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## Preventing Preemption: Finding Space for States to Regulate Consumers' Credit Reports

Elizabeth D. De Armond

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# Preventing Preemption: Finding Space for States to Regulate Consumers' Credit Reports

*Elizabeth D. De Armond* \*

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## I. INTRODUCTION

The recent Great Recession soiled the credit reports of many Americans. Furthermore, advances in database technology have allowed employers and others wider access to comprehensive information about consumers, sometimes significantly narrowing the opportunities those consumers might have for employment, credit, housing, or insurance. These results have inspired some state legislatures to revise their credit reporting statutes to ameliorate the percussive effects of the economic crisis on their citizens' credit records. However, state lawmakers must navigate the thicket of the federal Fair Credit Reporting Act's preemption provisions if they are to create legislation that will be effective rather than impotent. This Article analyzes these provisions alongside recent Supreme Court decisions about preemption. The Article then provides both a theory of the intersection of state and federal credit reporting laws and describes the space remaining for state legislatures to create preemption-proof, or at least preemption-resistant, credit reporting provisions that can fairly balance the concerns of individuals and those who want access to their background information.

Part II describes some recent legislative efforts in protecting consumers' financial and criminal record information. Following, Part III sets forth the framework of federal preemption generally and analyzes the Supreme Court's recent preemption decisions that are relevant to information-protection laws. Part IV describes the Fair Credit Reporting Act provisions that may overlap with state legislative activity, along with its specific preemption provisions, and analyzes the vulnerability of various state credit reporting provisions to preemption. The Article then maps out tactics for states to employ to preemption-proof their legislation and maximize the effects of their state information-protection laws.

## II. STATES' REGULATION OF DISCLOSURE OF CONSUMER FINANCIAL AND CRIMINAL RECORD INFORMATION

Nearly every state regulates how consumers' financial and criminal record information may be collected and disclosed; these are, in essence, reputation-protecting provisions. However, given recent developments in the economy and data technology, this may be a suitable time to adjust these laws to better balance the privacy interests of consumers against the information interests of employers, banks, and insurance companies.

The Great Recession inflicted tremendous damage to credit records by causing widespread unemployment and depressing housing values, putting great stress on the ability of many to repay debts.<sup>1</sup> Those defaults and delays in payment have been duly amassed by the consumer reporting agencies that publish credit reports about consumers and compute their credit scores. Seeing this information about those hurt by economic blows may make employers less likely to hire them, landlords less likely to rent to them, and insurers less likely to insure them (or willing to insure them, but only at elevated premiums).

Aside from the economic environment, advances in data technology have increased our ability to view public records across the country, leading many to be marked by visible criminal records incurred even decades ago—records that many might have thought

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1. An analysis by the Fair Isaac Corporation concluded that credit scores “for approximately 50 million people declined more than 20 points” during the 2008–09 period. Rachel Bell, *Recession Causes FICO Score Swings*, FICO: FICOBLOG, <http://www.fico.com/en/blogs/risk-compliance/recession-causes-fico-score-swings> (last visited Feb. 17, 2016). Credit scores then largely rebounded in the subsequent two years. *Id.*; see also *Credit Scores Drop During Recession: Are You Worried about Your Score?*, ABC NEWS (Mar. 21, 2016), <http://abcnews.go.com/WN/credit-scores-drop-millions-americans-recession-world-news/story?id=11142553> (noting that “more than [25%] of Americans . . . [had a] credit score[] of 599 or lower,” in contrast to a historical norm of 15%); BARRIERS FACING THE LONG-TERM UNEMPLOYED: STATEMENT OF THE NATIONAL EMPLOYMENT LAW PROJECT BEFORE THE U.S. SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS, NAT'L EMP. L. PROJECT 8 (Dec. 6, 2011), [http://www.nelp.org/page/-/UI/2011/Owens\\_Testimony\\_Barriers\\_Unemployed\\_12-2011.pdf?nocdn=1](http://www.nelp.org/page/-/UI/2011/Owens_Testimony_Barriers_Unemployed_12-2011.pdf?nocdn=1) (reporting that bankruptcy filings among the unemployed rose 23% between 2008 and 2010); Jeremy Simon, *U.S. economic recession shifted FICO credit scores* (Sept. 27, 2011), <http://blogs.creditcards.com/2011/09/economic-recession-fico-credit-scores.php> (showing annual increases in the percent of the population with poor credit scores from 2006–09, when they gradually began to improve).

they had surpassed.<sup>2</sup> In addition, medical costs continue to accelerate and medical debt not only spoils many otherwise solid credit reports but has also led to a significant number of bankruptcies.<sup>3</sup> Finally, the crime of identity theft has increased as data breaches become more common, exposing sensitive financial information to thieves who can then poison their victims' credit reports.<sup>4</sup>

State legislators can ameliorate the effects of some of these historical events on their constituents' opportunities, curbing the impact of old credit, criminal, medical, and identity theft problems. However, for such record-enhancing provisions to have their intended impact, the drafters must carefully navigate the express preemption provisions staked throughout the Fair Credit Reporting Act (FCRA), the federal statute governing the creation and use of credit reports.<sup>5</sup> Furthermore, drafters must simultaneously consider the Supreme Court's present stance on express and implied preemption. The next Section discusses some of the richest opportunities for legislatures to rebalance the interests of credit report users against the economic recovery of consumers. These include employers' use of credit reports, criminal record information, medical debt information, and identity theft content.

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2. See Dara N. Lee, *The Digital Scarlet Letter: The Effect of Online Criminal Records on Crime* Figure 1: Timing of Online Criminal Records, 1990–2008 (May 2011) (working paper) (on file with the Social Science Research Network) (showing a gradual increase in states making criminal records available online from 1990–2008, finishing with 28 states).

3. Kate Santich, *Despite insurance, medical bills push family to bankruptcy*, ORLANDO SENTINEL (July 30, 2011), [http://articles.orlandosentinel.com/2011-07-30/health/os-medical-bankruptcy-20110730\\_1\\_health-insurance-medical-bills-bankruptcy](http://articles.orlandosentinel.com/2011-07-30/health/os-medical-bankruptcy-20110730_1_health-insurance-medical-bills-bankruptcy) (describing trends in bankruptcies related to medical debt, and noting that “most experts interviewed said the problem is likely only to have worsened”); Sara R. Collins et al., *Insuring the Future, Current Trends in Health Coverage and the Effects of Implementing the Affordable Care Act*, COMMONWEALTH FUND xi (Apr. 2013), [http://www.commonwealthfund.org/~media/files/publications/fund-report/2013/apr/1681\\_collins\\_insuring\\_future\\_biennial\\_survey\\_2012\\_final.pdf](http://www.commonwealthfund.org/~media/files/publications/fund-report/2013/apr/1681_collins_insuring_future_biennial_survey_2012_final.pdf) (reporting that 75 million adults struggled with medical debt in 2012).

4. See Lisa Gerstner, *What you need to know about identity theft*, CHI. TRIB., May 19, 2013, at 12 (reporting that “about 12.6 million people” suffered identity theft in 2012, an increase of nearly 8% from 2011).

5. 15 U.S.C. §§ 1681–1681x (2012). The preemption provisions are found in 15 U.S.C. § 1681t.

*A. Employer Checks of Credit Reports*

After creditors, employers may be the most visible and obvious users of consumer credit reports and similar background checks, reviewing them to peer into the past financial and other decisions of both current employees and applicants in order to choose and place their workers. According to a survey by the Society for Human Resource Management, in 2012 approximately thirty-four percent of employers reported that they conduct credit background checks on some potential applicants, while another thirteen percent conduct them on all applicants.<sup>6</sup>

However, such information may unfairly damage an individual's prospects in a few ways. First, credit and other background checks can be surprisingly inaccurate; a recent report by the Federal Trade Commission to Congress disclosed that 21 percent of credit reports have some sort of error in them, and 12.9 percent of the reports had an error sufficient that the correction changed the corresponding credit scores.<sup>7</sup> When this percentage is applied to millions of reports, the number of consumers injured by mendacious reports is disquieting.<sup>8</sup> Furthermore, even when a credit report is accurate, it may blacklist otherwise qualified and competent candidates from a job if it incorporates information that may unduly grab the attention of its audience.

Several states perceive such reports to unfairly impede employment, and in response have enacted provisions designed to protect employees and job applicants from the scrutiny of a credit

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6. *Background Checking—The Use of Credit Background Checks in Hiring Decisions*, SOC'Y FOR HUM. RESOURCE MGMT. (July 19, 2012), <http://www.shrm.org/research/surveyfindings/articles/pages/creditbackgroundchecks.aspx>.

7. FED. TRADE COMM'N, REPORT TO CONG. UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003 iv-v (2012) (finding that 21% of the consumers whose reports were sampled "encounter a confirmed material error on one or more of their credit reports," and noting that "[t]he estimated proportion of reports and consumers who experience a credit score change resulting from modification of a credit report is higher than previous estimates from the credit reporting industry"). For 5.2% of the consumers, the change in score "was such that their credit risk tier decreased and thus the consumer may be more likely to be offered a lower auto loan interest rate." *Id.* at i.

8. See Richard Cordray, *Prepared Remarks by Richard Cordray on Credit Reporting*, CONSUMER FIN. PROTECTION BUREAU (July 16, 2012), <http://www.consumerfinance.gov/speeches/prepared-remarks-by-richard-cordray-on-credit-reporting> (stating every year "3 billion credit reports are issued").

report check. California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington have all passed credit history cloaking measures.<sup>9</sup> Guam has also passed such a provision.<sup>10</sup> Other states have considered these types of provisions without yet passing them.<sup>11</sup>

The adopted measures typically prevent employers or others from using a credit report in connection with employment.<sup>12</sup> Such restrictions far exceed those imposed by the FCRA, which permits employers to obtain an employee or applicant's credit report so long as the target has consented.<sup>13</sup>

The history of Maryland's law provides a typical example of the impetus for such statutes; the bill's sponsor introduced it to assist "blue-collar workers having trouble making ends meet, so that they don't have one more hurdle to overcome."<sup>14</sup> A poor credit score, said the sponsor, does not reveal the person's ability to perform the job: "Having bad credit does not make someone a bad person . . . . Costly medical problems, a messy divorce, and many other understandable reasons to have poor credit have nothing to do with one's ability to do a good job."<sup>15</sup> Though the business and credit reporting communities opposed the bill when it had previously been

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9. CAL. CIV. CODE § 1785.20.5 (2012) and CAL. LAB. CODE § 1024.5 (2011 & Supp. 2016); COLO. REV. STAT. § 8-2-126 (2016); 7 COLO. CODE REGS. §§ 1103-4:1-1103-4:12 (2016); CONN. GEN. STAT. ANN. § 31-51tt (2011 & 2016 Supp.); DEL. CODE ANN. tit. 19, § 711(g) (2013 & Supp. 2014); HAW. REV. STAT. § 378-2(a)(8) (1993 & Supp. 2013); 820 ILL. COMP. STAT. 70/5-70/30 (2008 & Supp. 2016); MD. CODE ANN. LAB. & EMP. § 3-711 (2008 & Supp. 2015); NEV. REV. STAT. § 613.570 (2013); OR. REV. STAT. § 659A.320 (2015); VT. STAT. ANN. tit. 21, § 495i (2009 & Supp. 2015); WASH. REV. CODE ANN. § 19.182.020(2)(c) (2013).

10. 22 GUAM PUB. L. 33-35 (2015); 22 GUAM CODE ANN. § 5201(h) (enacted June 10, 2015), <http://www.guamcourts.org/Compileroflaws/GCA/22gca/22gc005.PDF>.

11. *See, e.g.*, H.P. 795, 127th Leg., 1st Sess. (Me. 2015); H. File 233, 85th Gen. Assemb. (Iowa 2013); S.B. 80, 188th Gen. Court. (Mass. 2013); S.B. 145, 52d Leg., 1st Sess. (N.M. 2015); Assemb. 1799, 236th Sess. (N.Y. 2013); Assemb. 2148, 236th Sess. (N.Y. 2013); S.B. 699, 108th Gen. Assemb. (Tenn. 2013); H.B. 2532, 81st Reg. Sess. (W. Va. 2013).

12. *See infra* text accompanying notes 19 to 30.

13. 15 U.S.C. § 1681b(b) (2012).

14. Laura Bassett, *Maryland Lawmaker Reintroduces Bill To Ban Credit Checks In Hiring Process*, HUFFINGTON POST (Jan. 26 2011, 9:43 AM), [http://www.huffingtonpost.com/2011/01/26/maryland-job-applicant-fairness-act\\_n\\_814154.html](http://www.huffingtonpost.com/2011/01/26/maryland-job-applicant-fairness-act_n_814154.html).

15. *Id.*

considered,<sup>16</sup> the bill eventually passed in 2011 as the effects of the recession wore on.<sup>17</sup>

Though employers may insist that credit reports aid their decision-making process, empirical data has not appeared to establish a material link between an employee's credit record and that employee's job performance. In considering its credit history bill, for example, the Oregon legislature elicited testimony from an employee of one of the major credit reporting agencies, TransUnion, and learned that the agency did not have any evidence that an employee's credit history correlated with subsequent job performance, casting doubts on the validity of such a check.<sup>18</sup>

Credit history-cloaking laws have some common features. In general, the statutes apply to similar types of information—reports that contain information about the applicant's credit history<sup>19</sup>—and typically, they forbid employers from discriminating on the basis of credit information.<sup>20</sup> The strictest laws prohibit employers from even *obtaining* a report.<sup>21</sup> Connecticut has the weakest prohibition which merely bars employers from requiring an employee or applicant to consent to a request for a credit report—without prohibiting an

16. *Id.*

17. The bill, 2011 Maryland Laws Ch. 28 (S.B. 132) (H.B. 87), was passed on April 12, 2011.

18. Economic Fairness Oregon, *Testimony on Oregon's Job Applicant Fairness Act*, VIMEO (May 31, 2011, 3:02 PM), <http://www.vimeo.com/24479508>.

19. *See, e.g.*, CAL. CIV. CODE § 1785.20.5(a) (2012); CAL. LAB. CODE § 1024.5(a) (2011 & Supp. 2016); CONN. GEN. STAT. ANN. § 31-51tt(b) (2011 & Supp. 2016); 820 ILL. COMP. STAT. 70/5 (2008 & Supp. 2016); MD. CODE ANN. LAB. & EMP. § 3-711(b) (2008 & Supp. 2015); VT. STAT. ANN. § 495i(a)(2), (3) (2009 & Supp. 2015); WASH. REV. CODE ANN. § 19.182.020(2)(c) (2013); 22 GUAM CIV. CODE ANN. § 5201(h) (enacted June 10, 2015), <http://www.guamcourts.org/Compileroflaws/GCA/22gca/22gc005.PDF>.

20. CAL. LAB. CODE § 1024.5(a) (2011 & Supp. 2016); DEL. CODE ANN. tit. 19, § 711(g)(1) (2013 & Supp. 2014) (applies only to public employers and during the “initial application process”); HAW. REV. STAT. § 378-2(a)(8) (1993 & Supp. 2013); 820 ILL. COMP. STAT. 70/10(a) (2008 & Supp. 2016); ME. REV. STAT. ANN. tit. 26, § 600-A(1) (2007); MD. CODE ANN. LAB. & EMP. § 3-711(b), (c) (2008 & Supp. 2015) (use for a non-prohibited purpose); OR. REV. STAT. § 659A.320(1) (2015); 21 VT. STAT. ANN. tit. 21, § 495i(b) (2009 & Supp. 2015); 22 GUAM CODE ANN. § 5201(h) (enacted June 10, 2015) <http://www.guamcourts.org/Compileroflaws/GCA/22gca/22gc005.PDF>. Nevada comes close to prohibiting the acquisition of a report, forbidding employers from inquiring concerning a consumer credit report. NEV. REV. STAT. § 613.570(1)–(3) (2013).

