unless otherwise indicated, this Article will use the term “laws” to refer to both statutes and regulations. Similarly, federal law can preempt both state law and state tort suits. Cuesta, 458 U.S. at 146; Geier v. Am. Honda Motor Co., 529 U.S. 861, 886 (2000). Again, unless otherwise indicated, this Article will use the term “laws” to refer to both categories.

\(^13\) MCI Sales & Serv., Inc. v. Hinton, 329 S.W.3d 475, 482 (Tex. 2010). Federal law displaces conflicting state laws as a result of the Supremacy Clause. Id. at 481 (citing U.S. CONST. art. VI, cl. 2).

\(^14\) Id. at 482.

\(^15\) Id.

\(^16\) Cuesta, 458 U.S. at 152.

\(^17\) Id.

\(^18\) Id.

\(^19\) Id.

\(^20\) Id. at 614.

\(^21\) See Ferens v. John Deere Co., 494 U.S. 516, 527 (1990) (“An opportunity for forum shopping exists whenever a party has a choice of forums that will apply different laws.”).

However, is not available to a defendant within the context of preemption cases. As such, there is a heightened need for the two jurisdictions to maintain similar jurisprudence regarding this issue.

This Article will discuss the ways in which Texas courts apply a stronger version of the presumption against preemption than does the United States Fifth Circuit Court of Appeals. Part II will analyze the various situations in which the competing jurisdictions invoke the presumption. Part III will briefly discuss the way in which each jurisdiction uses the presumption to tilt the inquiry toward a finding of preemption. That Part will also analyze the presumption’s effect when the two jurisdictions are asked to determine whether federal regulatory inaction can impliedly preempt conflicting state laws.

II. INVOKING THE PREASSUMPTION AGAINST PREEMPTION

The two jurisdictions treat the presumption differently from the very beginning. Texas courts invoke the presumption reflexively, applying it anytime a party asserts preemption. The doctrine, in this context, acts as a baseline check against federal overreach—a wall guarding the state’s concurrent sovereignty. If the state constitutionally exercised its police powers, the Texas courts will presume that federal objectives do not encroach on the state’s autonomy. But the state also employs a heightened standard when the challenged law falls within the state’s traditional regulatory role. When premised on this power, the courts seem to interpret the federal law warily, restricting the federal authority to only those matters that the federal law expressly brings within its control.

The Fifth Circuit, on the other hand, has a more measured approach. It only applies the constitutional assumption when the “purpose and effect” of the state statute implicates a matter traditionally regulated by the states. This process involves a two-step inquiry. First, the circuit determines whether the regulation falls within the state’s historic police powers. But the circuit does not stop at the regulation’s subject matter alone. Instead, it takes a second step, looking to both the state’s regulatory intent and effect to determine if the statute implicates a matter of federal concern.

A. Matters of Traditional State Concern

The Fifth Circuit only invokes the presumption when the case involves a matter of traditional state concern. See Lady v. Neal Glaser Marine Inc., for example, the plaintiff

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23 Franchise Tax Bd. of State of Cal. v. Construction Labor Vacation Trust for S. Cal., 463 U.S. 1, 14 (1983) (“[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff’s complaint, and even if both parties admit that the defense is the only question truly at issue in the case.”). Though a defendant asserting a preemption defense can remove a case on the basis of diversity, rather than federal question jurisdiction, many plaintiffs join non-diverse parties to their suits to avoid this result. See id. at 8–9 (basing its holding on 28 U.S.C. § 1331’s federal question jurisdiction, rather than 28 U.S.C. § 1332’s diversity jurisdiction provision).

24 See Lady v. Neal Glaser Marine, Inc., 228 F.3d 598, 606–07 (5th Cir. 2000) (limiting the presumption’s application to areas traditionally controlled by the states). See also Franks Investment Co. v. Union Pac. R.R. Co., 593 F.3d 404, 407 (5th Cir. 2010) (en banc) (limiting the presumption’s application to areas of traditional state concern); O’Hara v. General Motors Corp., 508 F.3d 753, 759 (5th Cir. 2007) (“Because we hold that FMVSS 208 is a minimum safety standard which does not preempt the O’Hara’s suit regardless of any presumption against preemption, we do not reach this issue” of whether the presumption is applicable to this case).
asserted a state law tort claim against a recreational boat manufacturer.\textsuperscript{25} He had been riding a jet ski alongside his friend’s boat when he accidentally swerved into the side of the boat. He was thrown off the jet ski and tossed underneath the boat’s hull. As he was trying to surface, he was hit by the boat’s moving propeller. In his lawsuit against the defendant manufacturer, he claimed that he would not have been injured had the boat been equipped with a propeller guard.\textsuperscript{26}

When the defendant asserted that the plaintiff’s suit was preempted by the Federal Boating Safety Act, the plaintiff argued that his claims were presumed valid. The court nonetheless disagreed.\textsuperscript{27} It premised its holding on the Supreme Court’s \textit{United States v. Locke} decision, which addressed the presumption’s application to a law involving international maritime commerce.\textsuperscript{28} \textit{Locke} revolved around a series of regulations that the State of Washington had imposed in response to the Valdez oil spill.\textsuperscript{29} The Court acknowledged that the regulations were intended to protect the safety of the state’s citizens, but ultimately concluded that international maritime commerce is “an area where there has been a history of significant federal presence.”\textsuperscript{30} As such, the presumption’s underlying purpose in recognizing the boundaries of a federalist system did not apply.\textsuperscript{31}

The Fifth Circuit’s decision did not involve international maritime trade.\textsuperscript{32} In fact, the court recognized that “Lady’s tort actions touch on safety and health ‘matters that historically have been areas of state jurisdiction.’”\textsuperscript{33} But the tort case did not exist in a vacuum. Its context mattered. \textit{Lady} also involved “maritime activity—an area traditionally within the purview of federal regulation.”\textsuperscript{34} It did not matter that \textit{Locke}’s regulations applied to international commercial tankers engaged in commerce, whereas \textit{Lady}’s tort claims only applied to a small

