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Hayes R. Holderness
University of Richmond, hholdern@richmond.edu

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Hayes R. Holderness is an assistant professor of law at the University of Richmond School of Law. Many thanks to Jud Campbell, David Gamage, Andy Grewal, Peter Faber, and Kirk Stark for their helpful commentary. A special thanks to Taylor Nall for his excellent research assistance.

In this viewpoint, Holderness examines the case for preemption of states' workarounds of the federal state and local tax deduction cap.

In late 2017 the Tax Cuts and Jobs Act (P.L. 115-97) was passed into law. Controversy instantly ensued. One major controversy revolves around the capping of the Internal Revenue Code section 164 state and local tax deduction at $10,000 per taxpayer (the SALT cap).[1] Viewed by many blue states as an attack on their citizens, the SALT cap has spurred counterattacks in the form of state legislation designed to provide taxpayers with an avenue to counter the effects of the SALT cap (the SALT cap workarounds).[2] While others have and are considering the effectiveness of the SALT cap workarounds,[3] this essay explores a more basic question: do the states have the power to lob such counterattacks and facilitate taxpayers' federal tax avoidance? The answer is more nuanced than it might first appear; unlike individual tax avoidance actions, the states' actions raise the specter of federal preemption.

The U.S. Constitution provides that federal law is the supreme law of the land; it preempts conflicting state law.[4] Therefore, it would seem that the SALT cap workarounds are invalid because they intentionally frustrate the operation of the SALT cap. However, the Supreme Court has often hesitated to find that federal law has implicitly preempted conflicting state law when the conflict is merely incidental to the legitimate exercise of a traditional state power. What's more, the primary SALT cap workarounds rely on IRC section 170's deduction for charitable contributions to achieve their goal, arguably advancing the policy behind that part of the federal tax law. Do these two facts shield the workarounds from preemption? Where a state specifically targets the federal law with workarounds that are more formalistic than substantive exercises of state powers, the answer appears to be "no." The more substantive the state's action, the more likely it is to pass a preemption challenge. This may leave room for pre-TCJA state programs that operate similarly to the SALT cap workarounds to stand while new workarounds fall.

The essay proceeds in four parts. Part I provides basic background on the SALT cap

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[1] *E.g.*, Richard Rubin, "As Treasury Targets Workarounds to Tax Law, Impact May Extend Beyond High-Tax States," *The Wall Street Journal*, June 27, 2018; and Alan Rappeport and Jim Tankersley, "I.R.S. Warns States Not to Circumvent State and Local Tax Cap," *The New York Times*, May 23, 2018.

[2] *E.g.*, Paige Jones, "Legislature Passes Nation's First SALT Cap Workaround," *State Tax Notes*, Apr. 9, 2018, p. 158; and Lauren Loricchio, "Second State Enacts SALT Cap Workaround," *State Tax Notes*, May 14, 2018, p. 746.

[3] *See, e.g.*, Notice 2018-54, 2018 24 IRB 750 (IRS notice explaining that the agency is looking into the legal effect of the workarounds); Joseph Bankman et al., "State Responses to Federal Tax Reform: Charitable Tax Credits," *State Tax Notes*, Apr. 30, 2018, p. 433; and Andy Grewal, "The Charitable Contribution Strategy: An Ineffective SALT Substitute."

[4] *See* U.S. Const. Art. VI, cl. 2 (the supremacy clause).

workarounds, focusing on those that take advantage of the federal deduction for charitable contributions. Part II then outlines the case for federal preemption of the workarounds, first exploring federal preemption doctrine and obstacle preemption in particular. The standard for obstacle preemption is murky, but generally speaking, state law that frustrates federal policy is preemptable, though a presumption against preemption can save state laws. This part then analyzes the SALT cap workarounds under the obstacle preemption case law, concluding that the workarounds are squarely within the aim of obstacle preemption where they represent formalistic actions designed solely to frustrate the operation of the SALT cap. Part III contrasts that analysis with a look at existing state programs similar to the workarounds. Those existing programs stand a greater chance of being saved by the presumption against preemption than the SALT cap workarounds. Finally, Part IV concludes.