21. OR. REV. STAT. § 659A.320(1) (2015); VT. STAT. ANN. § 495i(b)(2) (2009 & Supp. 2015) (forbidding employers from “[i]nquir[ing] about an applicant or employee's credit report or credit history”); WASH. REV. CODE ANN. § 19.182.020(2)(c) (2013).



employer from making the request, applicants might not feel free to deny permission.<sup>22</sup>

Of course, these prohibitions have exceptions, some of which threaten to swallow the rule. For instance, most laws exempt some types of management positions,<sup>23</sup> and positions involving financial institutions or monetary transactions,<sup>24</sup> as well as law enforcement.<sup>25</sup> Certain other governmental employers are also commonly exempt.<sup>26</sup>

22. CONN. GEN. STAT. ANN. § 31-51tt(b) (2011 & Supp. 2016).

23. CAL. LAB. CODE 1024.5(a)(1) (2011 & Supp. 2016); CONN. GEN. STAT. ANN. § 31-51tt(a)(4)(A) (2011 & Supp. 2016) (defining qualifying managerial positions), (C) (defining qualifying fiduciary positions), (b) (providing the exemption); ME. REV. STAT. ANN. tit. 26, § 600-A(2)(A) (2007) (“management of the company’s finances or a customer’s financial assets”); MD. CODE ANN. LAB. & EMP. § 3-711(c)(1)(ii) (2008 & Supp. 2015) (exempting positions for which the employer has a “bona fide purpose”), (c)(2)(i) (defining those positions for which an employer has a bona fide purpose as including specified managerial positions); NEV. REV. STAT. § 613.580(3)(c) (2013); VT. STAT. ANN. tit. 21, § 495i(c)(1)(E) (2009 & Supp. 2015) (positions requiring “a financial fiduciary responsibility to the employer or a client of the employer”); *see also* HAW. REV. STAT. § 378-2.7(a)(1) (1993 & Supp. 2013) (credit history is “related to a bona fide occupational requirement” and the “employee has received a conditional offer of employment”), 378-2.7(a)(3) (the position is “managerial or supervisory”); 22 GUAM CODE ANN. § 5201(h)(2) (enacted June 10, 2015) <http://www.guamcourts.org/Compileroflaws/GCA/22gca/22gc005.PDF> (“the position is managerial and involves setting the direction or control of the business”). Illinois exempts those positions for which “a satisfactory credit history is an established bona fide occupational requirement,” a feature that requires the presence of at least one of seven designated circumstances, one of which is that the position is managerial. 820 ILL. COMP. STAT. 70/10(b)(4).

24. CAL. LAB. CODE § 1024.5(b) (2011 & Supp. 2016) (institutions covered by the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801–6809); 1024.5(a)(5)(A)–(C) (access to bank or credit card information along with an individual’s date of birth and social security number, excluding routine credit card transactions); 1024.5(a)(6) (positions in which an employee would have authority over specified financial matters); 1024.5(a)(8) (positions involving regular access to cash totaling \$10,000 or more); CONN. GEN. STAT. ANN. § 31-51tt((b)(1) (2011 & Supp. 2016) (financial institutions); HAW. REV. STAT. § 378-2.7(a)(4) (1993 & Supp. 2013); 820 ILL. COMP. STAT. 70/5 (excluding from the definition of “employer”); 820 ILL. COMP. STAT. 70/10(b)(2)–(3) (duties of the position include “access to cash or . . . assets worth \$2500 or more,” or “signatory power over . . . assets of \$100 or more”); ME. REV. STAT. ANN. tit. 26, § 600-A(2)(B) (2007) (“employer is in the financial services industry”); MD. CODE ANN. LAB. & EMP. § 3-711(c)(2)(iii)–(iv) (2008 & Supp. 2015) (involves a fiduciary responsibility, including collecting payments, and for those who are provided an expense account or corporate debit or credit card); NEV. REV. STAT. § 613.580(3)(a) (2013); OR. REV. STAT. § 659A.320(2)(a) (2015) (“federally insured banks or credit unions”); VT. STAT. ANN. tit. 21, § 495i(c)(1)(B), (C), and (G) (2009 & Supp. 2015) (“access to confidential financial information,” “employer is a financial institution,” or “access to an employer’s payroll information,” respectively); 22 GUAM CODE ANN. § 5201(h)(4), (6) (enacted June 10, 2015) <http://www.guamcourts.org/Compileroflaws/GCA/22gca/22gc005.PDF> (“[The] position

A few states weaken their general prohibitions by exempting a catch-all category of positions for which an employer may rely on a credit report, rather than limiting exemptions to specific categories. For instance, Oregon and Washington permit an employer to obtain and act upon a credit report when the report's information is "substantially job-related."<sup>27</sup> Vermont permits employers to use credit reports where "[t]he employer can demonstrate that the information is a valid and reliable predictor of employee performance

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involve[s] access to customers', employees', or the employer's personal or financial information other than information customarily provided in a retail transaction . . . , [or] includes an expense account.").

25. CAL. LAB. CODE § 1024.5(a)(3) (2011 & Supp. 2016); 820 ILL. COMP. STAT. ANN. 70/5(3) (excluding from the definition of "employer"); NEV. REV. STAT. § 613.580(3)(d) (2013); OR. REV. STAT. § 659A.320(2)(c) (2015); VT. STAT. ANN. tit. 21, § 495i(c)(1)(D) (2009 & Supp. 2015) (law enforcement, emergency medical personnel and firefighters).

26. CAL. LAB. CODE § 1024.5(a)(2) (2011 & Supp. 2016) (for positions with the state department of justice); 820 ILL. COMP. STAT. 70/5(4) (where a state or local agency requires a credit report as a condition of employment); 70/10(b)(7) (where "[t]he employee's . . . credit history is . . . required by or exempt under federal or State law"); WASH. REV. CODE ANN. § 19.182.020(c)(2) (2013). Other typical exemptions include positions for which another law requires the employer to examine an applicant's credit report, CAL. CIV. CODE § 1785.20.5 (2012) (requiring the report's user to identify a specific permissible basis) and CAL. LAB. CODE § 1024.5(a)(4) (2011 & Supp. 2016); CONN. GEN. STAT. ANN. § 31-51tt(b)(2) (2011 & Supp. 2016); 820 ILL. COMP. STAT. 70/10(b)(1) ("[s]tate or federal law requires bonding" of the "individual holding the position"), 70/10(b)(7) (federal or state law otherwise requires the employee's credit history); ME. REV. STAT. ANN. tit. 26, § 600-A(2)(C) (2007); OR. REV. STAT. § 659A.320(2)(b) (2015). Some states also exempt those positions that grant the employee access to confidential customer or trade secret information. CAL. CIV. CODE § 1785.20.5 (2012) (requiring the report's user to identify a specific permissible basis) and CAL. LAB. CODE § 1024.5(a)(5),(7) (2011 & Supp. 2016) (providing, among other positions permitting the use of a report, those where the employee would have regular access to bank or credit card information, social security numbers, and date of birth, excluding routine credit card transactions, and positions with access to designated confidential or proprietary information); CONN. GEN. STAT. ANN. § 31-51tt(b)(4)(E) (2011 & Supp. 2016) (access to customer information or confidential or proprietary business information); MD. CODE ANN. LAB. & EMP. 3-711(c)(2)(v) (2008 & Supp. 2015) (access to confidential business information); 820 ILL. COMP. STAT. 70/10(b)(5); *see also* 22 Guam Code Ann. § 5201(h)(3) (enacted June 10, 2015) <http://www.guamcourts.org/Compileroflaws/GCA/22gca/22gc005.PDF> ("[T]he position meets criteria in specified federal or state administrative rules to establish the circumstances when a credit history is a bona fide occupational requirement.").

27. OR. REV. STAT. § 659A.320(2)(d) (2015) (though requiring the employer to disclose its reasons for obtaining the report to the applicant or employee); WASH. REV. CODE ANN. § 19.182.020(c)(i) (2013).

in the specific position of employment.”<sup>28</sup> Hawaii also allows some scrutiny of an employee’s credit history, but only once the employer has extended a conditional offer of employment to the target, thus permitting the employer to withdraw the offer only if the history is “directly related to a bona fide occupational qualification.”<sup>29</sup> Nevada’s general exception is so broad that it nearly eviscerates the general prohibition, allowing employers to review credit reports when such information is “reasonably related” to the position.<sup>30</sup>

Notwithstanding these weakening exceptions, however, credit history-cloaking laws indicate a trend of increasing privacy—a recognition that simply because information is available does not necessarily mean that it should be seen or used. Such laws install boundaries around an individual’s financial life and implicitly acknowledge that employees have a sphere of existence outside of their employment.

### *B. Criminal Record Information*

In addition to examining applicants’ credit history information, many employers want to know their criminal record history as well. One 2012 survey by the Society for Human Resource Management reveals that sixty-nine percent of employers investigate the criminal background of every applicant.<sup>31</sup> Such public record information has become much more widely available; at one time, a comprehensive criminal background check would have required a county-by-county visit to clerks’ counters; now so many records are available online that an individual’s record can be checked from one’s own desk, or even from a smartphone.<sup>32</sup>

While it seems intuitive that employers would want to know of any criminal taint in an applicant’s past, employee advocates worry that a criminal record—even a simple single record of arrest—can

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28. VT. STAT. ANN. tit. 21, § 495i(c)(1)(F) (2009 & Supp. 2015).

29. HAW. REV. STAT. § 378-2.7(a)(1) (1993 & Supp. 2013).

30. NEV. REV. STAT. § 613.580(3) (2013). The provision designates nine types of duties for which “credit information shall be deemed reasonably related,” but does not provide that the designated duties are exclusive. *Id.* In addition, Nevada allows employers access to employee’s credit information whenever another law authorizes it. *Id.* § 613.580(1).

31. *Background Checking*, supra note 6.

32. Federal Trade Comm’n, *FTC Warns Marketers That Mobile Apps May Violate Fair Credit Reporting Act* (Feb. 7, 2012), <http://www.ftc.gov/opa/2012/02/mobileapps.shtm>.

unjustifiably wall off a candidate from consideration for a position that does not necessarily require an unblemished background.<sup>33</sup> For one thing, sheer numbers indicate that many will suffer the “collateral consequences” of a criminal record: 8.6 percent of American adults have a felony conviction, and approximately 65 million Americans have some kind of criminal record.<sup>34</sup> Accordingly, advocacy groups such as the National Employment Law Project have urged states to reform their employment laws to reduce the impact of a criminal background on an otherwise qualified applicant.<sup>35</sup>

The FCRA—the federal act governing consumer reports—does not prohibit the publication of criminal convictions in credit reports at all.<sup>36</sup> In contrast, the statute requires that records of arrest along with other “adverse item[s] of information” disappear from reports after seven years.<sup>37</sup> This latter “catch-all” provision should encompass other criminal record information, such as indications of probation or parole.<sup>38</sup> However, the FCRA lifts the seven-year limit for jobs that can “reasonably be expected” to draw a salary of \$75,000 or more,<sup>39</sup> a figure that has not risen since 1996, and likely allows employers to examine criminal record histories for an ever-growing pool of positions.<sup>40</sup>

Unlike the FCRA, some state credit reporting statutes restrict agencies from putting certain non-conviction criminal record information into consumer reports.<sup>41</sup> These restrictions vary widely. New York, with one of the more robust provisions, flatly prohibits agencies from reporting criminal arrest information for past charges unless the individual was convicted of the offense or the “charges are

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33. State Reforms Reducing Collateral Consequences for People with Criminal Records: 2011–2012 Legislative Round-Up, NAT’L EMP. L. PROJECT, (Sept. 2012), [http://nelp.3cdn.net/6ab3d3b51b9490b40c\\_cnm6b847q.pdf](http://nelp.3cdn.net/6ab3d3b51b9490b40c_cnm6b847q.pdf).

34. *Id.*

35. *Id.* at 1–2.

36. 15 U.S.C. § 1681c(a)(5).

37. § 1681c(a)(2) (“records of arrest”); § 1681c(a)(5) ([a]ny other adverse item of information).

38. *See* Russell, FTC Informal Staff Opinion Letter (Jan. 21, 1974).

39. 15 U.S.C. § 1681c(b)(3).

40. Pub. L. No. 104-208 § 2406(a)(2), 110 Stat. 3009 (amending 15 U.S.C. § 1681c(b)).

41. *See infra* text accompanying notes 45–51.

still pending.”<sup>42</sup> Furthermore, the state prohibits the reporting of criminal convictions more than seven years old unless an exception applies.<sup>43</sup> Similarly, California prohibits not only the reporting of criminal record information that is more than seven years old, but also the reporting of any arrests, indictments, or similar information where no conviction followed or where the conviction was pardoned.<sup>44</sup> Kentucky likewise prohibits agencies from keeping information about Kentucky state criminal charges unless a conviction resulted.<sup>45</sup>

Nonetheless, state law exclusions of criminal record information are often subject to an exclusion, returning otherwise prohibited information to an employee’s credit report in situations similar to the FCRA’s salary threshold exception.<sup>46</sup> For instance, Washington prohibits records of arrest, indictment, or conviction that predate the report by more than seven years.<sup>47</sup> However, Washington’s statute, and those of New Hampshire, Maryland and Kansas, lift the cloak on prohibited criminal record information for jobs that could reasonably be expected to draw a salary of \$20,000 or more.<sup>48</sup> Thus, while the FCRA protects job applicants who expect to earn between \$20,000 and \$75,000 from information about criminal arrests that are more than seven years old, these state statutes do not. Similarly, New York allows the continued reporting of criminal convictions where the user is seeking to employ the individual for an annual salary of \$25,000 or more.<sup>49</sup> Maine, Colorado, and Texas align themselves

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42. N.Y. GEN. BUS. LAW § 380-j(a)(1) (McKinney 2012). The statute does permit a consumer reporting agency to disclose the “detention of . . . [the consumer] by a retail mercantile establishment” so long as he or she “has executed an uncoerced admission of wrongdoing,” and received a prescribed notice from the establishment. § 380-j(b).

43. § 380-j(f)(1)(v).

44. CAL. CIV. CODE § 1785.13(a)(6) (2012).

45. KY. REV. STAT. ANN. § 367.310 (2015). Since this provision was enacted in 1980, it is exempt from the FCRA preemption provision that might otherwise apply to it. *See* 15 U.S.C. § 1681t(b)(1)(E) (exempting state laws that were in effect on September 30, 1996); *infra* text accompanying notes 196 to 207 (addressing the issue of the FCRA’s preemption of state laws concerning criminal record information).

46. *See supra* text accompanying notes 39–40.

47. WASH. REV. CODE ANN. § 19.182.040 (2013).

48. MD. CODE. ANN., COM. LAW § 14-1203(b)(3) (2010); KAN. STAT. ANN. § 50-704(b)(3) (2005 & Supp. 2014); N.H. REV. STAT. ANN. § 359-B:5(II)(c) (2009); WASH. REV. CODE ANN. 19.182.040(2) (2013).

49. N.Y. GEN. BUS. LAW § 380-(j)(f)(2)(iii) (McKinney 2012).

with the federal act, permitting criminal record reporting for those earning \$75,000 or more.<sup>50</sup> In contrast, Massachusetts, Montana, and California maintain the exclusion of criminal record information from consumer reports regardless of the expected salary of the particular employment position.<sup>51</sup>

Some states address this issue by restricting employers, as opposed to restricting the contents of credit reports.<sup>52</sup> For instance, a state might prohibit an employer from inquiring about an applicant's criminal record until the application process has progressed to a particular point.<sup>53</sup>

Notwithstanding their weaknesses, these measures display attempts by states to calibrate the appropriate balance between the privacy of an individual's past and an employer's legitimate interest in that past, revealing reasonably relevant information while cloaking the rest.

### C. Medical Debt Restrictions

While the rising impact of criminal record information on consumer reports likely arises from enhanced conversion of archived paper records to electronic ones—that is, an increase in the accessibility of information—the growth in the number of consumer credit records tarnished by medical debt may come from the

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50. COLO. REV. STAT. ANN. § 12-14.3-105.3(2)(c) (2010); ME. REV. STAT. ANN. tit. 10, § 1309 (2009 & Supp. 2015) (incorporating the federal Fair Credit Reporting Act by reference); TEX. BUS. & COM. CODE ANN. § 20.05(b)(3) (2015).

51. MASS. GEN. LAWS ANN. ch. 93, § 52 (2006); MONT. CODE ANN. § 31-3-112 (2015); CAL. CIV. CODE § 1785.13 (2012).

52. *See, e.g.*, D.C. CODE ANN. §§ 32-13-45 (2013 & Supp. 2015) (prohibiting employers from inquiring about criminal convictions until after making a conditional offer of employment, but providing exceptions); N.J. STAT. ANN. §§ 34:6B-11-19 (2011 & Supp. 2015) (prohibiting employers from inquiring about an applicant's criminal record during the initial employment application process, or from providing in an advertisement that the employer will not consider applicants with criminal records, but providing exceptions); 2015 OR. LAWS § 559 (declaring it to be an unlawful practice for an employer to "exclude an applicant from an initial interview solely because of a past criminal conviction" but providing exceptions); *see also* MD. CODE ANN., CRIM. PROC. §§ 10-301-06 (2010) (instituting a process to shield criminal record information, and prohibiting employers and educational institutions from requiring applicants to disclose shielded information, with exceptions).