\textsuperscript{25} \textit{Lady}, 228 F.3d at 607.
\textsuperscript{26} \textit{Id.} at 600.
\textsuperscript{27} \textit{Id.} at 606–08.
\textsuperscript{28} \textit{Id.} at 607 (citing United States v. Locke, 529 U.S. 89 (2000)).
\textsuperscript{29} \textit{Id.; Locke}, 529 U.S. at 99.
\textsuperscript{30} \textit{Locke}, 529 U.S. at 108.
\textsuperscript{31} \textit{Id.} at 108–09.
\textsuperscript{32} \textit{Lady}, 228 F.3d at 607.
\textsuperscript{33} \textit{Id.} (quoting MacDonald v. Monsanto Co., 27 F.3d 1021, 1023 (5th Cir. 1994)).
\textsuperscript{34} \textit{Id.} Though \textit{Wyeth v. Levine} later addressed this issue, the Fifth Circuit has not been presented with an opportunity since that opinion to apply \textit{Wyeth} to this particular situation. \textit{See Wyeth v. Levine}, 555 U.S. 555, 565 n.3 (2009) (stating that the presumption’s application “does not rely on the absence of federal regulation”).
motor boat that was being used in a local bayou.\textsuperscript{35} Both cases revolved around maritime activity, and therefore the presumption was inapplicable because the case involved a matter of primarily federal concern.\textsuperscript{36}

In the Fifth Circuit, the rule is clear: the presumption only applies to cases that involve traditional state regulation, and only when those state regulations do not touch the fringes of larger federal concerns.\textsuperscript{37} But the circuit is not deaf to the fact that other jurisdictions apply a more far-reaching standard. The Lady court, for example, noted that the Texas Supreme Court had reached an opposite conclusion on the exact same preemption issue Lady was asked to address—a decision that was based entirely on the fact that the presumption against preemption applied.\textsuperscript{38}

Like Lady, the plaintiff in Moore v. Brunswick Bowling & Billiards Corp. was injured when she was struck by a recreational motor boat’s propeller. And like Lady, she claimed that she would not have been injured had the boat been equipped with a propeller guard.\textsuperscript{39} But unlike Lady, the Moore court began its analysis with the presumption against preemption.\textsuperscript{40} Rather than compare the different spheres of federal and state concern, the court applied the presumption in an almost knee-jerk reaction, never questioning whether it was properly invoked. In fact, the court went even further by concluding that the presumption—though always applicable—should be given even more weight than usual because this case involved “state regulation of health and safety matters”\textsuperscript{41} and because the federal legislation did not provide a means for Texas citizens to recover compensatory damages.\textsuperscript{42} These heightened state interests required a particularly strict construction of the preemption clause.
The Texas Supreme Court issued the *Moore* decision before the Supreme Court decided *Locke*. *Moore*’s analysis, however, indicates that the *Locke* holding would probably not have prevented it from applying the presumption. The Fifth Circuit premised *Locke*’s application on the conclusion that the federal maritime interest outweighed the state’s interest in regulating the health and safety of its citizens.  

*Moore*, on the other hand, did not even acknowledge a level of federal concern. In fact, the *Moore* court determined that the state’s interest was even higher than normal because the federal legislation precluded compensatory damages recovery. *Moore*’s ambivalence to federal concerns is a preview of its presumed ambivalence to *Locke*. What matters, in the Texas courts’ view, is that the presumption protects against perceived federal intrusion.

*Moore* indicates the Texas courts’ more expansive view of the presumption’s application. The Texas Supreme Court has consistently maintained that the presumption applies to all preemption cases, rather than limiting its application to areas in which the states have traditionally occupied. A stronger presumption is employed when the preemption analysis addresses an area that traditionally belongs to the states, such as citizens’ health or safety. Finally, unlike the Fifth Circuit, Texas courts apply a more burdensome presumption in instances where the federal legislation would preclude a plaintiff’s recovery of compensatory damages.


### B. Analyzing the State Regulation’s Purpose and Effect

The Fifth Circuit does not accept a state’s reflexive invocation of its police powers at face value. Instead, the circuit tends to look past the law, considering both the statute’s purpose and its effect. If the legislative insight reveals that the state is shrouding its federal ambitions in traditional state laws, the circuit refuses to afford the state the presumption against preemption.

In *Farmers Branch*, the circuit was asked to review whether a city’s housing ordinance unlawfully interfered with federal immigration objectives. The ordinance at issue required noncitizen applicants to submit proof of their lawful immigration status before the city’s building

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33 *Lady*, 228 F.3d at 608 (“Because a state common-law rule requiring OMC to equip its boats with propeller guards implicates federal concerns at least as much as state concerns, we cannot say that the state’s interests predominate.”); *see also id.* at 611, 615 (finding implied preemption based on the strong federal interest in requiring a “uniform system of requirements for recreational vessels” in an area of significant federal involvement).

34 *Moore*, 889 S.W.2d at 251.

35 *Id.*

36 Graber v. Fuqua, 279 S.W.3d 608, 611 (Tex. 2009); *see supra* note 24 (citing cases wherein the Fifth Circuit stated that the presumption only applies to areas of traditional state concern).

37 *See Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001) (“[The presumption] is nowhere stronger than under circumstances in which states are exercising . . . authority in matters involving their citizens’ public health and safety.”).

38 *See supra* note 42 (discussing Texas and the Fifth Circuit’s presumption jurisprudence in relation to federal laws that, if given preemptive effect, would preclude a plaintiff from recovering damages for her injury).