I. The States' SALT Cap Workarounds

The SALT cap workarounds have taken numerous forms, though three are most prominent. The first, which I will focus on in this article given its popularity, involves providing a large credit against state taxes for donations to state-sponsored charitable organizations. The idea behind this workaround is that the donation to the organization will generate a federal tax deduction for the taxpayer under IRC section 170, and the organization will be able to spend the money as the state would have if the payment had been in the form of a tax payment rather than a deductible charitable donation.[5] The remaining two workarounds involve shifting state income taxes to payroll taxes paid by businesses (which remain deductible)[6] and providing for deductible taxes on passthrough entities accompanied with offsetting individual state income tax credits.[7]

The states enacting the SALT cap workarounds have made their intentions clear: they do not like the SALT cap and want to provide their taxpayers with the means to get around it. For instance, New York Gov. Andrew Cuomo (D) asked state lawmakers to "change our tax code in a way that thwarts [the federal] attack" that is the SALT cap.[8] New Jersey Gov. Phil Murphy (D) described the SALT cap as "a de facto tax hike on countless New Jersey households" before providing that "we're going to give residents back some of this much-needed tax deduction."[9]

The effectiveness of these workarounds remains to be seen. The IRS has promised guidance on whether it will respect their form for federal income tax purposes.[10] Many have argued that the charitable contributions in particular should not qualify taxpayers for the federal tax deduction for charitable contributions because they are getting something of value in return: a reduction of their state taxes.[11] Others counter that states have long offered tax reductions for donations to some organizations and that the IRS has allowed taxpayers to claim full federal tax deductions for those same donations.[12] For example, the Georgia qualified education expense tax credit offers eligible taxpayers tax credits for donations to organizations that provide scholarships for children who attend private schools.[13] Assuming these latter arguments are correct and the SALT cap workarounds technically function as designed, are they still problematic? Under federal preemption doctrine, the answer is yes.

II. Preemption and the SALT Cap Workarounds

Because the SALT cap workarounds are state laws rather than individual actions, they raise the

[5] *See* Bankman et al., supra note 3.

[6] *See* Daniel Hemel, "Repeal of the SALT Deduction for Income Taxes Might Not Raise a Cent, Whatever Source Derived," Medium.com, Nov. 9, 2017.

[7] *See* Amy Hamilton, "Legislature Approves Passthrough SALT Workaround," *State Tax Notes*, May 11, 2018, p. 723.

[8] Jeanne Sahadi, "How New York's Governor Wants to Get Around the SALT Cap," *CNN Money*, Jan 16, 2018.

[9] Dustin Racioppi, "Help for NJ's High Property Taxes? Phil Murphy Signs Workaround to Trump Tax Code Rewrite," NorthJersey.com, May 4, 2018.

[10] Notice 2018-54, 2018-24 IRB 750.

[11] *E.g.*, Peter L. Faber, "Do Charitable Contributions Avoid the TCJA SALT Deduction Limit?" *State Tax Notes*, Apr. 23, 2018, p. 309.

[12] *See* Bankman et al., *supra* note 3.

[13] Ga. Code Ann. section 48-7-29.16. A comprehensive list of such preexisting programs can be found in the Appendix to Joseph Bankman et al., *supra* note 3.

fundamental issue of preemption. The supremacy clause of the U.S. Constitution declares that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[14] Simply put, when state law conflicts with federal law, federal law wins. In a watershed case for preemption doctrine, *McCulloch v. Maryland*,[15] Chief Justice John Marshall described the impact and importance of the supremacy clause on federal-state relations:

> It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain.[16]

Determining when state law conflicts with federal law is not quite so simple, however.[17] The next section explores the state of the doctrine, focusing particularly on a form of preemption known as obstacle preemption.[18]

A. Federal Preemption Doctrine

The various ways in which federal law might preempt state law were recently described by the Supreme Court in *Murphy v. NCAA*:

> Our cases have identified three different types of preemption — "conflict," "express," and "field" — but all of them work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.[19]

Because the IRC does not expressly prohibit states from imposing income taxes on their residents, express preemption is not at issue regarding the SALT cap workarounds.[20] It is also unlikely that Congress intended to occupy the entire field of income tax law through the IRC, so field preemption is also not at issue here.[21] The remaining type of preemption — conflict preemption — may invalidate the SALT cap workarounds.