53. *See, e.g.*, N.J. STAT. ANN. §§ 34:6B-11-19 (2011 & Supp. 2015) (prohibiting employers from inquiring about an applicant's criminal record during the initial employment application process, but providing exceptions).

increased financial burden that rising health care costs put on many Americans.<sup>54</sup> Medical debt is one of the leading causes of bankruptcies in America.<sup>55</sup> As the costs of medical care have soared out of proportion to the rate of inflation and as incomes at most job levels have remained stagnant—or have even fallen (along with employment rates)—Americans increasingly find themselves burdened with medical debt that may appear on and taint their credit reports.<sup>56</sup> The Consumer Financial Protection Bureau (CFPB) reported that over half of the collections tradelines on a group of credit reports it studied consisted of medical debt.<sup>57</sup> Even one single medical bill can keep someone from receiving credit at a desirable rate, or perhaps from receiving credit at all.<sup>58</sup> But no one has demonstrated a clear link between financial competence and medical debt, and it is not intuitively obvious that such a link exists, as few people voluntarily or frivolously take on expensive medical care. In fact, one study by the CFPB indicated that consumers with medical debt were a *better* risk than consumers with other sorts of debts in collection and that many of them “ordinarily pay their other financial

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54. See, e.g., Adrienne Kroepsch, *Report Finds Medical Debt Increasing*, COMMONWEALTH FUND (Feb. 27, 2007), <http://www.commonwealthfund.org/Newsletters/Washington-Health-Policy-in-Review/2007/Mar/Washington-Health-Policy-Week-in-Review—March-5—2007/Report-Finds-Medical-Debt-Increasing.aspx>. Though consumers’ share of overall spending has decreased, overall bills have risen because the cost of health care has been growing so quickly. Sarah Kliff, *Patients’ share of health spending is shrinking. Yes, really*, WASH. POST (Feb. 5, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/02/05/out-of-pocket-health-spending-is-shrinking-yes-really/>.

55. One scholar testified that in 2007, 69.1% of bankruptcies included medical bills of \$1,000 or more—a 49.6% increase in the comparable percentage from 2001. *Written Testimony of Steffie Woolhandler Before the H. Judiciary Comm., Subcomm. on Admin. and Commercial Law*, HOUSE.GOV (July 28, 2009), [http://judiciary.house.gov/\\_files/hearings/pdf/Woolhandler090728.pdf](http://judiciary.house.gov/_files/hearings/pdf/Woolhandler090728.pdf).

56. See Kathy Kristof, *Getting sick can kill your credit score*, CBS MONEYWATCH (May 21, 2014), <http://www.cbsnews.com/news/getting-sick-can-kill-your-credit-score/>; Kate Santich, *Medical Bills Can Bankrupt Insured*, ORLANDO SENTINEL A1 (July 31, 2011).

57. CONSUMER FIN. PROTECTION BUREAU, CONSUMER CREDIT REPORTS: A STUDY OF MEDICAL AND NON-MEDICAL COLLECTIONS (2014), [http://files.consumerfinance.gov/f/201412\\_cfpb\\_reports\\_consumer-credit-medical-and-non-medical-collections.pdf](http://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medical-collections.pdf).

58. See Elisabeth Rosenthal, *When Health Costs Harm Your Credit*, N.Y. TIMES (Mar. 8, 2014), [http://www.nytimes.com/2014/03/09/sunday-review/when-health-costs-harm-your-credit.html?\\_r=0](http://www.nytimes.com/2014/03/09/sunday-review/when-health-costs-harm-your-credit.html?_r=0).

obligations on time.”<sup>59</sup> Furthermore, errors in medical accounts are notoriously common,<sup>60</sup> so people may find themselves blacklisted for debts that they have not actually incurred, or debts for which an insurance company is responsible.<sup>61</sup> The weak relationship between medical debt and credit worthiness led the credit scoring company Fair Isaac to reduce the impact of some types of medical debt in its trademarked FICO credit scoring algorithm.<sup>62</sup>

While no state prohibits outright the inclusion of medical debt in a consumer report or in calculating a credit score, Congress recently considered a bill that would have amended the FCRA to remove from consumer reports information regarding any medical debt that was eventually paid off or settled, thus clearing the usual seven year stickiness.<sup>63</sup> States could consider imposing similar restrictions on consumer reporting agencies in order to prevent consumers’ reports from being hurt to a degree that is disproportionate to their actual willingness to pay debts. A more dramatic and helpful provision would be to remove medical debts from consumer reports entirely.

#### *D. Identity Theft Provisions*

Identity theft, an Internet-powered phenomenon, has caused intense misery to its hapless victims, who may find themselves

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59. CONSUMER FIN. PROTECTION BUREAU, *supra* note 57 at 7, 38.

60. Estimates of errors in medical bills range from 30% to 80%. Jessica Silver-Greenberg, *How to Fight a Bogus Bill*, WALL ST. J. (Feb. 19, 2011), <http://www.wsj.com/articles/SB10001424052748703312904576146371931841968>.

61. See CONSUMER FIN. PROTECTION BUREAU, *supra* note 57, at 39–42 (describing the complexity and lack of transparency of medical costs, insurance coverage, and the billing process).

62. See *FICO Score 9 Introduces Refined Analysis of Medical Collections*, FICO (Aug. 7, 2014), <http://www.fico.com/en/about-us/newsroom/news-releases/fico-score-9-introduces-refined-analysis-medical-collections/> (“This will help ensure that medical collections have a lower impact on the score, commensurate with the credit risk they represent.”). This adaptation reveals that legislation may not be the only source of relief to consumers struggling to borrow in the face of existing medical debt. Another source may be software such as FICO Score 9.

63. S. 160, The Medical Debt Responsibility Act of 2013 § 3, 113th Cong., 1st Sess. (2013) (proposing an amendment to 15 U.S.C. § 1681c(a), the obsolescence provision described *supra*, that would delete from credit reports “[a]ny information related to a fully paid or settled medical debt that had been characterized as delinquent, charged off, or in collection which, from the date of payment or settlement, antedates the report by more than 45 days”).



shadowed by a pernicious doppelganger whose spendthrift records cannot be purged from their credit histories. The Federal Trade Commission reported that it received 490,220 complaints about identity theft in 2015, up 47 percent from 2014.<sup>64</sup> Fundamentally, the relationship between identity theft and a credit report is one of inaccuracy. To illustrate, once a thief obtains goods, credit, or services in the identity theft victim's name and then fails to pay for them, the lender wrongly ascribes the debt to the victim of the theft, rather than to the thief. The debt shows up not on the thief's credit report, but on the victim's credit report.

States have been contending with the rising impact of identity theft on consumers' credit reports. As an example, New Mexico enacted a statute that sought to allow identity theft victims to block a thief's debt from appearing on their credit reports. Under this law, once a consumer reporting agency receives a proper notice from an identity theft victim identifying information reported to or by the consumer reporting agency that is the product of identity theft, the agency must remove that information from the victim's file.<sup>65</sup> The agency may restore the information only if the consumer requests it or if ordered by a court after adjudicating the alleged debt.<sup>66</sup> The provision significantly overlaps with one in the federal FCRA, but the federal statute gives consumer reporting agencies a good deal more leeway to decline to block an identity theft debt.<sup>67</sup> The FCRA permits a consumer reporting agency to decline to block an item of information *sua sponte* if it determines that (A) the agency mistakenly blocked it, (B) the consumer misrepresented a material fact about the information, or (C) the consumer obtained goods, services, or money as a result of the blocked transaction.<sup>68</sup> The agency's right to act unilaterally can eviscerate the protection the provision intends to give to identity theft victims.

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64. FEDERAL TRADE COMM'N, CONSUMER SENTINEL NETWORK DATA BOOK FOR JANUARY–DECEMBER 2015, 6, 82 (2016), <https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2015/160229csn-2015databook.pdf>.

65. N.M. STAT. ANN. §§ 56-3A-2(D), 56-3A-3.1(A), (D) (2010).

66. § 56-3A-3.1(E) (2010).

67. 15 U.S.C. § 1681c-2(c).

68. § 1681c-2(c)(1)(A)–(C).

Thus, these four areas of concern—(i) employer use of consumer reports, (ii) criminal record information in consumer reports, (iii) medical debt in consumer reports, and (iv) the effects of identity theft on consumer reports—are fertile for state intervention in order to protect citizens from the disproportionate consequences of their failures. However, state legislation must avoid preemption by the federal Fair Credit Reporting Act in order to be effective. The following section discusses general principles of preemption and analyzes some of the Supreme Court’s recent decisions in the area of preemption.

### III. THE THREE VARIETIES OF PREEMPTION AND THE SUPREME COURT’S RECENT PREEMPTION DECISIONS

The Supreme Court has taken up the issue of preemption in a fistful of cases over the last several years. These cases will guide the preemptive effect of the federal Fair Credit Reporting Act on state innovations intended to improve the privacy of their citizens’ historical records.

As a basic matter, the Supremacy Clause of the United States Constitution is the mechanism that elevates federal laws over state laws. The second clause of Article VI provides that the laws of the United States “shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” Obviously, federal and state laws can peacefully co-exist—our system encourages simultaneous federal and state authority.<sup>69</sup> As just one example, the federal government protects consumers against unfair and deceptive trade practices through the Federal Trade Commission Act,<sup>70</sup> while states do so through similar state laws.<sup>71</sup> Nonetheless, under limited circumstances, federal law will neutralize an overlapping state law. This phenomenon by which federal law supersedes overlapping state laws is called preemption.

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69. *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012) (“Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.”).

70. 15 U.S.C. § 45.

71. *See, e.g.*, CAL. CIV. CODE §§ 1750–1785 (2012); 815 ILL. COMP. STAT. 510/1–510/7 (2015); N.Y. GEN. BUS. LAW §§ 349-50-f-1 (McKinney 2015).

Preemption occurs in three basic varieties: (i) field, (ii) express, and (iii) implied. Of these, it can be argued that express preemption most influences the viability of state credit reporting restrictions.

*A. Field Preemption: “[S]o pervasive . . . or so dominant”*<sup>72</sup>

Field preemption preempts the most extensively; it clears an entire subject area from state regulation, reserving it for federal dominion.<sup>73</sup> There are two types of field preemption. The first measures breadth and allows federal law to override any state law in the same field where the federal law’s framework is “so pervasive” it leaves no room for state regulation.<sup>74</sup> The second measures intensity and occurs when the federal interest is “so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”<sup>75</sup> For instance, anti-sedition is one area the Supreme Court has found subject to field preemption.<sup>76</sup>

*B. Express Preemption: “[A] fair but narrow reading”*<sup>77</sup>

While field preemption can exist without any action by Congress, express preemption arises only when Congress plants specific language in a federal act to target state legislation.<sup>78</sup> Even though the language may be explicit, however, courts must still construe it when evaluating its impact on a specific state provision, which raises the question of how they should do so: broadly, narrowly, or somewhere in between.

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72. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

73. *See, e.g., Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595, 1599 (2015) (describing field preemption as arising when “Congress may have intended ‘to foreclose any state regulation in the *area*,’ irrespective of whether state law is consistent or inconsistent with ‘federal standards,’” and holding that the federal Natural Gas Act did not preempt state antitrust lawsuits) (citations omitted) (emphasis in original).

74. *Arizona*, 132 S. Ct. at 2501.

75. *Id.*; *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488 (2008) (holding that the Clean Water Act’s penalties for water pollution did not preempt maritime common law on punitive damages, stating that “we see no clear indication of congressional intent to occupy the entire field of pollution remedies”).

76. *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956).

77. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 80 (2008).

78. *See Arizona*, 132 S. Ct. at 2500.

The Supreme Court recently examined express preemption in the 2013 decision of *Dan's City Used Cars, Inc. v. Pelkey*,<sup>79</sup> an action that pitted a consumer whose car had been towed and sold without his consent against a federal law that the defendant, the towing authority, asserted barred any state claim by the consumer. This decision followed three significant 2008 decisions about express preemption: *Altria Group, Inc. v. Good*,<sup>80</sup> *Riegel v. Medtronic, Inc.*,<sup>81</sup> and *Rowe v. New Hampshire Motor Transp. Ass'n*.<sup>82</sup> Taken together, the four cases illustrate that so long as the federal provision leaves some space for states to occupy, the Court is willing to allow states to fill that area.

Examining the opinion reveals first that an express preemption provision that preempts state laws “with respect to” a designated area that federal law regulates will receive a compact reading.<sup>83</sup> In *Dan's City*, the unhappy former car owner sued the towing company under a state consumer protection law that prescribed specific procedures for the storage and sale of a towed vehicle, procedures that he alleged the towing company failed to comply with.<sup>84</sup> The defendant relied on a preemption provision of the Federal Aviation Administration Authorization Act (known by the ungainly acronym “FAAAA”), which appeared to reach broadly into state domains. This provision stated that “a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law *related to* a price, route, or service of any motor carrier . . . *with respect to the transportation of property*.”<sup>85</sup>

The phrase “related to” reflects “a broad pre-emptive purpose.”<sup>86</sup> Nevertheless, the Court held that even such a broad phrase “does not mean the sky is the limit;” it “does not preempt state laws affecting carrier prices, routes, and services ‘in only a “tenuous, remote, or peripheral . . . manner.””<sup>87</sup> The Court cautioned that the

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79. 133 S. Ct. 1769 (2013).

80. 555 U.S. 70 (2008).

81. 552 U.S. 312 (2008).

82. 552 U.S. 364 (2008).

83. See *Altria*, 555 U.S. at 80–81.

84. 133 S. Ct. at 1775; N.H. REV. STAT. ANN. § 262:36-a (2014).

85. 49 U.S.C. § 14501(c)(1) (2012) (emphasis added).

86. *Dan's City*, 133 S. Ct. at 1778.

87. *Id.* (quoting *Rowe*, 552 U.S. at 371).

“related to” language could not have too broad and literal an effect, else “for all practical purposes pre-emption would never run its course.”<sup>88</sup> In this particular provision, the “related to” language was further limited by the phrase “with respect to the transportation of property.”<sup>89</sup> In determining the effect of the language, the Court focused on the different time periods involved. The federal Act addressed the period in which a particular vehicle was transported and stored, while the plaintiff’s state law claims addressed not the transport of the car, but the period of sale—well after the car had been towed. This distinction maintained the vitality of the state statutory scheme related to the sale of towed cars as well as the state common law bailment claims.<sup>90</sup>

To check its analysis, the Court examined the purpose behind Congress’s enactment of the Act’s preemption provision, and concluded that the state law claims would not in any way interfere with that purpose, which was to prevent states from “constrain[ing] participation in interstate commerce.”<sup>91</sup>

The preference for reading broad preemption language narrowly reflected in *Dan’s City* also prevailed in *Altria*. The state statute in question was Maine’s Unfair Trade Practices Act,<sup>92</sup> whose primary express preemption provision provided as follows: “No requirement or prohibition *based on smoking and health* shall be imposed under State law *with respect to* the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.”<sup>93</sup> The petitioners—cigarette manufacturers—alleged that the Federal Cigarette Labeling and

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88. *Id.* (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)).

89. 49 U.S.C. § 14501(c)(1).

90. *Dan’s City*, 133 S. Ct. at 1779.

91. *Id.* at 1780. In that same term, the Supreme Court construed this preempting provision of the FAAAA and concluded that it preempted a local requirement regarding placard and parking. *Am. Trucking Ass’ns, Inc. v. City of L.A.*, 133 S. Ct. 2096, 2104 (2013). There, however, the issue was not whether the requirement related, as a substantive matter, to “a price, route, or service of any motor carrier . . . with respect to the transportation of property,” 49 U.S.C. § 14501(c)(1), but rather whether the requirement “ha[d] the force and effect of law.” *Id.* at 2102, 2104.

92. *Altria Group, Inc. v. Good*, 555 U.S. 70, 72 (2008); ME. REV. STAT. ANN. tit. 5, § 207 (Supp. 2008).

93. 15 U.S.C. § 1334(b) (2012) (emphasis added).

Advertising Act preempted the respondents' claims under the state statute.<sup>94</sup> The respondents were users of petitioners' "light" cigarettes who brought a state law unfair trade practices claim in response to advertisements that claimed the "light" cigarettes passed less tar and nicotine to consumers than regular cigarettes<sup>95</sup>—the respondents alleged that the manufacturers knew that this was not so.<sup>96</sup> The manufacturers rebutted that the Labeling Act's express preemption provision preempted the state statute and therefore barred the smokers' claims.<sup>97</sup>

Thus, the question was whether the Maine Unfair Trade Practices Act, when applied to challenge the "light" cigarette advertisement, constituted a state law "based on smoking and health . . . with respect to the advertising or promotion of any cigarettes . . ." <sup>98</sup> The Court construed the phrase "based on smoking and health" as modifying the state law taken as a whole, as opposed to the particular application of the law.<sup>99</sup> Thus, the Court stepped back from the context of the immediate application of the state law and looked at the law itself—was it one "based on smoking and health"? The Court reasoned that the clause should be given "a fair but narrow reading."<sup>100</sup> The Act said nothing about either "smoking" or "health,"<sup>101</sup> but rather targeted deceptive statements that induced the respondents to buy the petitioners' cigarettes, imposing a general duty not to deceive, rather than one bound to smoking and health.<sup>102</sup> Thus, the express preemption provision did not preempt an action under a state's general deceptive trade practices statute.<sup>103</sup>

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94. *Altria*, 555 U.S. at 72.