39 Villas at Parkside Partners v. The City of Farmers Branch, Tex., 675 F.3d 802, 804 (5th Cir. 2012), aff’d 726 F.3d 524 (5th Cir. 2013) (en banc). The Fifth Circuit’s en banc opinion affirmed the panel’s decision, but it did not discuss the presumption’s applicability. *See Farmers Branch*, 726 F.3d at 566 (Jones, J., dissenting) (“Unfortunately, none of the three opposing opinions accords the Ordinance this strong presumption [against preemption] . . . .”).
Plaintiffs challenging the ordinance argued that the law—in both purpose and effect—amounted to an immigration regulation.51

The City asserted that the ordinance was entitled to the presumption against preemption because it was a housing regulation—a matter typically within the state’s sovereign control—and thus the ordinance was presumptively valid.52 But the Fifth Circuit was not persuaded. The mere fact that the regulation was passed as a housing ordinance did not mean that it was a housing ordinance. The court noted that the ordinance did not have any of the “indicia one would expect of a housing regulation.”53 It established an application process, but the only criteria was immigration status.54 It did not require any information about the applicant’s credit history, employment history, criminal background, or leasing history.55 In fact, the application, once granted, could only be revoked on a singular ground: change in immigration status.56

And the ordinance’s invocation of the City’s power to regulate public health and safety was similarly unpersuasive. The evidence, the court noted, did not support the City’s supposed attempt to protect the public’s welfare. The City had never conducted any studies about undocumented aliens’ impact on the city, and testimony even suggested that the sole purpose of the ordinance was to “remov[e] illegal immigrants” from the City’s borders.57 Given the legislative backdrop, the court concluded that the purported housing regulation was not a housing regulation at all; it was an impermissible “regulation of immigration” and therefore prohibited by the Supremacy Clause.58

Farmers Branch marks a shift in Fifth Circuit preemption jurisprudence. State regulations were previously categorized by the subject matter that the regulation addressed. But Farmers Branch creates a more searching inquiry. The analysis hinges not on what the regulation says it will do, but on what the legislation actually does do. Motives rise to the forefront, and the statute’s self-defined subject matter recedes into the background.

The Texas courts turn this analysis on its head. While the Fifth Circuit looks at whether the purpose of the state regulation conflicts with federal authority, the Texas courts look at whether the state law conflicts with the specific purpose of the federal law.59 The Grocers

50 Farmers Branch, 675 F.3d at 804.
51 Id. at 809.
52 Id.
53 Id.
54 Id. at 809–10.
55 Id.
56 Id.
57 Id. at 810.
58 Id. at 811. It is important to note that the Fifth Circuit did not base its decision on field preemption. Had it done so, it would have concluded that the regulation was improper because Congress completely controls the field of immigration. Instead, the circuit based its decision on the fact that the ordinance “pos[ed] an obstacle to federal control of immigration policy.” Id. (emphasis added).
59 See Grocers Supply, Inc. v. Cabello, 390 S.W.3d 707, 716 (Tex. App.—Dallas 2012, no pet.) (“A preemption analysis is an inquiry into congressional intent.” (quoting Comcast Cable of Plano, Inc. v. City of Plano, 315 S.W.3d 673, 677 (Tex. App.—Dallas 2010, no pet.))); id. at 718 (“Courts therefore must approach this interpretive task cautiously, applying a high threshold for concluding a state law is to be preempted for conflicting with the purposes of a federal statute.”).
Supply v. Cabello case offers an interesting example. In that case, the defendant argued that an undocumented alien plaintiff should not be allowed to recover lost wages in his personal injury action because federal immigration law prohibited the company from hiring undocumented workers in the first place. Awarding lost wages, the argument goes, would directly contravene Congress’s decision to discourage illegal immigration by eliminating illegal immigrant’s employment opportunities.

As in Moore, the Texas court began by invoking the presumption. It then looked to the subject matter of the suit to determine whether the law fell within a field traditionally controlled by the state. The court noted that two fields were in play. On one hand, “the power to regulate immigration is unquestionably a federal power,” but on the other hand, the state traditionally controls the type of tort remedies implicated by the case. Unlike the Fifth Circuit, however, the court did not consider these two fields to overlap: “[I]mmigration is a distinct and separate field from state tort law.” As a result, the court applied a heightened presumption.

After invoking the presumption, the court then turned to its more “cautious” preemption analysis: whether the state law conflicted with Congress’s limited purpose. Rather than looking at the purpose of the state law in the context of federal authority, the court looked to the purpose of the federal law in the context of state authority. Congress, the court noted, was not trying to prevent undocumented workers from receiving money in the United States. Instead, it was trying to discourage aliens from illegally entering the country in the first place by removing one of the primary incentives for immigration. Allowing a tort victim to recover his lost wages damages simply “could not implicate the number of job opportunities available to undocumented aliens.”

Farmers Branch and Grocers Supply both reached relatively uncontroversial conclusions, but it is the way that they reached them that is interesting. Farmers Branch refused to apply the presumption when the state law’s motive indicated that its goal was to usurp federal powers. But Grocers Supply invoked the presumption to limit the federal law’s objectives in light of the state’s traditional authority.