Conflict preemption breaks down into two forms: impossibility preemption and obstacle preemption.[22] Impossibility preemption requires that it be "impossible for a private party to comply with both state and federal requirements."[23] For example, in *Mutual Pharmaceuticals Co. v. Bartlett*, the Court found a state tort law affecting the labelling of pharmaceuticals to be preempted by the Federal Food, Drug, and Cosmetic Act because "it was impossible for Mutual to comply with both its state-law duty to strengthen the warnings on sulindac's label and its federal-law duty not to alter sulindac's label."[24] This form of preemption is not at issue in the current analysis because it is not impossible for a taxpayer to comply with both federal and state law.[25]

Thus, obstacle preemption remains. Obstacle preemption looks to whether the state law at issue frustrates the objectives of Congress.[26] The standard for obstacle preemption demands a consideration of the "entire scheme of the

[14] U.S. Const. Art. VI, cl. 2.

[15] *McCulloch v. Maryland*, 17 U.S. 316 (1819).

[16] *Id*. at 427.

[17] *See, e.g.*, Gregory M. Dickinson, "An Empirical Study of Obstacle Preemption in the Supreme Court," 89 *Neb. L. Rev*. 682, 682 (2011) ("The Supreme Court's preemption jurisprudence over the last few decades has been unpredictable to say the least.").

[18] Obstacle preemption is also sometimes referred to as "purposes and objectives" preemption. *See Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring).

[19] *Murphy v. National Collegiate Athletic Association*, 584 U.S. __, at *21-22 (2018) (internal citations omitted).

[20] Express preemption occurs when the federal law expressly prohibits overlapping state legislation. *See id*. at *22.

[21] Field preemption occurs when the federal regime is so pervasive that there is no room for additional state regulation. *See id.*

[22] *E.g.*, *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) ("We will find preemption where it is impossible for a private party to comply with both state and federal law, and where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (internal citations omitted); and *Arizona v. United States*, 567 U.S. 387, 400 (2012).

[23] *E.g.*, *Mutual Pharmaceuticals Co. v. Bartlett*, 570 U.S. 472, 480 (2013) (internal citations omitted).

[24] *Id.*

[25] *See Crosby*, 530 U.S. at 372-73.

[26] *Id.*

[federal] statute" in order to identify "its purpose and intended effects"; if the state law frustrates the operation of the federal statute or impedes the "natural effect" of the statute, the state law must yield.[27] Though the standard appears to demand a broad consideration of the federal law, the Court often focuses on the particular parts of a larger statutory regime that the state law conflicts with.[28] As the Court has explained, "in assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law."[29] Ultimately, whether the state law presents a significant enough obstacle to the federal law is a matter of judgment.[30]

In performing this analysis, a court should consider the provision at issue, its history, any explanation of its objectives, and current views of the preemptive effect of the provision.[31] Also, the state law must frustrate a *significant* objective of the federal law; peripheral objectives are not the concern.[32] Finally, under the presumption against preemption, a court avoids reading federal statutes to intrude on traditional state powers, such as taxation,[33] "in the absence of a clear indication that they do."[34] However, the supremacy clause cannot be "evaded by formalism";[35] a state cannot mask a direct assault on federal law or policy through a formalistic application of traditional state powers.

Often an obstacle preemption case involves a state law that imposes burdens on a person beyond what federal law requires. For example, in *Geier v. American Honda Motor Co. Inc.*,[36] a state law imposing state-level tort liability on car manufacturers who did not install airbags in their cars was found to frustrate the federal policy of allowing manufacturers to choose between installing airbags or automatic seatbelts in order to meet safety standards.