95. *Id.*

96. *Id.*

97. *Id.* at 80–88. The manufacturers also argued that the state law was preempted under a theory of implied obstacle preemption. *Id.* at 88–90. This aspect of *Altria* is discussed *infra* in Section II.B.

98. 15 U.S.C. § 1334(b) (2012).

99. 555 U.S. at 80.

100. *Id.* (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524 (1992)).

101. *Id.*

102. *Id.* at 82–83.

103. *Id.* at 87 ("In sum, we conclude now, as the plurality did in *Cipollone*, that 'the phrase "based on smoking and health" fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements.'").

However, in two other recent express preemption cases, the Court concluded that the federal statute's preemption provision did in fact squelch the state law at issue.<sup>104</sup> From these cases we discern first that a federal law that targets state "requirements" and "prohibitions" extends to state common law torts in addition to state statutes. Second, the Court will examine the policies behind the federal law and the overlapping state law and will be more likely to find preemption when those policies promote different goals. In addition, the Court has indicated that it will honor specific boundaries, even if they cover a broad expanse, and will find preempted even generally applicable common law.<sup>105</sup>

An expansive preemption provision written in concrete terms will be given expansive preemption power. In *Riegel v. Medtronic*, the Court construed the express preemption provision of the federal Medical Device Amendments Act (MDA).<sup>106</sup> This provision was quite broad, providing that a state shall not apply to the device "any requirement . . . which is different from, or in addition to, any requirement applicable" under federal law.<sup>107</sup> In effect, this provision left room for the states to enact only an identical twin of the federal provision.

*Riegel's* petitioners, a husband and wife, sued the manufacturer of a catheter under state strict liability, negligence, and similar laws after the device ruptured.<sup>108</sup> First, the Court concluded that the FDA's premarket approval process imposed "requirements" under the MDA, activating the statute's preemption provision.<sup>109</sup> Thus, the next question was whether the state's common law claim was a "requirement . . . different from, or in addition to" that premarket approval. Common law duties are, the Court concluded, "requirements" for purposes of an express preemption provision.<sup>110</sup>

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104. *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008); *Riegel v. Medtronic*, 552 U.S. 312 (2008).

105. *See Riegel*, 552 U.S. at 312.

106. *Id.*

107. 21 U.S.C. § 360k(a).

108. 552 U.S. at 319–21.

109. *Id.* at 322.

110. *Id.* at 324. The Court reasoned, "Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments." *Id.* The Court had previously interpreted a federal preemption provision's use of "requirements" as including state common law duties. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005); *Medtronic, Inc. v. Lohr*,

The petitioners, unfortunately, failed to pursue an argument that their state law claims nonetheless survived as requirements that were simply parallel to, as opposed to different from or in addition to that of the federal law, and thus lost their case once the Court concluded that their claims constituted “requirements.”<sup>111</sup>

Even where an express preemption provision is less expansive, preemption becomes more likely when the federal and state laws have fundamentally different purposes and the state law’s purpose coincides with the motivation behind the federal law’s express preemption provision. In *Rowe v. New Hampshire Transport Ass’n*,<sup>112</sup> the Court examined the preemption language of the Federal Aviation Administration Authorization Act of 1994,<sup>113</sup> the same statute that the Court addressed five years later in *Dan’s City*.<sup>114</sup> The language of the preemption provision was as follows: “a State . . . may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.”<sup>115</sup> Maine, hoping to cut back on minors’ use of tobacco, had enacted two provisions that imposed specific requirements for the transport and delivery of tobacco products.<sup>116</sup> The federal statute

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518 U.S. 470 (1996); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504 (1992). The Court rejected the petitioners’ argument that even if common law duties were “requirements,” they were not requirements “with respect to devices,” reasoning that the statutory text did not “suggest[] that the pre-empted state requirement must apply *only* to the relevant device . . .” *Riegel*, 552 U.S. at 328; *see also* *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 106 (2d Cir. 2009) (construing the language of an FCRA preemption provision, 15 U.S.C. § 1681t(b), that referred to a “requirement or prohibition” under state law as encompassing common law claims as well as statutory claims).

111. *Riegel*, 552 U.S. at 330.

112. 552 U.S. 364 (2008).

113. 49 U.S.C. § 14501(c)(1) (2005).

114. *Dan’s City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013); *see supra* text accompanying notes 84 to 91.

115. 49 U.S.C. § 14501(c)(1).

116. The first, imposing two requirements, forbade anyone other than a state-licensed tobacco retailer from accepting an order for tobacco delivery, and required licensed retailers accepting and shipping tobacco orders to use a delivery service that verifies the identity of the recipient. *Rowe*, 552 U.S. at 368 (citing ME. REV. STAT. ANN. tit. 22, § 1555-C(1), C(3)(C) (2003)). The second forbade any person from knowingly transporting a tobacco product to a person unless either the sender or the receiver had a Maine license, and designated circumstances as deeming knowledge. *Id.* at 369 (citing ME. REV. STAT. ANN. tit. 22, § 1555-D (2003)). These circumstances included those where “the package is marked as containing tobacco and displays the name and license number of a Maine-licensed tobacco retailer” or the receipt of “the package from someone whose name appears on a list of *un*-licensed



was designed to expand interstate trucking commerce by deregulating it; in contrast, the state law was designed to improve public health. Thus, there were two objectives in tension, at least in this instance.

The respondents in *Rowe*, transport associations affected by the state laws, challenged them, arguing that the federal act's express preemption provision nullified the state laws.<sup>117</sup> In an earlier decision, *Morales v. Trans World Airlines, Inc.*, the Court had interpreted similar preemptive language as applying to state enforcement actions in connection with "rates, routes, or services" even where the state law only indirectly affected those attributes.<sup>118</sup> Reasoning from *Morales*, the *Rowe* court concluded that the two Maine laws not only had a direct "connection with" motor carrier services, but that the provisions would have a "significant' and adverse 'impact' in respect of the federal Act's ability to achieve its pre-emption-related objectives," thus dooming the state laws.<sup>119</sup> The Court also declined to create a "public health objective" exception to the preemption provision, though Maine tried to distinguish its laws from the sort of economic regulation it argued Congress had intended to preempt.<sup>120</sup> The federal law in *Rowe* was unusual because it sought to deregulate, rather than regulate—to clear the table of restrictions on trucking, whether federal or state. Thus, Maine's laws—clearly directed towards imposing extra burdens on the trucking industry—directly undermined Congress's free market intent.<sup>121</sup>

The next case to interpret this provision of the Federal Aviation Administration Authorization Act was *Dan's City*, described *supra*, which permitted rather than preempted a state law.<sup>122</sup> The difference between *Rowe* and *Dan's City* lies in the strength of the link between the subject of the state law involved and "a price, route, or service of any motor carrier."<sup>123</sup> The state law in *Dan's City* related to events

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tobacco retailers that Maine's attorney general distributes to various package-delivery companies." *Id.* (emphasis in the opinion).

117. *Id.*

118. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

119. 552 U.S. at 371–73.

120. *Id.* at 374.

121. *Id.* at 371–72.

122. *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769 (2013).

123. 49 U.S.C. § 14501(c)(1) (2012).

after the transportation of a vehicle, a time period distinctly subsequent to the time period with which the federal law was concerned—the transporting period.<sup>124</sup> That link was too weak to bring the state law into the orbit of the preemption provision.<sup>125</sup>

So, taken collectively, *Dan's City*, *Altria*, *Riegel*, and *Rowe* indicate that a state is more likely to successfully avoid preemption when the state law imposes a general duty, rather than an area-specific law, and that courts will honor broad but specific boundary-setting and Congress's motivation for including the preemption provision.

*C. Implied Preemption: "Congress does not cavalierly pre-empt state-law causes of action"*<sup>126</sup>

Even where a federal law does not seek to pervade a field of regulation, and does not contain an express preemption provision, it can still preempt an overlapping state law through implied preemption. While field preemption removes an entire arena from state regulation, implied preemption removes only those state laws that conflict with a specific federal law.<sup>127</sup> Such a conflict can arise in two ways. First, implied preemption negates a state law when "compliance with both federal and state regulations is a physical impossibility," known as implied impossibility preemption.<sup>128</sup> Second, a state law must give way to a federal one where it "stands as an obstacle to the accomplishment and execution of the full purposes

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124. *Dan's City*, 133 S. Ct. at 1779.

125. *Id.*

126. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

127. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1981 (2011); *see also* *Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1398 (2013) ("Where state and federal law directly conflict, state law must give way.") (citations omitted).

128. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963); *see also* *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013) (describing the doctrine).

and objectives of Congress,”<sup>129</sup> undermining a policy that the federal law promotes. This is known as implied obstacle preemption.<sup>130</sup>

The Court’s recent implied preemption cases reflect a great deal of deference to state schemes, so long as the area is not one that Congress had pervasively regulated, leading to field preemption. The Court is fond of quoting the purpose presumption: “[i]n preemption analysis, courts should assume that ‘the historic police powers of the States’ are not superseded ‘unless that was the clear and manifest purpose of Congress.’”<sup>131</sup>

This presumption places a thumb on the scale in favor of leaving state laws intact. For instance, in *Wyeth v. Levine*, a 2009 case of implied preemption, the plaintiff brought a state failure to warn claim arising from a method of administering an anti-nausea drug.<sup>132</sup> The federal Food, Drug, and Cosmetic Act (FDCA) did not contain an express preemption clause relevant to prescription drugs.<sup>133</sup> However, the defendant, the drug’s manufacturer, argued that the FDCA preempted the state law claim under two theories. First, the defendant argued that it was impossible to comply with both the state’s warning requirements and the FDCA. The defendant’s second theory was that the FDCA created an obstacle such that complying with state law would obstruct the purposes and objectives of the federal drug labeling regulation. The Court rejected both arguments: “We rely on the presumption because respect for the States as ‘independent sovereigns in our federal system’ leads us to assume that ‘Congress does not cavalierly pre-empt state-law causes

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129. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Hillman*, 133 S. Ct. at 1950 (describing the doctrine); *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 493–94 (1987) (stating that “the Court must be guided by the goals and policies of [a federal act],” and concluding that a federal law preempts if a state law claim would “serious[ly] interfere[] with the achievement of the ‘full purposes and objectives of Congress’” or “with the methods by which the federal statute was designed to reach” its goals) (citation omitted).

130. Thus, even without the express preemptive language in the federal statute at issue in *Rowe*, Maine’s trucking laws might well have fallen to implied preemption. *See Danforth v. Minnesota*, 552 U.S. 264, 271–72 (2008) (noting the conflict between the state’s objectives and congressional intent).

131. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic*, 518 U.S. at 485).

132. *Wyeth*, 555 U.S. at 565.

133. *Id.* at 567.

of action.”<sup>134</sup> Recent Supreme Court decisions on both implied impossibility preemption and implied obstacle preemption are discussed *infra*.

### 1. Implied impossibility preemption

Implied impossibility preemption arises under fairly narrow circumstances where a regulated entity cannot comply with one sovereign’s law without simultaneously violating that of the other.

Where a regulated entity does not maintain full control over all contingencies needed to comply with the federal law, state law, or both, the implied impossibility preemption doctrine will likely block the state law, even in the absence of an actual conflict. The Supreme Court recently nullified state law claims on the grounds of implied impossibility by construing “impossible” broadly.<sup>135</sup> In *PLIVA, Inc. v. Mensing*, two patients were prescribed a generic form of a prescription drug that the defendants manufactured, and then subsequently developed a serious neurological disorder known to be associated with the drug.<sup>136</sup> They sued under their respective states’ tort laws for damages, claiming that the manufacturers should have warned of the dangers of developing the condition for patients taking the medication for more than twelve weeks.<sup>137</sup> The preemption issue arose because Congress imposed slightly different federal drug labeling duties on generic drug manufacturers than on brand name drug manufacturers.<sup>138</sup> Under FDA regulations, a generic drug manufacturer could acquire approval by showing that its warning label was the same as the brand name manufacturer’s label.<sup>139</sup> Under state law, the manufacturers had to “adequately and safely label their products.”<sup>140</sup>

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134. *Id.* at 565 n.3 (quoting *Medtronic*, 518 U.S. at 485).

135. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011).

136. *Id.* at 2572–73.

137. *Id.* at 2573.

138. *Id.* at 2574.

139. *Id.*

140. *Id.* at 2577. The issue was whether the FDA’s regulations permitted the generic drug manufacturers to update their warning labels in a way that would meet the state law’s requirements of “warning of [known] dangers,” (Minnesota’s law), or of “provid[ing] adequate instructions for safe use of a product.” *Id.* at 2573.

Of course, new information could require a new warning under either the state or the federal law. However, the Court construed the FDA's regulations as prohibiting a unilateral change; only with the FDA's cooperation could the manufacturer have updated the label to warn of the dangers associated with the neurological condition that the plaintiffs had acquired; these dangers were discovered only after the FDA approved the original label.<sup>141</sup> In other words, because the ability to change a label was not within the manufacturer's sole control, the manufacturer could no longer be absolutely certain of complying with both the federal and the state law. Since the only way the manufacturer could have guaranteed that its labels would comply with state law would be to have unilaterally changed them—an act that would have violated federal law—the Court reasoned that the doctrine of implied impossibility preemption applied to block the state law claims.

Furthermore, if the ability to comply with the dual systems would require the regulated party to abandon the regulated activity, that party can claim impossibility and thus trigger preemption, annulling the state law.<sup>142</sup> Subsequent to *PLIVA*, in the 2013 case of *Mutual Pharmaceutical Co. v. Bartlett*, the Supreme Court reviewed the labeling law involved in *PLIVA* and permitted a manufacturer to claim that it could not possibly comply with a state tort duty to warn of unreasonable dangers of a generic drug while also acceding to a federal law's requirement that it warn of only those dangers that the brand-name equivalent manufacturer had attached to that product's label.<sup>143</sup> The Court thus vacated a judgment for a woman whose skin had burned off as a side effect of a generic drug that had not explicitly warned of the known risk of the syndrome that befell her.<sup>144</sup> The Court specifically rejected the First Circuit's reasoning that the generic drug manufacturer could have complied with both the state and federal drug laws by simply ceasing to sell the generic drug, reasoning that the Court's past preemption decisions did not allow

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141. *Id.* at 2578.

142. *See* *Mutual Pharm. Co., v. Bartlett*, 133 S. Ct. 2466 (2013).

143. *Id.* at 2470–72.

144. *Id.* at 2476.

for that sort of leave-the-market solution and noting that it had not used that rationale to escape preemption in *PLIVA*.<sup>145</sup>

Thus, the Court's recent impossibility preemption cases indicate that if the ability to comply with both state and federal law hinged on a contingency outside the defendant's exclusive control, the federal law would preempt the state law. This preemption would occur even if the defendant had partial control over the contingency and even if the contingency were likely to fall in favor of compliance; the defendant need not seek to resolve the conflict by withdrawing from the market.

## 2. *Implied obstacle preemption*

Federal law will also trump a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>146</sup> This is known as implied obstacle preemption.

Sometimes a state law will parallel a federal one, but will provide a remedy that the federal law lacks, sprouting the question of whether the federal claim—and its lack of a remedy—should bar the consumer from recovering. The absence of a federal remedy does not necessarily indicate that Congress wanted to leave consumers without any remedy, and may in fact indicate that it expected consumers to pursue remedies under state law. For instance, in concluding that the FDCA did not bar an injured plaintiff's state failure to warn claim in *Wyeth v. Levine*, the Court considered the preference for consumers to have remedies.<sup>147</sup> It reasoned that Congress's choice not to provide a federal remedy for consumers harmed by unsafe or ineffective drugs indicated that Congress thought "widely available state rights of action provided appropriate relief for injured consumers."<sup>148</sup> Further, the Court saw great significance in Congress's choice to enact an express preemption provision for medical devices, but not for prescription drugs.<sup>149</sup> Thus,

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145. *Id.* As one dissenting opinion noted, the Court's majority opinion curiously omitted any reference to the purpose presumption. *Id.* at 2483 n.1 (Sotomayor, J., dissenting).

146. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

147. *Wyeth v. Levine*, 555 U.S. 555, 574 (2009).

148. *Id.*

149. *Id.*

the absence of an express preemption provision can indicate “Congress [did not think] state lawsuits posed an obstacle to its objectives.”<sup>150</sup> The federal agency’s practices also favored preserving state law, given that the FDA “traditionally regarded state law as a complementary form of drug regulation. The FDA has limited resources to monitor the 11,000 drugs on the market . . . .”<sup>151</sup> Therefore, state laws could help shore up the FDA’s regulation of drugs, presenting a promotion of rather than an obstacle to the federal government’s goals.

As noted *supra*, the petitioners in *Altria*—cigarette manufacturers fighting a state deceptive practices act claim arising from their advertising their cigarettes as “light”—advanced an implied preemption argument in addition to the express preemption one.<sup>152</sup> The Court concluded that the state deceptive trade practices statute was not impliedly preempted by virtue of “present[ing] an obstacle to a longstanding policy of the FTC,” the federal agency charged with administering the federal Labeling Act.<sup>153</sup> The Court reviewed the agency’s guidance and consent orders and concluded that no relevant longstanding policy existed. Thus, it appears that the Court assesses claims of implied obstacle preemption skeptically, perhaps reluctant to find preemption where Congress did not include an express preemption provision and where the target of the dual laws can in fact comply with both.

In summary, where a state wants to regulate an area that the federal government has penetrated, it should evaluate the potential for preemption by any existing federal provision in the regulated area. If the area is one that the federal government has penetrated pervasively, the state law may fall to field preemption. If a federal law has express preemption language, the state law may nonetheless be able to intercede in the gaps of the preemption provision, especially in areas traditionally within states’ purview, given that the preemption provision should receive a narrow construction. Nonetheless, where the purpose behind the preemption provision conflicts with the state’s regulation, the preemption provision may

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150. *Id.*

151. *Id.* at 578.

152. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 87 (2008).

153. *Id.* at 89–90.

well be construed to encompass, and therefore nullify, the state law. Finally, state provisions that clear field and express preemption must still overcome any implied preemption. In implied preemption contests, however, states will benefit from the purpose presumption, which favors preserving the state law.

The next question is what the preemption doctrine means in relation to state efforts to restrict the information available in consumers' credit reports, specifically information related to adverse credit history when evaluated for employment, criminal background information, and medical information, as well as identity theft debris.

#### IV. SURMOUNTING THE FAIR CREDIT REPORTING ACT'S BARRIERS

Taken together, the Court's recent preemption decisions generally bode well for preserving state claims. First, field preemption will not preclude states from intervening to protect consumer financial information. Congress has quite clearly not taken over this area, given that the Fair Credit Reporting Act—the premier piece of federal legislation in this area—expressly evinces room for state action.<sup>154</sup> Nonetheless, the FCRA presents express and implied preemption challenges for states.

The Sections below provide a brief description of the FCRA and an extended discussion of its various preemption provisions, along with a summary of the case law construing those provisions. Subsequently, the likelihood that the various types of state reputation-protecting legislation identified *supra* would prevail against a challenge of preemption—given the Supreme Court's decisions along with the role and provisions of the FCRA—is discussed.

##### *A. The FCRA*

The FCRA provides the primary federal control over consumer reports, and it conveys conflicting and complex messages about the role of state law in regulating consumer credit reports. It creates a federal regulatory scheme for consumer reports, yet explicitly recognizes state law by providing a general rule that such laws are preserved. Nonetheless, it claims a monopoly over certain fields

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154. 15 U.S.C. § 1681t(a) (2012); *see infra* text accompanying notes 159 to 161.



within the territory of consumer report regulation, identifying specific kinds of state laws that must yield to the federal Act. These types of state laws vary by the degree to which they relate to their corresponding federal provisions. After accounting for those monopolized areas, however, the FCRA still leaves substantial room for states to act, preserving a number of fields in which states can enact legislation to accord more weight to their citizens' privacy.

### 1. Overall scheme

The FCRA regulates “consumer reports,” also commonly known as credit reports, although the definition clearly covers reports describing matters other than mere credit. A “consumer report” “means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, *character, general reputation, personal characteristics, or mode of living*” where that information is “used or expected to be used or collected” for, among other purposes, “the consumer’s eligibility for employment.”<sup>155</sup> A “consumer reporting agency” includes “any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages . . . in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties . . . .”<sup>156</sup> Thus, this definition covers everything from the standard big three consumer reporting agencies of Trans Union, Experian, and Equifax to specialty agencies like tenant screening agencies<sup>157</sup> and the medical information data aggregator MIB.<sup>158</sup>

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155. 15 U.S.C. § 1681a(d)(1) (emphasis added). This article focuses on reports that qualify as “consumer reports” under the FCRA. Legislation governing reports that do not fall within this definition would face far fewer preemption concerns. *See* § 1681t.

156. § 1681a(f). The definition includes an interstate commerce nexus as well. *Id.*

157. For example, Tenant Background Search, which advertises that it can help a landlord “[v]erify your applicant’s identity and credit, and search for a criminal background before you rent. Tenant Background Search is the leader in providing high quality tenant credit check and tenant background check services.” *Order Now*, TENANT BACKGROUND SEARCH, <https://www.tenantbackgroundsearch.com/tenantScreening.aspx> (last visited Mar. 23, 2016).

158. *See* MIB.COM, <http://www.mib.com/index.html> (describing MIB’s services) (last visited Mar. 23, 2016).

Looked at broadly, the FCRA imposes responsibilities not just on consumer reporting agencies, but also on the users who buy consumer reports from agencies and the furnishers who feed information about consumers to the agencies.

## 2. *General rule of non-preemption*

By its express language, the FCRA provides a general rule that the Act does not preempt state law claims:

Except as provided in subsections (b)<sup>159</sup> and (c)<sup>160</sup> . . . , [the FCRA] does not annul, alter, affect, or exempt any person subject to the provisions of this [title] from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this [title] . . . and then only to the extent of the inconsistency.<sup>161</sup>

This explicit acknowledgement of the states' interest eliminates pervasive field preemption.<sup>162</sup> Furthermore, that same acknowledgement shows that the federal regulation does not have the dominance that would lead to field preemption.<sup>163</sup> Accordingly,

159. Providing exceptions. 15 U.S.C. § 1681t(b). *See infra* text accompanying notes 166 to 176.

160. Defining the term “firm offer of credit or insurance” for purposes of both federal and state law. 15 U.S.C. § 1681t(b).

161. § 1681t(a). This general preemption standard indicates that Congress did not intend to comprehensively preempt states from the field of credit reporting regulation. *See Davenport v. Farmers Ins. Group*, 378 F.3d 839, 842 (8th Cir. 2004); *Credit Data of Ariz., Inc. v. Arizona*, 602 F.2d 195, 197 (9th Cir. 1979).

162. *See supra* text accompanying note 74; *see also Davenport*, 378 F.3d at 842 (stating that this provision demonstrates that Congress did not intend to preempt the field of claims and upholding against a challenge of preemption a state insurance statute that regulated behavior not covered by the FCRA); *Credit Data of Ariz.*, 602 F.2d at 197 (upholding against a challenge of preemption a state statute that required consumer reporting agencies to provide free reports, a provision that predated the FCRA's present free report provisions in 15 U.S.C. § 1681j(a)(1)); *State Dep't of Commerce, Community, & Econ. Dev., Div. of Ins. v. Progressive Cas. Ins. Co.*, 165 P.3d 624, 626–27 (Alaska 2007) (upholding against a challenge of preemption a state law that forbade insurers from failing to renew a personal insurance policy “based in whole or in part on a consumer's credit history or insurance score” without the consumer's consent). *But see Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 901 (10th Cir. 2012) (“The FCRA leaves no room for overlapping state regulations. Congress set out to create uniform, national standards in the area of credit reporting . . . .”) (*dicta*).

163. *See supra* text accompanying note 75.

the remainder of this Article will focus on express and implied preemption.

The FCRA's non-preemption language shows that Congress presumed that the federal statute could coexist peacefully with a state statute, even one that overlies the same territory, so long as the two are not inconsistent. In this way the FCRA expressly incorporates a version of the implied preemption doctrine to supplement the Act's express preemption provisions, discussed *infra*. A state law is inconsistent with a federal law only if complying with one would put the actor in violation of the other,<sup>164</sup> or if it would frustrate a particular purpose of the federal act.<sup>165</sup>

### 3. *Specific express preemption provisions*

The FCRA somewhat undercuts its general rule of non-preemption by listing five sets of FCRA provisions that it protects against any "requirement or prohibition [that] may be imposed under the laws of any State."<sup>166</sup> Three of these sets target fairly narrow practices of the FCRA: (1) The exchange of information among business affiliates;<sup>167</sup> (2) designated disclosures required by the FCRA;<sup>168</sup> and (3) the frequency with which consumers can obtain free consumer reports.<sup>169</sup>

Along with those three narrow sets, however, the remaining two sets cover a broad array of FCRA provisions. The two differ in the

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164. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963).

165. See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Equifax Servs., Inc. v. Cohen*, 420 A.2d 189, 211 (Me. 1980) (testing the state provision against the "full purposes and objectives" of Congress).

166. 15 U.S.C. § 1681t(b).

167. § 1681t(b)(2); see also *Am. Bankers Ass'n v. Gould*, 412 F.3d 1081, 1087 (9th Cir. 2005) (holding that this provision preempted that part of the California Financial Information Privacy Act to the extent that it attempted to regulate the communication of information among affiliates), *appealed after remand, sub nom. Am. Bankers Ass'n v. Lockyer*, 541 F.3d 1214 (9th Cir. 2008) *cert. denied*, 557 U.S. 935 (2009) (narrowing the state statute to sever the preempted portion).

168. 15 U.S.C. § 1681t(b)(3). The FCRA specifically exempts from this prohibition specified laws of the States of California, § 1681t(b)(3)(A), and Colorado. § 1681t(b)(3)(B). In addition, the Act limits the effect of this prohibition on state laws regulating insurance activity. § 1681t(b)(3)(C).

169. § 1681t(b)(4). The FCRA specifically exempts from this prohibition specified laws of the States of Colorado, Georgia, Maine, Maryland, Massachusetts, New Jersey, and Vermont in effect on December 4, 2003. § 1681t(b)(4)(A)-(G).

reach of the area around which the identified provisions remain reserved for the federal monopoly. The first of these sets, which we will call “subject matter preempters,” preempts state requirements or prohibitions imposed as to the “subject matter regulated under” eleven specific FCRA provisions.<sup>170</sup> The other group, which we will

170. § 1681t(b)(1)(A)–(I). These eleven provisions are as follows:

- (A) subsection (c) or (e) of section 1681b of this title, relating to the prescreening of consumer reports;
- (B) section 1681i of this title, relating to the time by which a consumer reporting agency must take any action, including the provision of notification to a consumer or other person, in any procedure related to the disputed accuracy of information in a consumer’s file, except that this subparagraph shall not apply to any State law in effect on September 30, 1996;
- (C) subsections (a) and (b) of section 1681m of this title, relating to the duties of a person who takes any adverse action with respect to a consumer;
- (D) section 1681m(d) of this title, relating to the duties of persons who use a consumer report of a consumer in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance;
- (E) section 1681c of this title, relating to information contained in consumer reports, except that this subparagraph shall not apply to any State law in effect on September 30, 1996;
- (F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply—
  - (i) with respect to section 54A(a) of chapter 93 of the Massachusetts Annotated Laws (as in effect on September 30, 1996); or
  - (ii) with respect to section 1785.25(a) of the California Civil Code (as in effect on September 30, 1996);
- (G) section 1681g(e) of this title, relating to information available to victims under section 1681g(e) of this title;
- (H) section 1681s-3 of this title, relating to the exchange and use of information to make a solicitation for marketing purposes; or
- (I) section 1681m(h) of this title, relating to the duties of users of consumer reports to provide notice with respect to terms in certain credit transactions.

§ 1681t(b)(1); *see* *Banga v. Equifax Info. Servs. LLC*, No. 14-CV-03038-WHO, 2015 WL 3799546, at \*8 (N.D. Cal. June 18, 2014) (holding that a state credit reporting act’s prescreening provision was preempted by section 1681t(b)(1)(A)); *Bauer v. Target Corp.*, 2012 WL 4054296, 8:12-CV-978-T-AEP, 2012 WL 4054296, at \*5 (M.D. Fla. Sept. 14, 2012) (holding that § 1681t(b)(1)(F) preempted a claim under a Florida state debt collection statute’s provision that regulated furnishers’ disclosure of information about a debt); *Galper v. JPMorgan Chase, N.A.*, No. 13 CIV. 3449, 2014 WL 1089061, at \*3–5 (S.D.N.Y. Mar. 17, 2014) (holding that both a conversion claim and a claim brought under a state statute that restricted the transmission of information resulting from identity theft against a bank that had allegedly made false reports to credit reporting agencies was preempted by section 1681t(b)(1)(F)); *Dickman v. Verizon Commc’ns, Inc.*, 876 F. Supp. 2d 166, 175 (E.D.N.Y. 2012) (concluding that claims for breach of contract and for violation of a state deceptive

call “conduct preempters,” has a narrower scope, eliminating only those state requirements or prohibitions that pertain to the “conduct required by” eleven additional FCRA provisions.<sup>171</sup> If we think of the

practices act based on a furnisher’s furnishing of false information to a credit reporting agency was preempted by section 1681t(b)(1)(F)); *Okocha v. HSBC Bank USA, N.A.*, 700 F. Supp. 2d 369, 375 (S.D.N.Y. 2010) (holding that a claim for violation of a state deceptive practices act against an information furnisher for furnishing false information to a credit reporting agency was preempted by section 1681t(b)(1)(F)); *Consumer Data Indus. Ass’n v. Swanson*, No. 07-CV-3376 PJSJJG, 2007 WL 2219389, at \*4 (D. Minn. July 30, 2007) (holding that a state statute prohibiting “mortgage trigger” lists was preempted by section 1681t(b)(1)(A)); *see also* *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 106–07 (2d Cir. 2009) (holding that mortgage lenders’ claims for misappropriation of trade secrets, unfair competition, and unjust enrichment brought against credit reporting agencies for their use of mortgage “trigger leads” were preempted by section 1681t(b)(1)(A)).

A recent Second Circuit opinion rejected a broad reading of these “subject matter” preemption provisions. In *Galper v. JP Morgan Chase Bank, N.A.*, the plaintiff, an identity theft victim, sued the defendant, a bank whose employees had allegedly facilitated the identity theft. 802 F.3d at 442. The plaintiff brought a claim under a state identity theft statute, asserting a theory of vicarious liability pursuant to the doctrine of *respondeat superior*. *Id.* at 446. The Second Circuit vacated the trial court’s dismissal of her claim, reasoning that section 1681t(b)(1)(F) preempts only those claims that concern a furnisher’s responsibilities, and not *all* claims brought against an entity that also happens to be a furnisher. *Id.* The court rejected the defendant’s argument that the preemption provision “preempts all claims ‘relating to the responsibilities’ of furnishers in any way . . . regardless of the capacity in which the furnisher is acting.” *Id.* at 447. Rather, the court reasoned that “Congress opted . . . to use language that focuses more narrowly on the preemption of laws that regulate the *responsibilities* of persons who furnish information to consumer reporting agencies.” *Id.* (emphasis in original).

171. § 1681t(b)(5)(A)–(I). This provision states as follows:

(b) General exceptions

No requirement or prohibition may be imposed under the laws of any State—

\* \* \*

(5) with respect to the conduct required by the specific provisions of—

(A) section 1681c(g) of this title [pertains to truncation of credit card and debit card numbers];

(B) section 1681c-1 of this title [pertains to identity theft prevention, fraud alerts, and active duty alerts];

(C) section 1681c-2 of this title [pertains to the blocking of information resulting from identity theft];

(D) section 1681g(a)(1)(A) of this title [pertains to the truncation of consumers’ social security numbers on their reports at their request];

(E) section 1681j(a) of this title [pertains to charges for reports made to consumers, including the annual free report, and the time for reinvestigations of information on such reports];

(F) subsections (e), (f), and (g) of section 1681m of this title [pertain, respectively, to the requirement that agencies issue “red flag” guidelines and regulations; the prohibition on the sale or transfer of debt caused by identity theft; and communications required of debt collectors concerning identity theft];

provisions given preemptive power as poles planted in the ground of potential state regulation, those of the subject matter preempters will cast a state-law-free shadow around them equivalent in scope to the subject matter of that provision. In general, the conduct preempters will cast almost no shadow at all—just wide enough to cover nearly identical state provisions, or those that require identical conduct.