### III. EFFECT OF THE PRESUMPTION

One of the most striking distinctions between the two jurisdictions is the different effect that the presumption’s application has on a court’s decision. Both jurisdictions apply the “clear

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60 Id. at 711.
61 Id. at 713.
62 Id. at 716–17.
63 Id. at 717.
64 Id. at 713–14.
65 Id. at 716 (“In [the presumption] context—and because the purpose of Congress is the ultimate touchstone in every preemption case—we must examine Congress’s purpose in enacting IRCA.”).
66 Id. at 719 (“We have found no evidence Congress intended IRCA to combat illegal immigration by encroaching into the States’ authority to regulate health and safety matters . . . .”).
67 Id. at 718.
68 Id. at 718–19.
and manifest intent” standard after the presumption has been invoked, but the manner in which the jurisdictions do so result in strikingly different analyses.69

The Texas courts use the presumption as a barrier to finding preemption—a wall that can only be overcome by a clear statement of congressional intent.70 Absent Congress’s definite indication that it intended to supersede state law, the Texas courts will allow state law to control.71 The way in which the Texas courts initiate the preemption analysis depicts the pivotal role that the presumption plays: The courts always begin by invoking the presumption.72

The Fifth Circuit, on the other hand, uses the presumption merely as an interpretive tool, settling equal arguments in favor of the state.73 Unlike the Texas courts’ practice of automatically invoking the presumption prior to starting their preemption analysis,74 the Fifth Circuit generally avoids invoking the presumption, first attempting to resolve the preemption issue prior to determining whether the presumption is applicable to the present case.75 Similarly, when the court is required to apply the presumption, it only uses the canon as a “tie-breaker.”76 In express preemption cases, for example, the circuit employs the presumption to resolve equally logical constructions of the same provision in favor of the state.77 Absent an ambiguity in the preemption clause’s meaning, however, the presumption does not come into play.78

IV. APPLICATION OF THE PRESUMPTION

A. Express Preemption: Texas courts apply the presumption by requiring a narrow construction of a preemption clause.

The Texas Supreme Court has held that the presumption against preemption works in another way not recognized by the Fifth Circuit. In Texas, the presumption is employed to narrowly construe a preempting statute, thus limiting the scope and effect that the preempting statute has over state law.79 The presumption works two ways: (1) to act as a barrier to a statute being originally found as preemptive,80 and (2) to narrowly construe that statute once it has been

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69 Franks Invest. Co. v. Union Pac. R. Co., 593 F.3d 404, 407 (5th Cir. 2010) (en banc); Graber, 279 S.W.3d at 612.
70 Graber, 279 S.W.3d at 611–12; Moore, 889 S.W.2d at 249–252.
71 Graber, 279 S.W.3d at 611–12; Moore, 889 S.W.2d at 249–252.
72 See, e.g., id. (beginning with the presumption before analyzing the preemption issue); MCI Sales & Serv., Inc. v. Hinton, 329 S.W.3d 475, 482 (Tex. 2010) (reconfirming the presumption’s application to all preemption cases “[b]efore discussing whether preemption applie[d]” to the matter before the court).
73 See White Buffalo Ventures, Inc. v. Univ. of Tex. at Austin, 420 F.3d 366, 370 (5th Cir. 2005) (describing the presumption as “classic ‘tie goes to the state’ jurisprudence”).
74 See supra note 72 and accompanying text.
75 See Franks Invest. Co. v. Union Pac. R. Co., 593 F.3d 404, 408 (5th Cir. 2010) (en banc) (discussing the role that the presumption plays, but then deciding that “the presumption need not be invoked in this case” because the statute’s preemption clause was not broad enough, even without applying the presumption, to cover the plaintiff’s claims); White Buffalo, 420 F.3d at 372 (stating that the presumption’s application is “trigger[ed]” upon a finding of textual ambiguity in the express preemption clause).
76 Id. at 370.
77 Id. at 370–72.
78 Id.
79 Graber, 279 S.W.3d at 611.
80 See supra Part III (discussing the way in which the Texas courts perceive the presumption as a significant obstacle to finding that state law has been preempted by federal action).
determined to preempt state law. The Fifth Circuit, on the other hand, does not employ the presumption in either of these ways. Rather than requiring a strict construction of a preemption clause, the circuit uses the presumption merely as a tie-breaker: if the statute has two equally plausible meanings, then the presumption functions to settle the issue in the state’s favor.

This contrast between the two jurisdictions is perhaps best seen in their conflicting interpretations of the Medical Device Amendments of 1976 (MDA). Like the Deregulation Act, the MDA resulted in a “legion of cases attempting to determine [the Act’s] preemptive scope.” In general, the MDA grants the Food and Drug Administration (FDA) the authority to regulate various classifications of medical devices. Congress expressed its intent to preclude state interference with the FDA’s decision-making by enacting an express preemption clause:

[N]o State . . . may establish or continue in effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under this Act to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this Act.

The FDA, pursuant to its authority granted by the MDA, has interpreted the preemptive scope of § 360k(a):

State or local requirements are preempted only when the Food and Drug Administration has established specific counterpart regulations or there are other specific requirements applicable to a particular device under the act, thereby making any existing divergent State or local requirements applicable to the device different from, or in addition to, the specific [FDA] requirements.

The Fifth Circuit’s Stamps v. Collagen Corp. opinion was one of the first opinion’s to rule upon the clause’s construction in the context of Class III regulations. The court’s cursory analysis addressed several issues. First, it determined that the term “requirement” includes state

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81 Grübler, 279 S.W.3d at 611 (“The presumption applies not only to whether Congress preempted state law at all, but also to the scope of preemption.” (emphasis in original)).
82 See supra Part III (discussing the Fifth Circuit’s “tie-breaker” mentality toward the presumption).
84 See Stamps v. Collagen Corp., 984 F.2d 1416, 1418–19 (5th Cir. 1993) (describing the FDA’s role in ensuring that medical devices are safe for market use prior to being marketed), overruled in part by Medtronic, Inc. v. Lohr, 518 U.S.470 (1996). The MDA gave the FDA authority to divide all medical devices into three categories (Class I, II, and III) based on the amount of harm that they can inflict. Lohr, 518 U.S. at 476–77. Each category is subject to varying levels of regulation. Id. at 477. Class III devices are the most stringently regulated. Id. In order to meet FDA approval necessary to be publically marketed, the device must go through the pre-market approval (PMA) process. Id. This process requires submitting an enormous amount of laboratory data, which the FDA is responsible for reviewing. Id. On average, it results in approximately 1,200 hours of labor. Id. Most devices, however, have never undergone the PMA process. Id. These devices were either grandfathered-in by the MDA, or had undergone a comparatively minor approval process whereby the manufacturer of the device demonstrates that the device is substantially equivalent to a previously approved device. Id. at 477–78.
86 21 C.F.R. § 808.1(d).
87 Stamps, 984 F.2d at 1423 n.7.
law tort liability, as opposed to positive enactments by a state legislative or regulatory body. As such, the court reasoned, any state requirement (such as tort liability) necessarily was “different from, or in addition to” the federal PMA requirement. Third, the Stamps panel applied Morales v. Trans World Airlines, Inc.’s broad interpretation of a statute’s “relate to” language to the MDA’s preemption clause. As such, the panel concluded, “Stamps’s state law claims undoubtedly ‘relate to’ the safety or effectiveness” of the medical device in question and were therefore preempted by the MDA.