However, in some cases, the state law at issue has provided an avenue for a person to escape federal burdens. For example, in *Hillman v. Maretta*,[37] the Court considered a challenge to a Virginia law that held a former spouse liable for insurance proceeds to whoever would have received them under applicable law but for the former spouse being designated the beneficiary. That law conflicted with the Federal Employees' Group Life Insurance Act, which provided that insurance proceeds were to be paid to the designated beneficiary first. The Virginia law did not make it impossible for the federal law to operate — the life insurance proceeds would still be paid out to the designated beneficiary. Rather the law conflicted with the federal law by providing an avenue for those proceeds to be stripped away from the designated beneficiary.

Observing that there was a presumption against preemption in *Hillman* because the "regulation of domestic relations is traditionally the domain of state law," the Court noted that the state law must do "'major damage' to 'clear and substantial' federal interests" before the state law is preempted.[38] The Court then began its analysis by determining the nature of the federal interest, which it described as ensuring that a duly named beneficiary would receive the insurance proceeds and be able to make use of them.[39] The Court also observed that it made no difference to the case that the state law did not actually require the transfer of proceeds but instead created a cause of action enabling someone to effectuate such a transfer. In the Court's view, the Virginia law "frustrates the deliberate purpose of Congress" because it "displaces the beneficiary selected by

[27] *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also Hillsborough County v. Automated Medical Laboratories Inc.*, 471 U.S. 707, 713 (1985).

[28] *E.g.*, *Hillman v. Maretta*, 569 U.S. 483 (2013) (considering state law conflict with beneficiary designation provisions of the Federal Employees' Group Life Insurance Act); *Arizona v. United States*, 567 U.S. at 400 (considering state law conflict with particular federal alien-registration requirements in the federal immigration law regime); and *Williamson v. Mazda Motor of America Inc.*, 562 U.S. 323, 330 (2011) (considering whether state law conflicted with the provisions of Standard 208 issued under the National Traffic and Motor Vehicle Safety Act).

[29] *See Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 105-06 (1992).

[30] *Crosby*, 530 U.S. at 373.

[31] *See Williamson*, 562 U.S. at 330.

[32] *Id.*

[33] *See Hines v. Davidowitz*, 312 U.S. 52 (1941).

[34] *E.g.*, *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014); *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

[35] *Haywood v. Drown*, 556 U.S. 729, 742 (2009).

[36] *Geier v. American Honda Motor Co. Inc.*, 529 U.S. 861 (2000).

[37] *Hillman*, 569 U.S. 483.

[38] *Id.* at 490-491.

[39] *Id.* at 493-494.

the insured . . . and places someone else in her stead."[40] The Virginia law was preempted.

In *Hughes v. Talen Energy Marketing LLC*,[41] the Court affirmed that Maryland's efforts to work around federal rates for electricity were preempted because they conflicted with the rates set by the Federal Energy Regulatory Committee. *Hughes* is a narrow case concerning a specific area of law[42] — interstate electricity rates — but indicates the Court's discomfort with state actions that intentionally undermine federal law.[43] As the Court observed:

> States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates, as Maryland has done here. *See* [*Oneck Inc. v. Learjet Inc.*, 575 U.S. __ (2015)] (distinguishing between "measures *aimed directly* at interstate purchasers and wholesalers for resale, and those aimed at subjects left to the states to regulate.")[44]

Obstacle preemption analysis can be murky,[45] but as described, some guideposts do exist. First, the state law in question must frustrate a significant federal policy. Second, if that frustration is only incidental to the state exercising one of its fundamental powers, the state law has a stronger chance of being permitted to stand thanks to the presumption against preemption.