Finally, the FCRA blocks state law in one other instance—not by preempting it, but by providing qualified immunity from certain state torts to designated actors.<sup>172</sup> The immunity is not absolute; a consumer can overcome it by showing that the defendant provided false information with malice or with willful intent to injure the consumer.<sup>173</sup> The provision plays a robust part in the analysis of preemption of the common law claims it identifies, because its gears must mesh with those of the preemption provisions in order to allow all of the provisions to be effective. The rule against surplusage encourages giving full meaning to every provision in an act, and discourages interpretations that render a provision superfluous.<sup>174</sup> Accordingly, courts have had to struggle to harmonize the preemption provisions with the qualified immunity provision in order to ensure that they do not obviate the immunity—after all, no one needs to be immunized from a preempted state law.

(G) section 1681s(f) of this title [pertains to required coordination among consumer reporting agencies with respect to consumer complaint investigations];

(H) section 1681s-2(a)(6) of this title [pertains to the duties of furnishers upon notice of identity theft-related information]; or

(I) section 1681w of this title [pertains to the required disposal of records].

172. This provision states as follows:

Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer.

§ 1681h(e).

173. *Id.*

174. This is known as the rule against surplusage. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (it is a “cardinal rule of statutory construction” that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant”) (internal citations omitted).

However, the impact of the qualified immunity provision is relatively irrelevant for the purpose of enacting reputation-protecting state statutes. The question of the pool of laws subject to qualified immunity has import for only those state causes of action that are “in the nature of defamation, invasion of privacy, or negligence.”<sup>175</sup> So long as a state statute avoids presenting itself as a law of one of these flavors, it will not be subject to qualified immunity. Therefore, no further discussion of the qualified immunity provision of the FCRA is necessary here.

In its preemption provisions, the FCRA focuses on state “requirement[s] or prohibition[s]” that have a particular relationship with a specified FCRA provision.<sup>176</sup> So, the question arises: How would the Supreme Court define the breadth of such a relationship?

#### *4. Significant areas clearly free from FCRA preemption*

The FCRA identifies a slew of express preemption provisions that require close analysis to determine the extent of areas of regulation fenced off from the states.<sup>177</sup> Nonetheless, large patches of the Act’s coverage are left bare for state intervention. The specific rules regarding medical information, for instance, include restrictions on identifying information reported by medical information furnishers<sup>178</sup> and on creditor use of medical information.<sup>179</sup> In addition, most of the Act’s provisions requiring consumer reporting agencies to put accurate information in agency-issued consumer reports are free from preemption language. This means that states themselves can tighten accuracy standards, improving the protection of their consumers’ reputations.<sup>180</sup> Similarly, states may enact requirements to

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175. § 1681h(e).

176. § 1681t(b)(1)–(5). While the FCRA uses “relating to” in its preemption section, it does so only to describe the content of the specific preempting provisions. It uses “with respect to” to describe the relationship between the state law and the preempting subject matter. § 1681t(b)(5).

177. *See supra* text accompanying notes 166 to 171.

178. § 1681c(a)(6)(A); *see* § 1681a(i) (defining medical information).

179. § 1681b(g)(2); *see also* § 1681b(g)(1)(C) (requiring agencies to code medical information so that the substance of the medical portion is hidden).

180. § 1681e(b) (requiring that “[w]henever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates”).

reinvestigate challenged data that would be more stringent than those in the FCRA.<sup>181</sup> The FCRA also left its requirements for obtaining a report for employment purposes free from preemptive effect, leaving that area open to the states.<sup>182</sup>

In addition, the FCRA has special requirements for reports that contain detrimental public record information—information that would include bankruptcy and criminal record information.<sup>183</sup> This provision falls outside of FCRA preemption provisions, permitting states to impose additional requirements for public record information that agencies place in reports.

Finally, the FCRA's remedies provisions are largely unaffected by the FCRA's preemption provisions.<sup>184</sup> States can therefore provide additional protection to consumers by enhancing the remedies available to those injured by the violation of a state provision, for instance, by offering treble damages. Although a pair of Colorado district courts have concluded that the FCRA's willfulness damages provision did preempt a Colorado statute's treble damages provision,<sup>185</sup> one court seemed to misunderstand both the FCRA's punitive damages provision and the presumption against preemption.<sup>186</sup>

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181. § 1681i.

182. § 1681b; 1681b(b).

183. § 1681k.

184. § 1681n (civil liability for willful non-compliance); 1681o (civil liability for negligent non-compliance). A few FCRA provisions are expressly free from the act's private remedies provisions. *See, e.g.*, § 1681s-s(a), (c)(1), g(e)(6).

185. *Maiteki v. Knight Transp. Inc.*, 12-CV-2021-WJM-CBS, 2015 WL 328250, at \*5 (D. Colo. Jan. 23, 2015); *Eller v. Trans Union LLC*, No. 09-CV-0040-WJM-KMT, 2012 WL 786283, at \*3–4 (D. Colo. Mar. 9, 2012).

186. *Eller*, 2012 WL 786283 at \*3. In assessing the FCRA's provision for damages for willfulness, the court noted only that the FCRA allows statutory damages, and failed to note that the act also provides for punitive damages. *See* § 1681n(a)(1)(B)(2). Not only did the court fail to note the general rule of non-preemption in section 1681t(a), it misread the subsequent subsection as providing a list of FCRA provisions that were exempt from preemption, when in fact it provides a list of subsections that are expressly given preemptive effect. § 1681t(b); *see supra* text accompanying notes 166 to 171. Another Colorado district court has permitted claims for punitive damages under both the FCRA and the Colorado Consumer Credit Reporting Act, though without analyzing preemption. *Eller v. Experian Info. Solutions, Inc.*, No. 09-cv-00040-WJM-KMT, 2011 WL 3365955, at \*18–19 (D. Colo. May 17, 2011), magistrate's report and recommendation adopted No. 09-cv-00040-WJM-KMT, 2011 WL 3365513 (Aug. 4, 2011).



*Infra*, the FCRA's preemption provisions, viewed through the prism of the Supreme Court's recent express and implied preemption decisions, are applied to four areas that are attractive candidates for state regulation: employers' use of credit reports and other kinds of background checks, the inclusion of criminal record information, the inclusion of medical debt information, and identity theft protections.

### *B. Strategies for States*

The FCRA's relationship to state law, along with its express preemption provisions, allow a fair amount of room in which states could operate to protect the reputations of their citizens, so long as states craft those provisions carefully.

With respect to the regulation of consumer reports, no one could credibly argue that consumer credit reporting is subject to field preemption given the Act's express statement that except as otherwise provided, the Act does not "annul, affect, or exempt any person subject to the [FCRA's] provisions . . . ."<sup>187</sup> The preemption analysis benefits from the purpose presumption, a precept the Court has often stressed, in "that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'"<sup>188</sup> The Court has repeatedly emphasized this point.<sup>189</sup> By expressly stating a general rule that the FCRA does *not* preempt state law, Congress effectively nullified field preemption. Under the remaining two preemption theories, a state statute that may tread on an area in which Congress has toiled has to clear three analytical hurdles: express preemption, and the two types of implied preemption—implied impossibility preemption, and implied obstacle preemption.<sup>190</sup>

Taken together, the FCRA's express preemption provisions evince that Congress sought near exclusive control over the

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187. § 1681t(a); *see also supra* text accompanying notes 159 to 165.

188. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

189. *See, e.g.*, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2256 (2013); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

190. *See supra* text accompanying notes 78 to 153.

regulation of information furnishers first,<sup>191</sup> followed by a somewhat less vigorous interest in controlling consumer reporting agencies, and even less interest in controlling users of consumer credit reports. This indicates that the kind of state legislation most likely to survive the preemption provision gauntlet is legislation targeted at the users of specific information. Further, while some regulation of credit agencies might be permitted, very little regulation of furnishers will be tolerated. *Infra*, each area of recent concern is evaluated in light of potential express and implied preemption challenges.

### 1. Employers' use of credit reports

The FCRA contemplates that employers will use credit reports in selecting and placing employees. It specifically designates employment purposes as a permissible reason for looking at a person's credit history.<sup>192</sup> While the Act imposes slightly more onerous terms on employers than those that apply to, for example, run-of-the-mill creditors that use credit reports,<sup>193</sup> by and large it permits employers as much access to an individual's credit history as any other entity that can claim a permissible purpose.

However, the express preemption doctrine would not block a state law that prohibited employers from obtaining reports for employment purposes. None of the FCRA's express preemption provisions cover the Act's permissible purposes provision, which permits an employer to acquire a credit report for employment purposes.<sup>194</sup> Absolutely nothing in the FCRA itself *requires* an

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191. A number of decisions have concluded that the preemption provision of § 1681t(b)(1)(F), which preempts a state "requirement or prohibition . . . with respect to any subject matter regulated under— . . . section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies" preempts a state law claim arising from a furnisher's furnishing of such information. *See, e.g.*, *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 106 (2d Cir. 2009); *Barberan v. Nationpoint*, 706 F. Supp. 2d 408, 426–29 (S.D.N.Y. 2010); *see also* *Aleshire v. Harris*, 586 Fed. App'x 668, 671 (7th Cir. 2013) (concluding that the plaintiff had forfeited her argument, but reasoning that nonetheless the "argument is without merit because state law tort claims are 'requirement[s]' for preemption purposes") (emphasis and citation omitted).

192. § 1681b(a)(3)(B).

193. The employer must notify the consumer that a consumer report may be obtained for employment purposes and the consumer must authorize the employer's procurement of a consumer report. § 1681b(2)(A)(ii).

194. § 1681b.

employer to obtain a credit report; accordingly an employer could meet the demands of both the FCRA and a state law prohibiting employers from accessing credit reports simply by abiding by the state law. Thus, implied impossibility preemption would not arise.

As for implied obstacle preemption, recent Supreme Court decisions indicate deference to state schemes, so long as the area is not one in which Congress has pervasively regulated.<sup>195</sup> Given *Wyeth v. Levine*'s heavy reliance on the purpose presumption, and the FCRA's own express reservation of power to states, any state law limiting employers (or other users) from acquiring credit reports would very likely clear implied obstacle analysis.

## 2. Criminal record information

State statutes that prohibit consumer reporting agencies from including certain types of state record information on credit reports are more vulnerable to express preemption. The state restrictions described in Section II.A *supra* restrict specific users from asking for, acquiring, or using credit information. An alternate method to regulate the trafficking of personal information is to regulate the content of a consumer report rather than its acquisition. In short, not "user, you cannot buy this," but "agency, you cannot sell this." This may appear to be an unnecessarily fine distinction, but the FCRA's express preemption provisions render this distinction highly meaningful.

The FCRA has a content preemption provision that prevents states from regulating the "subject matter . . . [of] section 1681c,"<sup>196</sup> identified as "relating to information contained in consumer reports."<sup>197</sup> Criminal background information is content information; furthermore it is content information that section 1681c specifically accounts for in part by effectively rendering arrest records as obsolete, and thus ineligible for inclusion in a consumer report, after seven years.<sup>198</sup> The question is whether a state law more protective of such information than section 1681c—one that prohibits consumer reporting agencies outright from placing

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195. See *supra* text accompanying notes 146 to 153.

196. § 1681t(b)(1)(E).

197. § 1681c.

198. § 1681c(a)(2).

criminal background information in consumer reports—would be seen as relating to the subject matter of this section in light of the Supreme Court decisions construing the effects of express preemption provisions.

While the title of the section identified as preempted is broad—“[r]equirements relating to information contained in consumer reports”<sup>199</sup>—the actual scope of the section is much narrower. It does not purport to regulate content as a whole, but rather focuses on specific items of information that should be excluded because the information is old. This section addresses criminal record information in three ways. First, it provides that consumer reporting agencies may not, in general, report arrest records (or other adverse criminal record information,<sup>200</sup> aside from convictions) that are more than seven years old.<sup>201</sup> Second, agencies may nonetheless report those records where a credit transaction or life insurance underwriting is for \$150,000 or more, or where the report is “to be used in connection with . . . the employment of [someone who will receive a salary] of \$75,000 or more.”<sup>202</sup> Finally, agencies may report all criminal convictions in perpetuity.<sup>203</sup> In analyzing the power of the obsolescence provisions to preempt, one court concluded that the FCRA’s obsolescence provision preempted a parallel Colorado provision that prohibited criminal convictions that were more than seven years old, reasoning that the state provision was clearly of the same subject matter—the length of time an agency can report a criminal conviction.<sup>204</sup> This analysis evinces a broad reading of the section, one not necessarily justified by its content, as discussed next.

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199. § 1681c.

200. § 1681(a)(5) prohibits the reporting of “[a]ny other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.” Criminal record information qualifies as an “adverse item of information.” *See, e.g.,* *Haley v. TalentWise, Inc.*, 9 F. Supp. 3d 1188, 1192 (W.D. Wash. 2014) (information regarding dismissed criminal charges qualified as “adverse” information).

201. § 1681c(a)(2), (5) (prohibiting agencies from reporting arrest records “more than seven years” old or after “the governing statute of limitations has expired, whichever is . . . longer”).

202. § 1681c(b)(1)–(3).

203. § 1681c(a)(5) (exempting criminal conviction records from the general rule that agencies may not report “any . . . adverse item of information” “more than seven years” old).

204. *See* *Simon v. DirecTV, Inc.*, 09-cv-00852-PAB-KLM, 2010 WL 1452853, at \*4 (D. Colo. Mar. 19, 2010) (report and recommendation of magistrate judge), *adopted by* 09-cv-00852-PAB-KLM, 2010 WL 1452854 (D. Colo. Apr. 12, 2010).

However, the FCRA provision is less about the substantive character of the information and much more about its age. The provision establishes that information is sufficiently “fresh” only for the designated period of time, without governing the content itself. This construction casts the provision as closely resembling the express preemption provision analyzed in *Altria*, where the Supreme Court interpreted the preemption provision—“[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter”<sup>205</sup>—as applying only to state laws based on smoking and health. Reading the span of section 1681t(b)(1)(E) as reaching only the subject matter of state laws that address the obsolescence of criminal record information would mean that under the reasoning of *Altria*, a broader statute, like the Maine deceptive practices act involved in that case, would not be construed as addressing the specific material that the preemption provision refers to. The Court construed the state statute in *Altria* as imposing a general duty not to deceive, rather than one that was more narrowly based on “smoking and health.” Here, the FCRA’s content preemption provision could apply only to state laws regulating the time for which an item with specified content could remain on a report, not the initial eligibility of the information to *ever* be included in a report. Nonetheless, such an analysis would arguably be an inapt adaptation of *Altria*, given that the state statute in that case was a broadly applicable anti-fraud statute, in contrast to the sort of content-specific state credit report statute that states might consider limiting information placed in credit reports. Proponents of a state ban on criminal record content might have to argue that *Altria* should permit narrow state statutes where the coverage of the federal statute’s express preemption provision was also commensurately narrower.

What’s more, section 1681c relates specifically to what consumer reporting agencies can put into a consumer report; every subsection pertains to what an *agency* can and cannot do.<sup>206</sup> Nothing in the section pertains to what an *employer* can or cannot do. Hence, one

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205. 15 U.S.C. § 1334(b) (2012).

206. 15 U.S.C. § 1681c.

fair alternative to regulating the criminal record content of a consumer report issued for employment purposes would be to tell employers that they may not request a consumer report that includes such criminal record information, or that if an employer receives a report containing such information, the employer may not use it. This approach regulates users, rather than furnishers or agencies, and would create, in essence, an anti-discrimination law. This is the approach taken by some states, including California and Illinois, in recently enacted consumer report cloaking provisions that appear to include reports of criminal history.<sup>207</sup> In this way the restriction becomes a restriction on users of consumer reports, not creators of consumer reports, and likely should fall outside the preemptive effects of 15 U.S.C. § 1681t(b)(1)(E).

Under this—a constrained reading of the preemption provision that would comport with the general rule that federal courts should so read such provisions—a state would be permitted to prohibit criminal records on credit reports, so long as it did not address the length of time that other categories of information could be reported by a consumer reporting agency. In contrast, a state statute that sought to limit the window of time that a criminal record (whether arrest, conviction, or other) could be reported would likely be construed as intruding on the subject matter of the FCRA's obsolescence provision and thereby would be preempted.