Interestingly, the Stamps court mentioned the presumption’s application prior to beginning its analysis, though its opinion reveals that the court did not apply it to the case. The court never mentioned the presumption’s standard after stating its black-letter law, nor does it appear that the court considered it either an obstacle to overcome or a doctrine requiring a narrow construction of the preemption provision. The court’s refusal to apply the presumption reveals the circuit’s hesitancy toward the doctrine. Because the court employs the presumption only as a tie-breaker whenever the court is confronted by an ambiguous preemption clause, the court’s determination that the statute’s language was clear necessarily precluded the presumption’s application.

The Supreme Court ruled on the MDA’s preemptive scope before the Fifth Circuit was again asked to readdress the statute. The Medtronic, Inc. v. Lohr decision, however, did not shed an abundant amount of light on the issue. Though subsequent courts have since limited the Lohr decision to precluding preemption only in the context of § 510(k) notifications, these later courts have been relatively unable to agree about any other consistent construction of the case. This inability to reach a general consensus of the case is primarily a result of the incongruence between the splintered decisions. Fortunately, an independent analysis of the Lohr opinion is

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88 Id. at 1421. The court largely premised this decision on one of its earlier decisions made in the context of Class II regulations, Moore v. Kimberly-Clark Corp., 867 F.2d 243 (5th Cir. 1989), and a Supreme Court decision addressing the preemptive scope of the Federal Cigarette Labeling and Advertising Act of 1965, Cipollone v. Liggett Grp., Inc., 505 U.S. 504 (1992). Shortly before the Stamps decision, the Supreme Court had held that the phrase “requirement or prohibition” included common law claims. Id. at 520. The Fifth Circuit noted that it would be “anomalous” to find the MDA’s failure to similarly include the term “prohibition” in the preemption clause manifested Congress’s intent to allow state law tort liability. Stamps, 984 F.2d at 1421.

89 Id. at 1421–22.

90 Id.


92 Stamps, 984 F.2d at 1421–22.

93 Id.

94 Id. at 1419.

95 See supra Part III.

96 Stamps, 984 F.2d at 1421–22.


98 See, e.g., Martin v. Medtronic, Inc., 254 F.3d 573, 583 (5th Cir. 2001)

99 Justice Stevens wrote the plurality opinion, in which three other Justices joined entirely. See Worthy v. Collagen Corp., 967 S.W.2d 360, 367–68 (Tex. 1998) (discussing the “complicated” task of discerning the controlling precepts of the Lohr decision). Justice O’Connor wrote the dissenting opinion, in which three other Justices joined entirely. Id. Justice Breyer joined part of Justice Steven’s opinion, thus creating a majority for part of the decision. Id. Justice Breyer, however, filed a separate concurrence and joined part of Justice O’Connor’s dissent. Id. Much of the confusion regarding § 360k(a)’s preemptive scope is a result of seemingly conflicting
not necessary for the present purposes. Instead, it is the Fifth Circuit’s and the Texas Supreme Court’s analyses of *Lohr* that is illuminating.

In *Martin v. Medtronic, Inc.*, the Fifth Circuit was asked to determine whether *Stamps* had survived *Lohr*. The court divided the fractured *Lohr* decision into three basic postulations. First, it determined that a majority of the Court had found that common law tort suits can constitute state requirements within the purview of the preemption statute. Second, it found that *Stamps*’s original determination that all state law tort suits that are remotely related to a patient’s health or a medical device’s safety or effectiveness was overbroad. Instead, a common law tort claim could enforce a general duty of care, but it would be preempted if it threatened to impose specific requirements that conflicted with a specific federal requirement imposed by the PMA process. Third, the court noted that *Lohr* addressed preemption in the context of the §510(k) notification provision, rather than the PMA process. This distinction, the *Martin* court decided, prevented *Lohr* from disturbing *Stamps*’s essential holding that state common law tort claims are requirements “different from, or in addition to” the PMA process. Nonetheless, the court noted that *Lohr*’s language necessarily restricted part of the *Stamps* decision, which had held that any state requirement was preempted by the PMA process. Instead, *Lohr* mandated a finding that state common law claims that parallel the PMA requirements are not preempted.

The *Martin* court, therefore, concluded that *Stamps* was only overruled in part. As such, the court reaffirmed “that a medical device manufacturer’s compliance with the FDA’s PMA process will preempt state tort law claims brought with respect to that approved device and relating to safety, effectiveness or other MDA requirements when the substantive requirements imposed by those claims potentially conflict with PMA approval.”

The Fifth Circuit did not invoke the presumption against preemption in the *Martin* decision, presumably for the same reasons that the *Stamps* panel did not apply it. Without the presumption standing in its way, the court was able to reaffirm its earlier broad interpretation of statements between the part of Justice Stevens’ decision in which Justice Breyer joined and Justice Breyer’s separate concurrence. See, e.g., *Martin*, 254 F.3d at 581–82 (5th Cir. 2001) (discussing the apparent conflict between the two opinions).