B. The Case Against the SALT Cap Workarounds

In the case of the SALT cap workarounds, the states are certainly reacting to the changes of the TCJA, but are they frustrating federal policy? The House Committee Report on the TCJA said the following regarding the reasons for the SALT cap:

> The Committee believes that scaling back existing tax incentives, including the deduction for State and local taxes, makes the system simpler and fairer for all families and individuals, and allows for lower tax rates. The Committee further believes that modification of this provision to apply only to real property taxes is consistent with streamlining the tax code, broadening the tax base, lowering rates, and growing the economy.[46]

Though federal lawmakers did not provide much further insight into the policy behind the imposition of the SALT cap, there are numerous possible policies that might be considered core to the SALT cap such that they are substantial enough for preemption analysis to come into play.

First, the TCJA as a whole was intended to lower federal tax burdens and simplify filing by limiting itemized deductions and pushing more people into claiming the standard deduction.[47] The SALT cap workarounds do not necessarily frustrate the goal of lowering federal tax burdens as they further lower federal tax burdens, but the Court has recognized that a "conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy."[48] Also, the TCJA did not seek to eliminate federal tax burdens, but to lower them to a specific point. The SALT cap workarounds frustrate that objective by offering an avenue for lowering federal tax burdens past the intended point. The workarounds do conflict with the simplification goal by offering taxpayers an avenue to claim more itemized deductions, at least in the case of the charitable contribution workarounds.

More specifically, the policy behind enacting the SALT cap may have been to alter taxpayers'

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[40] *Id.* at 494.

[41] *Hughes v. Talen Energy Marketing LLC*, 136 S. Ct. 1288 (2016).

[42] *Id.* at 1299.

[43] *Cf. Haywood*, 556 U.S. at 736 ("Although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.").

[44] *Hughes*, 136 S. Ct. at 1298 (emphasis in original).

[45] *See Williamson*, 562 U.S. at 342 (Thomas, J., concurring) ("That the Court in *Geier* reached an opposite conclusion [than the one in this case] reveals the utterly unconstrained nature of purposes-and-objectives pre-emption. There is certainly 'considerable similarity between this case and *Geier*.'").

[46] H.R. Rep. No. 115-409, Tax Cuts and Jobs Act (115th Congress 2017-2018).

[47] *Id.* ("H.R. 1, as reported by the Committee on Ways and Means, makes comprehensive reforms to the Internal Revenue Code of 1986 to provide tax relief and simplification to American families and individuals so that they can keep more of what they earn and devote less time and resources to filing their tax returns.").

[48] *Arizona v. United States*, 567 U.S. 387, 406 (2012) (citing *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971)).

federal tax burdens as a way to reduce the regressivity of the cap and the federal subsidization of state taxes. The history and commentary surrounding the SALT cap point toward this purpose, as the SALT cap has long been criticized on such grounds.[49] Alternatively, the policy behind implementing the cap may have been more practical: to raise revenue to offset tax cuts in other parts of the TCJA. Despite the difficulty of determining the precise reason the SALT cap was in the TCJA, this much is clear: the implementation of the SALT cap could free up to $1 trillion in the next 10 years.[50]

The SALT cap workarounds clearly frustrate these policies: They permit taxpayers to alter their federal tax burdens, retain the regressivity of the SALT cap, continue the federal subsidization of state taxes, and reduce the revenue brought in by the SALT cap.[51] The blueprint for the preemption case against the workarounds might even be found in the earliest of cases, *McCulloch v. Maryland*.[52] Following the War of 1812, the United States found itself in financial straits and established the Second Bank of the United States for support.[53] In an act of protest against the bank, Maryland attempted to tax it. The Court determined that the tax imposed on the bank "would abridge, and almost annihilate [the] useful and necessary right of the [federal] legislature to select its means."[54] The Maryland tax was preempted.

However, preemption doctrine has evolved since *McCulloch*, and, in the case of the SALT cap workarounds, the states are exercising their fundamental tax powers to achieve their goals. The states are providing state tax benefits to effectuate the workarounds, so perhaps they should not be preempted. Though the presumption against preemption often protects state law in such circumstances, the presumption is not absolute. Here, as in *Hillman* and *Hughes*, the states are directly targeting the federal law through the workarounds, significantly damaging the case for the presumption to protect the workarounds. Furthermore, the workarounds appear to be an exercise in formalism: the states are not advancing any state tax policy, they are using their laws to offer a workaround to federal tax policy. Preempting these types of state actions is hardly a case of the federal government encroaching on traditional state powers; formalism cannot be used to avoid the supremacy clause.[55]

Even so, a state exercising its traditional powers in this way does not prevent the federal government from achieving its goals by simply disregarding the state action for federal purposes. A taxpayer can have a charitable deduction at the state level and none at the federal level, and the federal-state balance is hardly upset. In this line of thinking, the state cannot frustrate the federal law because it has no real power over the federal law.