### *3. Medical debt restrictions*

Using similar reasoning, states should be able to pass preemption-proof restrictions on the placement of medical debt information in consumer reports. While states have not yet acted in

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207. CAL. LAB. CODE § 1024.5(a) (2011 & Supp. 2016); 820 ILL. COMP. STAT. 70/10(a). California's provision broadly defines "consumer credit report" to include "any written, oral, or other communication of any information by a consumer credit reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity, which is used or is expected to be used, or collected in whole or in part for [designated permissible purposes, including employment purposes]." CAL. LAB. CODE § 1024.5(a) (2011 & Supp. 2016) (citing CAL. CIV. CODE § 1785.3(c) (2012)). Similarly, Illinois's provision defines a credit report to mean "any written or other communication of any information by a consumer reporting agency that bears on a consumer's creditworthiness, credit standing, credit capacity, or credit history." 820 ILL. COMP. STAT. 70/5(a) (2008 & Supp. 2016). These two provisions capture criminal record information to the extent it's considered to impact creditworthiness. See also *supra* text accompanying notes 41 to 52.

this area, the fact that the 113th Congress considered a bill that would have prohibited consumer reporting agencies from putting designated medical debt in a credit report could inspire states to do so.<sup>208</sup>

Concerns over the privacy of medical information motivated Congress to add protections to the FCRA when it revised the act in 1996. Congress limited the use of medical information by creditors, insurers, and employers.<sup>209</sup> It defined medical information broadly, encompassing “information or data . . . that relates to—(A) the past, present, or future physical, mental, or behavioral health or condition of an individual . . . .”<sup>210</sup> The FCRA’s restrictions on the use of such information are more protective in the case of employment use than in the case of an insurance transaction—for an insurance transaction, the consumer need only consent to the furnishing of the medical information.<sup>211</sup> However, for reports issued for employment or credit transaction purposes, the agency may include the consumer’s medical information in the report only if the information is relevant to the transaction and the consumer has given “specific written consent for . . . the report[.]” This consent must “describe[] in clear and conspicuous language the use for which the information will be furnished.”<sup>212</sup>

Two of the FCRA’s express preemption provisions may impact state regulation of medical debt information in consumer reports, one relating to the content of reports and one relating to the regulation of information furnishers. First, as discussed *supra*, the FCRA has an express preemption provision that prevents states from regulating the subject matter of section 1681c, relating to the

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208. S. 160, The Medical Debt Responsibility Act of 2013 § 3, 113th Cong., 1st Sess. (2013) (proposing an amendment to 15 U.S.C. § 1681c(a), the obsolescence provision described *supra*, that would delete from credit reports “[a]ny information related to a fully paid or settled medical debt that had been characterized as delinquent, charged off, or in collection which, from the date of payment or settlement, antedates the report by more than 45 days”).

209. 15 U.S.C. § 1681b(g).

210. § 1681a(i).

211. § 1681b(g)(1)(A).

212. § 1681b(g)(1)(B). The act does permit agencies to include medical information that “pertains solely to transactions, accounts, or balances relating to debts arising from the receipt of medical services, products, or devices [sic]” where the information is coded to avoid identifying the “nature of [the] services, products, or devices.” § 1681b(g)(1)(C).

content of information contained in consumer reports.<sup>213</sup> However, in contrast to its treatment of criminal record content information, discussed *supra*, section 1681c says very little about medical information content. The only reference to the medical industry pertains to a report's inclusion of the identifying information of any medical information furnisher; the FCRA requires agencies to withhold such information unless it is coded to avoid disclosing the nature of the provider and what it has provided.<sup>214</sup>

Accordingly, under the relatively state-friendly ruling of *Altria*, if the preemption provision's reference to the content of section 1681c were read to size itself down to the very specific and limited content restriction contained within section 1681c, then a broader state law banning the inclusion of medical debt would appear to address subject matter that differed from that in section 1681c, allowing a state law ban to survive express preemption under this theory. The main restrictions on the inclusion of medical information in consumer reports are located not in section 1681c, which is the target of an express preemption provision, but in section 1681b(g), which is not such a target.<sup>215</sup> Accordingly, states should remain free to decide what medical information content agencies may and may not put in reports, so long as they do not put agencies in the position of being unable to comply with both the state provision and

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213. § 1681t(b)(1)(E); *see supra* text accompanying note 170.

214. § 1681c(a)(6). Specifically, the name, address, and telephone number of the medical information furnisher are withheld. *Id.* This restriction does not apply if the agency is providing the report to an insurance company for something “other than property [or] casualty insurance”—meaning the agency can provide non-coded identifying information to an insurance company that wants the report for medical, life, or other sorts of insurance. The FCRA references medical information in a number of other ways. First, in general, information that would otherwise be a consumer report is not such if it meets the terms of the Act's affiliate sharing exemption. § 1681a(d)(2)(A). However, that exception does not apply when affiliates share medical information. § 1681a(d)(3). In addition, the FCRA imposes somewhat stricter requirements on reports furnished for employment or credit purposes that contain medical information, requiring that the information be relevant to the transaction and that the consumer provide specific consent for the furnishing of the report. § 1681b(g)(B). Nonetheless, information about medical debts may be included without those restrictions so long as the information is coded to obscure the “specific provider . . . [and] the nature of . . . [the medical] services, products, or devices” giving rise to the debt. § 1681b(g)(1)(C). So, as long as the agency codes the information, it may place it in the report, including the amount of the debt—that amount, of course, being precisely what will harm the consumer's credit rating.

215. Specifically, section 1681b(g)(1).



the FCRA (which would lead to obstacle-impossibility preemption)<sup>216</sup> or act so broadly as to disrupt the purpose of the FCRA (which would lead to obstacle-purpose preemption).<sup>217</sup>

Once such a state law has cleared preemption of the subject matter of the FCRA's content restriction provision, a state law limiting medical debt information in consumer reports would then have to hurdle section 1681t(b)(1)(F), an express preemption provision prohibiting states from regulating the subject matter of the FCRA's main furnisher-responsibilities provision. However, even this more specific subject matter preemption provision in the FCRA should not impede states much. As discussed *supra*, this preemption provision provides merely that states may not regulate the subject matter of, among other provisions, a provision that requires furnishers "whose primary business is providing medical services, products, or devices" to notify the agency of their status as medical information furnishers, a rather small, perfunctory provision.<sup>218</sup> Thus, given a narrow construction, this preempting provision forbids states from regulating the subject matter of notifications by medical information furnishers to consumer reporting agencies. This preempting provision is far narrower than that of the Medical Device Amendment Act in *Riegel*, which preempted any state law beyond one that was an identical twin to the federal law, leading the Court to conclude that it barred state products liability claims.<sup>219</sup> California's Supreme Court has in fact construed this preemption provision narrowly, extending "only to state laws relating to furnisher accuracy or dispute resolution."<sup>220</sup> Accordingly, the provision did not preempt a claim under a state medical privacy statute.<sup>221</sup> Thus, a state provision barring medical debts from credit reports that did not relate to furnisher accuracy or dispute resolution should clear express preemption.

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216. See *supra* text accompanying notes 134 to 145.

217. See *supra* text accompanying notes 147 to 153.

218. § 1681t(b)(1)(F) (incorporating § 1681s-2(a)(9)).

219. See *supra* text accompanying notes 105 to 111.

220. *Brown v. Mortensen*, 51 Cal. 4th 1052, 1064–65 (Cal. 2011) (rejecting argument that the FCRA barred a claim under California's Confidentiality of Medical Information Act that arose from a dentist's sharing of the medical records of a client and his sons, concluding that the state act targeted different subject matter from that of section 1681s-2).

221. *Id.* at 1065.

As for implied impossibility preemption, nothing would force an agency to violate a state law forbidding the inclusion of medical debt in credit reports in order to comply with the FCRA, because nothing in the FCRA *requires* an agency to include medical debt in a consumer report. Accordingly, that doctrine would not nullify a state effort to keep medical debt out of consumers' credit reports.

As for implied obstacle preemption, a medical debt restriction would not be at direct odds with the FCRA's purposes, one of which is, ultimately, to protect consumers.<sup>222</sup> Thus a state provision limiting the corrosive effects of involuntary expenditures for medical services would be entirely consistent with that purpose. The FCRA's pro-consumer purpose contrasts distinctly with that of the federal motor carrier services law construed in *Rowe* and its purpose to have market forces, rather than state legislatures, impose limits. That purpose conflicted with the youth-protecting purpose of the state anti-tobacco law, and thus the state law fell.<sup>223</sup> Therefore, a restriction on medical debt would not become null under a theory of implied obstacle preemption.

In short, states likely have a fair amount of room to exclude medical debt from consumer credit reports, and could use that room to help their citizens maintain the confidentiality of their unanticipated or unaffordable medical expenses. Thus, states that are concerned about the effects of medical debt on their citizens' credit reports could prohibit agencies from putting such debts into credit reports.

#### *4. Identity theft protections*

States may be a good deal more hampered when it comes to protecting their consumers from the crushing damage that can arise when an identity thief has poisoned a consumer's credit report with the thief's own transactions. As described *supra*, New Mexico took the step of enacting a provision making it reasonably easy for a consumer to block information arising from an identity thief's

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222. See § 1681(a)(4) (stating that “[t]here is a need to insure [sic] that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy”).

223. See *supra* text accompanying notes 112 to 120.

debts.<sup>224</sup> However, when Congress added identity theft–protections to the FCRA,<sup>225</sup> it also boosted the preemption subsection to specifically address those protections, staking out some exclusive federal territory. The identity theft–related protections sheltered by an express preemption provision include some duties imposed on furnishers,<sup>226</sup> consumer reporting agencies,<sup>227</sup> the FTC and other

224. See *supra* text accompanying notes 65 to 68.

225. Fair and Accurate Credit Transactions Act, Pub. L. 108-159, 117 Stat. 1952 (2003).

226. The following duties of furnishers relate to identity theft and are subject to a preemption provision: Furnishers' duties to "have in place reasonable procedures to respond to any notification that it receives from a consumer reporting agency . . . relating to information resulting from identity theft, to prevent that person from refurnishing such blocked information." § 1681s-2(a)(6)(A), subject to § 1681t(b)(1)(F) (subject matter).

Furnishers' duties to refrain from furnishing information resulting from identity theft, where the consumer has submitted an identity theft report to the furnisher. § 1681s-2(a)(6)(B), subject to § 1681t(b)(1)(F) (subject matter). To trigger the furnisher's duty, the consumer must have submitted the report "at the address specified by [the furnisher] for receiving such reports." § 1681s-2(a)(6)(B). The furnisher may resume reporting the information if it "subsequently knows or is informed by the consumer that the information is correct." *Id.*

One court, however, has upheld a state identity theft provision against a preemption challenge that asserted that the provision was within the "subject matter" regulated by section 1681s-2(a)(6), concluding that the "state [action] . . . concern[ed] the direct relationship between the credit provider and the consumer," rather than one that fell within the "subject matter" of a furnisher's "reporting of credit information" to a consumer reporting agency. *Pasternak v. Trans Union*, C07-04980MJJ, 2008 WL 928840, at \*4 (N.D. Cal. Apr. 3, 2008).

227. The following duties of consumer reporting agencies are subject to a preemption provision: Consumer reporting agencies' duty to notify one who has requested a consumer report that the address in the request "substantially differs from the addresses in the file of the consumer." § 1681c(h)(1). In theory the subject matter of this provision is subject to preemption pursuant to § 1681t(b)(1)(E).

Agencies' duties to provide fraud alerts, extended fraud alerts, and active duty alerts, and to refer alerts to other nationwide consumer reporting agencies, and for resellers to reconvey alerts, and to provide consumers with information on how to contact the Bureau of Consumer Financial Protection. § 1681c-1. The conduct required by this provision is subject to preemption pursuant to § 1681t(b)(5)(B).

Agencies' duties to block the reporting of identified theft-related information from a consumer's report, and to notify the information's furnisher of the block. § 1681c-2. This provision is subject to the conduct-required-by preemption provision of § 1681t(b)(5)(B). This provision allows consumer reporting agencies to rescind or decline the block under the following circumstances:

[T]he consumer reporting agency reasonably determines that—

- (A) the information was blocked in error or a block was requested by the consumer in error;
- (B) the information was blocked, or a block was requested by the consumer, on the basis of a material misrepresentation of fact by the consumer relevant to the request to block; or

federal agencies,<sup>228</sup> businesses that transact with identity thieves,<sup>229</sup> owners of debts resulting from identity thieves,<sup>230</sup> and debt collectors.<sup>231</sup>

The relevant FCRA provisions generally regulate furnishers and agencies.<sup>232</sup> Furnishers must refrain from furnishing to consumer reporting agencies information they learn resulted from identity theft; furthermore, furnishers must have procedures to respond to a notice from a consumer reporting agency that the agency has blocked such information.<sup>233</sup> Agencies, in turn, must provide fraud alerts in reports and block identity theft-related information, among other duties.<sup>234</sup>

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(C) the consumer obtained possession of goods, services, or money as a result of the blocked transaction or transactions.

§ 1681c-2(c)(1).

The duty of nationwide consumer reporting agencies to develop procedures to refer identity theft complaints, fraud requests, and information block requests to one another. § 1681s(f). The conduct required by this subsection is subject to preemption pursuant to § 1681t(b)(5)(G).

228. The following duties of federal agencies are covered by an express preemption provision: The Federal Trade Commission's duty to prepare a summary of rights of identity theft victims, and consumer reporting agency's duties to provide consumers who complain of being the victim of fraud or identity theft with the summary. § 1681g(d). States may not impose any requirement or prohibition "with respect to the disclosures required to be made" by this subsection. § 1681t(b)(3).

The duty of designated federal agencies to draft "red flag guidelines and regulations." § 1681m(e). The conduct required by this subsection is subject to preemption pursuant to section 1681t(b)(5)(F).

229. The duty of businesses who have transacted with an identity thief to provide to the victim information about the transaction or transactions. § 1681g(e). The subject matter of this subsection is subject to preemption pursuant to section 1681t(b)(1)(G). Furthermore, states may not impose any requirement or prohibition "with respect to the disclosures required to be made" by this subsection. § 1681t(b)(3).

230. The duty of owners of debts resulting from identity theft who have been properly notified to not "sell, transfer, or place for [debt] collection [the] debt." § 1681m(f). The conduct required by this subsection is subject to preemption pursuant to section 1681t(b)(5)(F).

231. The duty of debt collectors who learn that the debts that they are attempting to collect "may be fraudulent or . . . the result of identity theft" to notify the person on whose behalf the collector is acting about these qualities of the information, and to provide certain information to the consumer upon request. § 1681m(g). The conduct required by this subsection is subject to preemption pursuant to section 1681t(b)(5)(F).

232. *See supra* text accompanying notes 226 to 227.

233. *See supra* text accompanying note 226.

234. *See supra* text accompanying note 227.

In assessing the relationship between state identity theft provisions and the FCRA, a California district court dismissed a preemption challenge to a state identity theft provision that allowed theft victims to sue creditors that seek to recover from the victim a claim incurred by an identity thief in the victim's name.<sup>235</sup> The opinion narrowly construed the "subject matter" reach of 15 U.S.C. § 1681s-2, one of the provisions identified in the FCRA's subject matter preemption provisions.<sup>236</sup> The court rejected the consumer reporting agency's arguments that two different provisions of section 1681s-2 that pertained to identity theft bore a subject matter that extended to and nullified the state provision.<sup>237</sup> The court characterized the plaintiff's action against the defendant—who sought to force the plaintiff to pay the identity thief's debt—as one that "concern[ed] the direct relationship between the credit provider and the consumer," rather than one that fell within the "subject matter" of a furnisher's reporting of credit information to a credit reporting agency.<sup>238</sup> Thus, the court carefully analyzed the content of the specific subsections of the FCRA's furnisher obligations rather than simply concluding that the preempting provision should be construed as covering any state claim against a furnisher.<sup>239</sup>

In contrast, some courts have construed the subject matter preemption effect of the FCRA's provision regulating furnishers as broadly preempting *any* claim that relates to furnisher behavior,

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235. CAL. CIV. CODE §§ 1798.92–97 (2012). Identity theft victims can sue to establish that they were the victims of identity theft and, thus, not responsible to a claimant for debts incurred by the thief.

236. 15 U.S.C. § 1681t(b)(1)(F); *Pasternak v. Trans Union*, C07-04980 MJJ, 2008 WL 928840, at \*4 (N.D. Cal. Apr. 3, 2008).

237. *Pasternak*, 2008 WL 928840, at \*4. One FCRA provision pertains to the duties of furnishers upon an agency's notice of identity theft and imposing on furnishers a duty to refrain from refurnishing the disputed information, § 1681s-2(a)(6), while the other requires furnishers to take certain actions upon receiving an identity theft complaint from a consumer, § 1681s-2(a)(8).

238. *Pasternak*, 2008 WL 928840, at \*4.