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100 *Martin*, 254 F.3d at 577.
101 The court also asserted a fourth, though the fourth is really only a restatement of its third finding that limits the *Lohr* decision to the §510(k) notification process. *Id.* at 583.
102 *Id.* at 580–81 (citing Justice O’Connor’s dissent and Justice Breyer’s concurrence as authority for this proposition).
103 *Id.* at 581–83.
104 *Id.* at 582–83.
105 *Id.* at 583.
106 *Id.*
107 *Id.*
108 *Id.*
109 *See id.* at 584 (“In sum, we simply cannot read *Lohr* as establishing a new rule of law that contradicts our preexisting case law as it applies in this appeal.”).
110 *Id.* at 585.
111 *See supra* notes 94–96 and accompanying text.
the statute. Subsequent Texas courts, addressing the same statute, have applied the presumption to reach narrower conclusions.

In *Worthy v. Collagen Corp.*, the Texas Supreme Court was asked to rule on the same issue that *Martin* and *Stamps* had addressed: whether state common law tort claims were preempted by the federal PMA requirements. Ultimately, the court held that the plaintiff’s claims were preempted, but the court’s analysis and subsequent rule depicts a stricter construction of the statute than the Fifth Circuit’s.

Like *Martin*, the *Worthy* court attempted to glean whatever rules from the fractured *Lohr* opinions it could to guide its analysis. First, it concluded that the federal requirements imposed by the § 510(k) notification process were too general to carry preemptive weight. Second, the court noted that some, but not all, federal requirements imposed by the PMA process were sufficiently specific to preempt state law.

Applying *Lohr*’s invocation of the presumption against preemption, the *Worthy* court construed the language of the statute narrowly, ultimately concluding that the PMA process, standing alone, was insufficient to create specific federal requirements that could preempt state law.

The court claimed that this interpretation was compatible with Congress’s intent in passing the MDA:

>>*[T]he mere fact that a product has received a PMA, a procedure that was instituted with the purpose of benefitting and protecting consumers, is not a reason to forever shield its distributors from State tort actions based on harm caused by the product. Indeed, it is inconceivable that Congress would have provided for such a draconian result without making itself more explicit.*

Nonetheless, the court held that the plaintiff’s claims were preempted because “the details of the FDA’s premarketing approval of Zyderm—as opposed to the PMA process in general—[was] sufficiently specific to have preemptive effect.”

The court’s holding demonstrates how the Texas courts apply a stronger presumption that strictly construes preemption clauses, thus limiting the scope of a statute’s preemptive effect. *Stamps* and *Martin* established a per se rule: if the product has been approved through the PMA process, any state common law claim that is not identical to the federal regulation is necessarily

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113 *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 362 (Tex. 1998).
114 *Id.* at 376.
115 *Id.* at 368–72.
116 *Id.* at 369–70.
117 *Id.* at 371 (“[W]e take it to be the view of a majority of the Supreme Court that a federal requirement concerning a device can preempt a suit in which the claim is that the device should have been made or marketed differently provided, as we have already observed, the federal requirement is sufficiently specific.”).
118 *Id.* at 366–67, 376 (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 485–86 (employing the presumption against preemption to require “a narrow interpretation of [] an express” preemption clause)).
120 *Id.* at 376.
preempted. Worthy declined to impose such a formulaic result; instead, it held that only specific federal requirements imposed during the PMA process could preempt a state common law tort claim if the tort claim depended upon a finding that was specifically rejected by a particular federal requirement.\(^{121}\)

The disparity between the Worthy rule and the Martin analysis is perhaps best demonstrated by the Herring v. Telectronics Pacing Systems, Inc. decision, filed only a few days after the Texas Supreme Court released its Worthy opinion.\(^{122}\) The Herring plaintiff asserted numerous state law theories of recovery for injuries sustained by a PMA-approved Class III pacemaker.\(^{123}\) After invoking the presumption against preemption, the court concluded that the plaintiff’s claims were not preempted.\(^{124}\)

The court grounded its holding on the fact that Telectronic “based its motion entirely on the premise that, as a matter of law, no person injured by a pacemaker can ever sue the manufacturer.”\(^{125}\) The court rejected this per se rule—the same rule that the Fifth Circuit upheld in Martin.\(^{126}\) Instead, the court required the party asserting preemption to show the plaintiff’s state law tort claims were not general requirements, but rather particular substantive requirements that conflicted with a specific federal obligation imposed by the PMA process.\(^{127}\) The presumption’s application is apparent in this holding. Instead of imbuing § 360k(a) with a categorical preemptive scope, the Herring court employed the presumption to limit § 360k(a)’s preemptive effect to only include specific claims that created conflicting requirements imposed by the PMA process.

\section*{B. Implied Preemption: Texas courts employ the presumption to require a higher burden in order for regulatory silence to be given preemptive effect.}

Actual conflict preemption is generally divided into two subcategories: (1) impossibility, and (2) obstacle.\(^{128}\) These categories, though academically placed into separate spheres, are practically just gradations of the same concept. A state law cannot prevent federal legislation or regulations from accomplishing the desired goal, whether that prevention takes the form of

\(^{121}\) For example, the court noted that the plaintiff was asserting a deceptive trade practices claim for misrepresenting the safety of the product. Id. at 376. The plaintiff, however, was not alleging that the defendant failed to manufacture and advertise the product “in compliance with the FDA requirements.” Id. Because the plaintiff’s claims necessarily required a finding that the product was not safe—a finding that would have specifically contradicted the FDA’s determination that the product was safe if manufactured according to the submitted specifications—the plaintiff’s claim was preempted. Id.