It is true that Congress can disregard the state actions for federal purposes, but Congress is not required to explicitly do so in all instances.[56] The fact that there are forms of implied preemption is proof of this proposition. If the congressional intent was to enact a particular policy, then the states should not be permitted to directly and substantially frustrate that policy regardless of the various remedies available to Congress. Not forcing Congress to revisit its laws because of state action is the basis of implied preemption.[57] In

[49] *See* Joseph J. Thorndike, "Tax History: The SALT Deduction Has Always Been Hard to Defend — And to Kill," *Tax Notes*, Oct. 9, 2017, p. 176 (detailing the history of the SALT cap and arguments for and against it).

[50] *Id.*

[51] *Cf. Crosby v. National Foreign Trade Council*, 530 U.S. 363, 377 (2000) ("We used the metaphor of the bargaining chip to describe the President's control of funds valuable to a hostile country; here the state Act reduces the value of the chips created by the federal statute. It thus 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (internal citations omitted).

[52] *McCulloch*, 17 U.S. 316.

[53] Andrew T. Hill, "The Second Bank of the United States," Federal Reserve History.

[54] *McCulloch*, 17 U.S. at 419.

[55] *Haywood*, 556 U.S. at 742.

[56] *See Crosby*, 530 U.S. at 387-88 ("A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply, and in any event the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict. The State's interference of congressional intent is unwarranted here, therefore, simply because the silence of Congress is ambiguous.").

[57] *See* Caleb Nelson, "Preemption," 86 *Va. L. Rev.* 225, 277-78 (2000) (framing implied preemption as "an exercise in 'imaginative reconstruction'" which represents "an attempt to resolve preemption questions in a way that the enacting Congress would have liked). As Nelson notes, ascribing a purpose or intention to a particular Congress is a difficult, if not impossible, task, *id.* at 280-282. This criticism is duly noted, but given that the Supreme Court is willing to engage in the discovery of congressional intent, the analysis here will proceed as the Court does.

other words, if express preemption was the only form of preemption, then Congress would need to account for all scenarios in which it intended to preempt state law. Rather, implied preemption recognizes that when Congress intends to enact a particular policy, it can also be presumed to intend not to permit the states to frustrate that policy.[58] Without implied preemption, Congress would need to amend its statutes to preempt conflicting state actions. The Court has indicated that requiring Congress to amend its statutes would be a substantial obstacle, though the obstacle might be lessened when Congress delegates authority to an agency to administer the law.[59]

C. Weaknesses in the Case

The preemption case against the SALT cap workarounds is not without weaknesses. Two major weaknesses of the argument are that the workarounds rely on another provision of the IRC for their effect and that the IRS is tasked with administering the code.

That the workarounds rely on IRC section 170 to achieve their goals presents a hurdle for the preemption case. As others have observed, section 170 demonstrates a federal purpose to encourage charitable deductions to arms of state and local governments.[60] Therefore, at a minimum, the SALT cap workarounds frustrate one part of the federal tax code by advancing the purposes of another part of the federal tax code.[61] In a way, the federal tax code is frustrating its own purposes through the potentially conflicting goals of sections 170 and 164.[62] The SALT cap workarounds merely expose that conflict, which Congress should have to resolve.