\(^{123}\) The Herring opinion does not actually specify whether the pacemaker was PMA-approved, but subsequent commentary regarding the case has determined that the product had been subjected to the rigorous PMA process. W. Kennedy Simpson et al., Recent Developments in Products, General Liability, and Consumer Law, 35 TORT & INS. L.J. 553, 566 & n.146 (2000). This determination is not surprising, considering that Lohr clearly precluded any preemption arguments relating to the 510(k) notification process.

\(^{124}\) Herring, 964 S.W.2d at 755, 757–58.

\(^{125}\) Id. at 757–58 (internal quotation marks omitted).

\(^{126}\) Id.; see supra notes 100–112 and accompanying text (discussing the Martin rule espoused by the Fifth Circuit).

\(^{127}\) Herring, 964 S.W.2d at 757–58.

\(^{128}\) MCI Sales & Serv., Inc. v. Hinton, 329 S.W.3d 475, 482 (Tex. 2010).
undermining the legislation by setting up an opposing law or regulation or by standing as an obstacle to the achievement of a federal goal or initiative.129

While conflict preemption is generally achieved by positive legislative or regulatory enactments, federal regulatory silence has also been interpreted to express a federal policy to not regulate in a particular area.130 Both the Texas Supreme Court and the Fifth Circuit have been confronted with the preemptive effect of regulatory silence.131 Prior to reaching the preemption issue, both courts addressed the applicability of the presumption against preemption: the Texas court invoked the presumption whereas the Fifth Circuit declined to apply it.132 The effect of these courts’ application or rejection of the presumption is best seen in their analysis of identical controlling authorities.

The Fifth Circuit read the precedential case law narrowly, ultimately concluding that the Supreme Court’s previous decisions encouraged finding a regulatory agency’s decision not to regulate as a positive mandate to prohibit state law jury awards.133 In reaching the conclusion that the Coast Guard impliedly stated its intent to prohibit any regulation in relation to propeller guards, the Fifth Circuit panel analyzed two notable Supreme Court cases.134

First, the court confronted Freightliner Corp. v. Myrick.135 Freightliner involved a regulation that had been suspended after the Ninth Circuit determined that it was “neither reasonable nor practicable at the time it was put into effect.”136 The National Highway Traffic Safety Administration (NHTSA), however, left the regulation in the Federal Register “so that manufacturers would know ‘what the agency still considers to be reasonable standards for minimum acceptable performance.’”137 While the defendant argued that the suspended regulation should be interpreted as the NHTSA’s determination that state regulation was prohibited, the Court disagreed.138 In holding that the plaintiff’s claims were not preempted, the Court acknowledged that the defendant was unable to point to any statement where the NHTSA indicated an unwillingness for states to regulate the subject-matter of the suspended regulation.139

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129 Id.
130 Id. at 482, 489.
131 Id.; Lady v. Neal Glaser Marine, Inc., 228 F.3d 598 (5th Cir. 2000).
132 Lady, 228 F.3d at 606–08; MCI, 329 S.W.3d at 487–89.
133 In dicta, the Fifth Circuit has since backed away from its earlier recognition of the preemptive effect of regulatory silence. See, e.g., Carden v. General Motors Corp., 509 F.3d 227, 232 (5th Cir. 2007) (noting that complete regulatory silence is not sufficient to result in preemption, but holding that a positive policy statement by a regulatory agency is sufficient to establish preemption); Frank v. Delta Airlines, Inc., 314 F.3d 195, 199 n.6 (5th Cir. 2002) (same). Though the Fifth Circuit has not been presented with a situation involving regulatory silence since expressing its new resolve to require a higher showing prior to giving regulatory silence preemptive effect, the court’s comments suggest that it may be moving closer to Texas's jurisprudence on this issue. Carden, 509 F.3d at 232; Frank, 314 F.3d at 199 n.6.
134 Lady, 228 F.3d at 611–15.
138 Id. at 286.
139 Id. at 287–89.
The Lady court distinguished Freightliner on the grounds that it involved a situation where the agency had failed to say something, as opposed to deciding to say nothing. Because the Coast Guard had affirmatively considered regulating propeller guards, but decided not to do so, the Lady court held that the Coast Guard had effectively decided that propeller guards were best left unregulated. Thus, a state court’s jury award would essentially conflict with the Coast Guard’s determination to allow manufacturers the opportunity to set their own standard.

The Fifth Circuit also looked to the Supreme Court’s Ray v. Atlantic Richfield Co. opinion. In Ray, the Court was asked to determine whether a State of Washington law prohibiting tanker vessels that were larger than 125,000 deadweight tonnage from entering a waterway was preempted by the Ports and Waterways Safety Act. The Court relied on the language of the act itself, as well as the Coast Guard’s “unwritten ‘local navigation rule’” that prohibited more than one tanker that was larger than 70,000 deadweight tonnage from entering the waterway. Because the Coast Guard had addressed size, but not mentioned a maximum, the Coast Guard’s silence functioned as an affirmative prohibition on state regulation.

Interpreting Ray, the Lady court argued that the Washington regulations were impliedly preempted because they conflicted with the agency’s decision not to regulate larger vessels.

Ray thus supported the Lady court’s holding that the state law tort judgment was impliedly preempted because it conflicted with the Coast Guard’s implied determination that regulation was improper. The court acknowledged that the “issue is an extremely close one,” but ultimately determined that the Coast Guard’s silence preempted the state law judgment.

The court, however, hedged its opinion:

We do not hold that simply because the Coast Guard has not acted on a safety matter that state action is precluded. Rather, where the Coast Guard has been presented with an issue, studied it, and affirmatively decided as a substantive matter that it was not appropriate to impose a requirement, that decision takes on the character of a regulation and the FBSA’s objective of national uniformity mandates that state law not provide a result different than the Coast Guard’s. For example, if Lady’s state common-law tort action against OMC concerned a manufacturing or design issue never presented to or considered by the Coast Guard, impliedly preemption would not attach.

140 Lady v. Neal Glaser Marine, Inc., 228 F.3d 598, 612 (5th Cir. 2000) (“In contrast to Freightliner where ‘the lack of federal regulation did not result from an affirmative decision by agency officials to refrain from regulating,’ the lack of a regulation mandating propeller guards on recreational boats came after the Coast Guard studied the matter and affirmatively determined that requiring propeller guards was substantively inappropriate.” (quoting Freightliner, 514 U.S. 286)).
141 Id. at 614–15.
142 Id.
143 Id. (discussing Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978)).
145 Id. at 160–61, 170–71.
146 Id. at 174–78.
147 Lady, 228 F.3d at 613–14.
148 Id.
149 Id.
preemption would not apply, because there would be no federal action to be contravened by a successful tort claim.\textsuperscript{150}

The court’s willingness to find preemption based on regulatory silence reveals the court’s rejection of the presumption against preemption. Ordinarily, the presumption can only be overcome by a “clear and manifest intent” that the federal law should reign supreme.\textsuperscript{151} But the Fifth Circuit never cites any decision wherein the Coast Guard determined that state law was inadequate or inappropriate.\textsuperscript{152} Instead, it only cites to various references wherein the Coast Guard decided that federal regulatory power was unlikely to be effective.\textsuperscript{153} Such ambiguous indications would be insufficient to overcome the presumption—if the presumption applied.\textsuperscript{154}

The Texas Supreme Court’s \textit{MCI Sales & Serv., Inc. v. Hinton} represents the diametric opposite of the \textit{Lady} decision. Unlike \textit{Lady}, \textit{MCI} began its analysis with the presumption against preemption, the effect of which is best seen by its opposing interpretations of the \textit{Freightliner} and \textit{Ray} opinions.\textsuperscript{155}

\textit{Freightliner}, the \textit{MCI} court noted, did not present a situation where the NHTSA affirmatively decided that the minimum safety standard was the absence of all regulation.\textsuperscript{156} Instead, the \textit{MCI} court viewed \textit{Freightliner} as holding that an agency’s failure to affirmatively state that regulation was prohibited necessarily meant that there was “no preemptive federal law absent a clear and manifest indication of the agency’s intention to forbid all regulation.”\textsuperscript{157} The court similarly viewed the \textit{Ray} holding in a stricter light. Unlike \textit{Lady}, which viewed \textit{Ray} as allowing implied conflict preemption based on regulatory silence, the \textit{MCI} court interpreted the decision as one enforcing implied field preemption.\textsuperscript{158}

The \textit{MCI} holding reflects the broad application of the presumption against preemption as well as its narrow reading of the \textit{Freightliner} and \textit{Ray} decisions:

From these cases, it follows that an agency’s mere decision to leave an area unregulated is not enough to preempt state law. Instead, the agency must, consistent with the authority delegated to it by Congress, affirmatively indicate that no regulation is appropriate. That is, the agency must state that not only will it leave the area unregulated, it will not allow any regulation in that area as a matter

\textsuperscript{150} \textit{Id.} at 615. The Fifth Circuit’s conclusion is similar to the way in which the Supreme Court’s \textit{Williamson} decision distinguished one of its well-known \textit{Geier v. American Honda Motor Co.}, 529 U.S. 861 (2000). \textit{Williamson} v. Mazda Motor of Am., Inc., 131 S. Ct. 1131, 1136–39 (2011). Because neither \textit{Geier} nor \textit{Williamson} involved the presumption against preemption, these important preemption cases fall outside of the scope of this Article.


\textsuperscript{152} \textit{Lady}, 228 F.3d at 614.

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} See \textit{MCI Sales & Serv., Inc.}, 329 S.W.3d 475, 491 (holding that only positive regulatory statements expressing a concrete intent to prohibit all regulation is sufficient to preempt state law).

\textsuperscript{155} \textit{Id.} at 487–91.

\textsuperscript{156} \textit{Id.} at 490–91.

\textsuperscript{157} \textit{Id.} at 494.

\textsuperscript{158} \textit{Id.} at 490 (describing \textit{Ray} as a case involving a situation where “Congress had intended to consolidate all regulatory power in the federal government”).
of policy. Unless the agency takes this “further step” to disallow state regulation, its decision not to regulate has no preemptive force.159

MCI’s application of the presumption requires a positive “further step” that the Fifth Circuit did not find necessary.160 For Texas jurisprudence, it is insufficient for an agency to merely consider regulation but then decide that it is inappropriate.161 Instead, the agency must positively express an intention to prohibit all regulation.162 The Fifth Circuit, on the other hand, was persuaded of the agency’s preemptive decision merely by the fact that the agency had considered regulating propeller guards and ultimately decided not to do so.163 The Texas courts require more.164

V. CONCLUSION

The purpose of the presumption against preemption is to ensure that Congress, rather than the courts, makes the decision to preempt state law. Thus, in recognition of this country’s uniquely federalist system, the courts hesitate to find that federal law displaces state authority. But courts should be wary to diverge so drastically from each other. If they are not, they could inject unnecessary unfairness into the judicial system by creating incentives to shop for a forum that has more favorable laws.

The Supreme Court has demonstrated a recent skepticism toward the presumption, and scholars fear that the presumption is too often used as a means to justify a predetermined result. Regardless of the presumption’s future, one thing is clear: if courts continue to apply it, they should at least keep an eye to applying it more uniformly. The Fifth Circuit has followed the Supreme Court’s increasing skepticism toward this post hoc reasoning, and the Texas courts should do the same. Any reflexive invocation of a result-driven presumption could create a situation where a claim is valid in the state courthouse, but not in the federal courthouse across the street.

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159 Id. at 491.
160 Id.
161 Id.
162 Id.
164 MCI, 329 S.W.3d at 491.