The resolution of this issue may depend on how narrowly a court construes a preemption challenge (a challenge alleging conflict only under section 164 and not the IRC at large would stand a greater chance of success), but there is reason to believe that a narrow challenge is appropriate. First, the states have specifically targeted section 164, not the larger federal tax code, which may counsel in favor of examining whether the states have achieved that goal. Second, as noted, the workarounds are highly formalistic, calling into question whether the relabeling of the taxpayer's taxes to charitable deductions advances the causes of section 170. Finally, it is not clear under the preemption doctrine that advancing federal interests is enough to overcome the frustration of other federal interests.[63] For example, in *Arizona v. United States*, the Court found a state law prohibiting illegal immigrants from seeking employment was preempted despite the fact that it "attempt[ed] to achieve one of the same goals of federal law."[64] The law was preempted because it conflicted with federal law in another way — method of enforcement. If the goal of obstacle preemption is to prevent federal-state conflicts, there is reason to believe that covering a

[58] *See Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493 (1989) ("Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law. Determining whether it has exercised this power requires that we examine congressional intent. In the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent . . . where the state law at issue conflicts with federal law.").

[59] *See Hillsborough County, Fla. v. Automated Medical Labs. Inc.*, 471 U.S. 707, 721 (1985) ("Our analysis would be somewhat different had Congress not delegated to the FDA the administration of the federal program. Congress, unlike an agency, normally does not follow, years after the enactment of federal legislation, the effects of external factors on the goals that the federal legislation sought to promote. Moreover, it is more difficult for Congress to make its intentions known — for example by amending a statute — than it is for an agency to amend its regulations or to otherwise indicate its position.").

[60] *See* Bankman et al., *supra* note 3.

[61] Many thanks to Kirk Stark for raising this point.

[62] *Cf. Sears, Roebuck & Co. v. C.I.R.*, 972 F.2d 858, 868 (7th Cir. 1992) (Easterbrook) ("Provisions of the Internal Revenue Code do not conflict with 'tax policy,' as the Commissioner seems to believe. They are tax policy and are to be enforced."). Many thanks to Andy Grewal for this citation.

[63] *See Perez v. Campbell*, 402 U.S. 637, 652 (1971) ("Any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause."); *see also Arizona v. United States*, 567 U.S. at 406 (finding a state law that "attempts to achieve one of the same goals of federal law" preempted under conflict preemption principles because it conflicted with federal law in another way — method of enforcement); Crosby, 530 U.S. at 379 ("The conflicts [between state and federal law] are not rendered irrelevant by the State's argument that there is no real conflict between the statutes because they share the same goals and because some companies may comply with both sets of restrictions. The fact of a common end hardly neutralizes conflicting means[.]"); and *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 103 (1992) ("To allow a State selectively to 'supplement' certain federal regulations with ostensibly nonconflicting standards would be inconsistent with this federal scheme of establishing uniform federal standards, on the one hand, and encouraging States to assume full responsibility for development and enforcement of their own OSH programs, on the other.").

[64] *Arizona v. U.S.*, 567 U.S. at 406 (finding a state law that "attempts to achieve one of the same goals of federal law" preempted under conflict preemption principles because it conflicted with federal law in another way — method of enforcement).

conflict with an advancement of other federal goals would not achieve that goal.

Another major hurdle to the preemption case is that the IRS has the authority to administer the IRC and can revisit the law in light of the states' actions. Indeed, it has already stated that it will do so in this case.[65] That the IRS may issue guidance regarding the SALT cap workarounds that advances the federal tax law policy indicates that the workarounds are not substantial obstacles to the federal law.[66] However, in *Automated Medical Laboratories*, in which the Supreme Court indicated that the administration of the law by an agency can reduce the obstacle presented by conflicting state law, the Food and Drug Administration was tasked with substantial authority over setting standards for the collection of blood plasma.[67] The IRS has significant authority over the IRC, but sections 170 and 164 define charitable contributions and taxes with a degree of specificity that may indicate that the IRS has less room to address the SALT cap workarounds.

Finally, it is unclear when a preemption challenge to the SALT cap workarounds would become ripe. As laid out in *Arizona v. United States*, the Court will not seek out conflicts when none clearly exists; when uncertainty exists, the state law must be given time to operate to uncover a conflict with federal law.[68] It may be that the SALT cap workarounds do not create an actual conflict with federal law, particularly if the IRS disregards their form for federal tax purposes. In such a case, the preemption analysis would be unnecessary.

III. Georgia on My Mind

What about the charitable deduction schemes in place in a variety of states before the enactment of the TCJA? If the SALT cap workarounds are preempted, should the existing schemes also be preempted? The answer is less clear for one reason. Though these schemes substantively do frustrate the federal law in a manner similar if not identical to the SALT cap workarounds, they may be saved by the presumption against preemption. If those laws were not designed solely to target federal law, then the presumption against preemption may require a clear statement from Congress that it intended to preempt these state programs when enacting the TCJA with the SALT cap. No such clear statement exists, so these programs might withstand a preemption attack.

These programs may have been set up in large part to permit alternative minimum tax payers to avoid the disallowance of the section 164 deduction.[69] If that were the sole motivation for the earlier programs, there is nothing to distinguish them from the SALT cap workarounds (except perhaps the current rhetoric from the states adopting the workarounds). However, given that the existing programs had no substantive effect for non-AMT payers before the enactment of the TCJA,[70] in comparison to the SALT cap workarounds the purpose behind the programs may be more credibly articulated as implementing substantive state policies of supporting various types of organizations, such as schools and hospitals.[71] In this case, the laws would not be a mere formalistic application of traditional state powers, and the presumption against preemption might save them under the TCJA.

Admittedly, the line between some of the existing state programs and the new SALT cap workarounds under this analysis is razor thin. The legal resolution may depend on which type of law is challenged first, as it seems inequitable to grandfather old programs while prohibiting the new workarounds when both have the same substantive effect (and when many of the old programs are being marketed as means for avoiding the SALT cap.)[72]

[65] *See* Notice 2018-54, 2018-24 IRB 750.

[66] *See supra* note 59.

[67] *See Automated Medical Laboratories*, 471 U.S. at 710.

[68] *Arizona v. United States*, 567 U.S. at 415.

[69] *See* Carl Davis, "State Tax Subsidies for Private K-12 Education," Institute on Taxation and Economic Policy (Oct. 2016).

[70] Because SALT deductions were uncapped and charitable deductions were capped under prior law, these laws did little if anything to incentivize federal tax avoidance. Furthermore, the value of the deductions was the same for both, so the federal government likely was indifferent as to which the taxpayer claimed.

[71] *See, e.g.*, Ala. Code section 16-6D-2(b) (describing the purpose of multiple provisions, including some state tax credits, as "to advance the benefits of local school and school system autonomy in innovation and creativity by allowing flexibility from state laws, regulations, and policies").

[72] *See* Carl Davis, "The Other SALT Cap Workaround: Accountants Steer Clients Toward Private K-12 Voucher Tax Credits," Institute on Taxation and Economic Policy (June 2018) (cataloguing such efforts).

IV. Conclusion

The case for preemption of the SALT cap workarounds exists, even if it is not bulletproof. How such a case would come out is murky, as many preemption cases are. On the one hand, states should not be encouraged or able to intentionally frustrate federal policy that they disagree with. In this instance, the clear motivations behind the workarounds would seem to bring them directly into the crosshairs of the obstacle preemption doctrine. Should a state be rewarded for explicitly intending to obscure federal policy, no matter how repugnant it may be to the state?

On the other hand, taxation is a fundamental power of the states that should not be lightly interfered with by the courts. If there is a legitimate purpose to be found for enacting the workarounds, it is more difficult to justify preempting the state laws for their effects on federal law. Certainly, states that did not have these tax programs in place before the TCJA should not be precluded from adopting them now if the old programs remain effective. And though Congress is not asked to explicitly provide for preemption in every instance, it also should not be given a blank pass for sloppy legislation that created the loopholes that are being exploited. Is it truly against federal policy for a state to assist a taxpayer in taking advantage of another part of the same statute? Perhaps the answer will come down to who acted most poorly: the federal government in enacting the TCJA or the states in directly targeting that law with their workarounds. ■