239. For similar careful, though less detailed analysis, see *Lichtenfels v. Crook*, CV065007438S, 2007 WL 2938716, at \*6 (Conn. Super. Ct. Sept. 26, 2007) (dismissing state law claims based on allegations of furnisher behavior that fell within section 1681s-2, but retaining the others); *Deutsche Bank Nat'l Trust Co. v. Lichtenfels*, CV044003402S, 2007 WL 2938730, at \*1 (Conn. Super. Ct. Sept. 26, 2007) (same).

without carefully examining the precise contours of the different responsibilities identified within that section.<sup>240</sup>

A different federal court has also indicated that the FCRA's express preemption provisions may bar the New Mexico law that overlaps with the FCRA's identity theft debt-blocking provision. The FCRA requires consumer reporting agencies to block the reporting of identity theft debts that a consumer has properly identified as arising from the work of an identity thief.<sup>241</sup> However, the FCRA provision allows an agency to decline to block or rescind the barrier to reporting debts resulting from identity theft if it "reasonably determines that" one of three conditions was met—the information was erroneously blocked, the consumer made a material misrepresentation about the information blocked, or the consumer benefitted from the blocked transaction.<sup>242</sup> New Mexico's

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240. See, e.g., *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 888 (9th Cir. 2010) (holding that the FCRA preempted a state provision requiring furnishers who receive notice of a dispute to investigate and review relevant information); *Sukiasyan v. OCS Recovery Inc.*, CV 11-9622GAF CWX, 2013 WL 490683, at \*6 (C.D. Cal. Jan. 22, 2013) (holding that a California statutory provision regulating furnishers that provide negative credit information was preempted); *Harrold v. Experian Info. Solutions, Inc.*, C12-02987WHA, 2012 WL 4097708, at \*3 (N.D. Cal. Sept. 17, 2012) (concluding that claims brought pursuant to CAL. CIV. CODE § 1785.25(b), (c), and (f), which impose accuracy requirements on furnishers of information to credit reporting agencies, were preempted by 15 U.S.C. § 1681t(b)(1)(F)); *Oganyan v. Square Two Fin.*, CV11-10226RGK VKB, 2012 WL 3656355, at \*4 (C.D. Cal. Aug. 24, 2012) (holding that the section 1681t(b)(1)(F) preempted a California statutory provision regulating furnishers that provide negative credit information, and also a provision regarding furnishers' reinvestigations, which the court characterized as "fall[ing] within the general ambit" of section 1681s-2); *Subhani v. JPMorgan Chase Bank, Nat'l Ass'n*, C12-01857WHA, 2012 WL 1980416, at \*6 (N.D. Cal. June 1, 2012) (concluding that claims brought against a furnisher under a state statute that imposed parallel requirements to those of section 1681s-2(a)); *Banga v. Allstate Ins. Co.*, CIVS081518LKKEFBPS, 2010 WL 1267841, at \*5 (E.D. Cal. Mar. 31, 2010) (holding that the FCRA preempted a claim against a furnisher brought under California's unfair competition law to the extent that it was predicated on violations of section 1681s-2(a) and (b)); *Drew v. Equifax Info. Servs.*, C 07-00726 SI, 2007 WL 2028745, at \*5 (N.D. Cal. July 11, 2007) (holding that the FCRA preempted a claim against a furnisher brought under a state statute with similarities to section 1681s-2, though refusing to dismiss a state claim arising from a user's conduct rather than a furnisher's); see also *Wang v. Asset Acceptance, LLC*, 681 F. Supp. 2d 1143, 1150 (N.D. Cal. 2010) (construing California's unfair competition law as imposing a "requirement or prohibition" by prohibiting "any unlawful, unfair or fraudulent business act or practice"); *Howard v. Blue Ridge Bank*, 371 F. Supp. 2d 1139, 1143-44 (N.D. Cal. 2005) (concluding that the 1681s-2 preemption provision precluded a claim under California's unfair competition law that sought to impose a remedy for a violation of the FCRA's provisions).

241. 15 U.S.C. § 1681c-2.

242. § 1681c-2(c)(1).

overlapping provision appears to have the same general intent as the FCRA's blocking provision—that of protecting consumers from being tarnished by debts that they did not create. However, the New Mexico provision is more protective of identity theft victims, because it does not permit consumer reporting agencies to evade their responsibilities to block identity theft-related debt by engaging in their own independent review of the block and, thereafter, unilaterally rescinding it.<sup>243</sup> Rather, the New Mexico law permits an agency to lift the block only if the consumer requests it or a court orders it.<sup>244</sup>

However, the FCRA expressly preempts state laws with respect to the conduct required by the blocking provision.<sup>245</sup> Accordingly, the main industry association for consumer credit reporting, the Consumer Data Industry Association, sought to enjoin enforcement of the New Mexico provision.<sup>246</sup> The district court dismissed the complaint on the grounds that the CDIA could not establish standing and therefore the case was nonjusticiable, but the Tenth Circuit reversed, concluding that the declaratory relief the CDIA sought would sufficiently redress its injury.<sup>247</sup> The court's discussion of the preemptive effects of the FCRA cause some concern. Rather than addressing the quite narrow preemption provision that would apply, the court stated grandly that “[t]he FCRA leaves no room for overlapping state regulations.” As discussed *infra*, this substantially misstates the text of the FCRA.<sup>248</sup>

Two points oppose a broad reading of these identity theft-related preemption provisions. First, these specific preemption provisions should be construed in light of the introductory command of the preemption section, that except as provided, the FCRA does not “annul, alter, affect, or exempt any person . . . from complying with the laws of any State . . . for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent [with the Act], *and then only to the extent of the inconsistency.*”<sup>249</sup> This

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243. N.M. STAT. ANN. § 56-3A-3.1(D), (E) (2010).

244. § 56-3A-3.1(E).

245. 15 U.S.C. § 1681t(b)(5)(C).

246. Consumer Data Indus. Ass'n v. King, 678 F.3d 898, 902–03 (10th Cir. 2012).

247. *Id.*

248. See *infra* text accompanying notes 249 to 252.

249. 15 U.S.C. § 1681t(a) (emphasis added).

countervailing instruction indicates that preemption should be limited to only such state statutes that overlap nearly edge to edge with one of the identified FCRA provisions.

Furthermore, as discussed *supra*, the Supreme Court has deferred to state legislation that supports the purpose of the corresponding federal law. As an additional argument against express preemption of the New Mexico identity theft provision, both the FCRA provisions and the New Mexico provision have the intent of protecting consumers from debts that they did not create; they differ in their details, not in their aim. Accordingly, the reasoning of *Rowe*, where the pro-commerce aim of the federal statute differed from and conflicted with the anti-tobacco aim of the state statute, can be meaningfully distinguished. Furthermore, the aim of the New Mexico identity theft provision—protecting consumers—is one that has traditionally been the province of the states.<sup>250</sup>

Nothing in the FCRA's blocking provision *requires* a consumer reporting agency to rescind a block based on its own determination that the block was placed in error. Rather, the Act clearly states that an agency “*may* decline to block, or *may* rescind any block” in the identified circumstances.<sup>251</sup> Therefore, the absence of required

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250. Admittedly, the state and federal regimes having the same aim might not immunize the state provision from preemption. For instance, the Supreme Court concluded in *Arizona v. United States* that some provisions of Arizona's statute regulating unlawful aliens were preempted by federal law. 132 S. Ct. 2492, 2502, 2505, 2507. However, there the state law involved immigration, a subject over which “[t]he Government of the United States has broad, undoubted power” and thus two state provisions that had immigration-management goals similar to that of the federal regime were nonetheless preempted. The first, which made the failure to comply with federal alien-registration requirements a state misdemeanor because immigration bears the power of field preemption: “[T]he Federal Government has occupied the field of alien registration.” *Id.* at 2502. Another provision, making it a misdemeanor for an alien to seek work in the state, was preempted through implied obstacle preemption because the means sought by the state law's provisions (criminal enforcement) created an obstacle to the aims of the federal regime, control through a civil mechanism. *Id.* at 2505. Similarly, a third provision, which authorized state officials to arrest aliens without a warrant under specified circumstances, interfered with the federal scheme by expanding the circumstances under which state officers could act as immigration agents. *Id.* at 2506–07. A fourth provision, however, survived preemption notwithstanding the federal law's interest in maintaining control over immigration because the Court concluded that it was premature to rule before the state showed how it would interpret it. *Id.* at 2510.

However, in contrast to the area of consumer protection, this case involved an area that is expressly reserved to the federal government in the Constitution. U.S. CONST. art. I, § 8, cl. 4 (granting the federal government power to “establish an uniform Rule of Naturalization”).

251. 15 U.S.C. § 1681c-2(c)(1).



conduct leaves nothing for section 1681t(b)(5)(C) to preempt regarding the rescission of (as opposed to the placement of) a block. Second, the preemption provisions extend only to the “conduct required by” the identified FCRA provisions, in contrast to the broader “subject matter regulated under” relationship that applies to a clutch of other preempting provisions.<sup>252</sup>

However, if the New Mexico law is ultimately found to be preempted by the FCRA, New Mexico, along with other states, could perhaps achieve its goal by painting with a broader brush. The underlying problem with identity theft-related debt tainting a consumer’s credit report is not the actual source of the debt, but the fact of its inaccuracy. If a consumer reporting agency reported the debt of another person as belonging to the targeted consumer, the effects on the consumer would be just the same as if the misreported debt did not arise from identity theft, but merely from the mixing up by the agency of the targeted consumer with the debt’s true creator. The issue is the accuracy of the information that the agency chooses to assign to a consumer’s report. Accordingly, a state could mitigate the effects of identity theft by imposing stricter accuracy requirements on consumer reporting agencies, enhancing the penalties for inaccurate reporting, or both. While the FCRA does, in fact, impose certain accuracy requirements on agencies,<sup>253</sup> it imposes nothing like strict attention to accuracy. Accordingly, by requiring agencies to meaningfully assess the accuracy of information initially, or to strictly verify it once it has been disputed by a consumer, a state could quite likely drastically reduce the pernicious effects of identity theft without stepping on the toes of the FCRA, which does not explicitly preempt state laws imposing accuracy standards on agencies, as opposed to furnishers.<sup>254</sup>

Another fruitful way for states to thwart identity theft is through mandating that consumer reporting agencies impose security freezes on the files of consumers who request them. These permit a consumer to hide their credit information from new potential

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252. § 1681t(b)(1), (5).

253. §§ 1681e(b), 1681i.

254. *See* § 1681t(b)(1)(F), preempting states from regulating the subject matter of section 1681s-2, which imposes accuracy requirements on furnishers.

creditors<sup>255</sup> while allowing the consumer to explicitly “thaw” the freeze for specific transactions. Several states have enacted such provisions and they can effectively block an identity thief from co-opting a consumer’s credit record.<sup>256</sup>

States seeking to legislate in the identity theft area should avoid implied impossibility preemption by ensuring that an agency, user, or furnisher can comply with both the FCRA and the proposed state law. Furthermore, states should proactively anticipate implied obstacle preemption arguments. *Wyeth* indicated a preference for consumer remedies, and some of the FCRA’s identity theft provisions deny consumers a private cause of action for the violation of identity theft specific provisions. For instance, the FCRA allows

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255. In general, such freezes may not hide reports from existing creditors. *See, e.g.*, 815 ILL. COMP. STAT. 505/2MM(n) (providing that the freeze provisions do not apply to entities that the consumer owes).

256. *See, e.g.*, ALA. CODE §§ 8-35-1 to -3 (2002 & Supp. 2015); ALASKA STAT. §§ 45.48.100–290 (2014); ARIZ. REV. STAT. ANN. § 44-1698 (2013 & Supp. 2015); ARK. CODE ANN. §§ 4-112-101–14 (2011); CAL. CIV. CODE §§ 1785.11.2–.4, .6 (2012); COLO. REV. STAT. ANN. § 12-14.3-106.6 to -106.9 (2010); CONN. GEN. STAT. §§ 36a-701–701a (2011 & Supp. 2016); DEL. CODE ANN. tit. 6 §§ 2201–04 (2013); D.C. CODE ANN. §§ 28-3861 to -3864 (2001); FLA. STAT. ANN. §§ 501.005, 501.0051 (2010 & Supp. 2016); GA. CODE ANN. §§ 10-1-913 to -915 (2009 & Supp. 2015); HAW. REV. STAT. §§ 489P-3 to 489P-6 (2008); IDAHO CODE ANN. §§ 28-52-101 to -109 (2013); 815 ILL. COMP. STAT. 505/2MM (2008 & Supp. 2016); IND. CODE §§ 24-5-24-1 to -17 (2013 & Supp. 2015); IOWA CODE §§ 714G.1–.11 (2013 & Supp. 2016); KAN. STAT. ANN. §§ 50-723 to -724 (2005 & Supp. 2014); KY. REV. STAT. ANN. §§ 367.363–367.365 (2008); LA. REV. STAT. ANN. §§ 9:3571.1(H)–(Z), 3571.3 (2009 & Supp. 2016); ME. REV. STAT. ANN. tit. 10, § 1310 (2009 & 2015 Supp.); MD. CODE ANN., Com. Law §§ 14-1212.1 to -1212.3 (2010); MASS. GEN. LAWS ch. 93, §§ 56, 62A, 63, 64 (2006); MICH. COMP. LAWS §§ 445.2531–.2535 (2014); MINN. STAT. § 13C.016–.019 (2013); MISS. CODE ANN. §§ 75-24-201 to -217 (2009); MO. REV. STAT. §§ 407.1380–.1385 (2011); MONT. CODE ANN. §§ 30-14-1727 to -1736 (2015); NEB. REV. STAT. §§ 8-2601 to -2615 (2012); NEV. REV. STAT. §§ 598C.300–598C.390 (2013); N.H. REV. STAT. ANN. §§ 359-B:22 to -B:29 (2009); N.J. STAT. ANN. §§ 56:11-46 to -49 (2012); N.M. STAT. ANN. §§ 56-3A-2 to -6 (2010); N.Y. GEN. BUS. LAW § 380-t (McKinney 2012); N.C. GEN. STAT. § 75-63 (2013); N.D. CENT. CODE §§ 51-33-01 to -14 (2007 & Supp. 2015); OHIO REV. CODE ANN. § 1349.52 (2012); OKLA. STAT. tit. 24, §§ 149–59 (2008); OR. REV. STAT. §§ 646A.606–646A.618 (2015); 73 PA. STAT. ANN. §§ 2501–10 (2008); R.I. GEN. LAWS §§ 6-48-1 to -9 (2014); S.C. CODE ANN. §§ 37-20-160 to -161, -200 (2015 & Supp. 2015); S.D. CODIFIED LAWS § 54-15-1 to -16 (2004 & Supp. 2015); TENN. CODE ANN. § 47-18-2108 to -2109 (2013); TEX. BUS. & COM. CODE §§ 20.031–.039, 20.21–.31 (2015); UTAH CODE ANN. §§ 13-45-201 to -205 (2013 & Supp. 2015); VT. STAT. ANN. tit. 9, §§ 2480h–j (2014); VA. CODE ANN. §§ 59.1-441.1 to -444.3 (2014); WASH. Rev. Code §§ 19.182.170–.210 (2013); W. Va. Code §§ 46A-6L-101 to -105 (2016); Wis. STAT. §§ 100.54–.545 (2010 & Supp. 2015); WYO. STAT. ANN. §§ 40-12-501 to -509 (2015).

consumers to obtain transaction information from businesses that have been tricked by an identity thief into relying on the victim's identity.<sup>257</sup> However, the Act denies consumers a right to sue over a violation of that provision.<sup>258</sup> Instead, only the Federal Trade Commission and designated state officials may sue to enforce this provision.<sup>259</sup> A state law that provided a remedy could complement the FCRA, promoting the Congressional preference for allowing consumers to have remedies that the *Wyeth* court noted.<sup>260</sup> Now, quite possibly a defendant might argue that Congress's explicit carve-out of this section from the standard FCRA remedies provisions<sup>261</sup> negated such a general preference in this specific context. However, one response might be that, while Congress did not intend to provide a federal remedy and have such litigation in federal courts, nonetheless, Congress preferred that states determine individually whether a remedy was appropriate and whether each state wanted its courts to accommodate such claims, filling that gap in the FCRA. Such a construction receives support from the anti-preemption language of section 1681t(a) along with the fact that consumer protection is typically the province of state law.<sup>262</sup>

While the FCRA does preempt states from imposing any "requirement or prohibition . . . with respect to any subject matter regulated under . . . section 1681i of this title, relating to the time by which a consumer reporting agency must take any action,"<sup>263</sup> that could fairly be read narrowly, pursuant to the principles described *supra*,<sup>264</sup> to prevent a state from requiring an agency to complete a reinvestigation of disputed information before the end of the 30 day period that the section designates.<sup>265</sup> Even if it were construed to read more broadly to extend to any reinvestigation of accuracy

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257. 15 U.S.C. § 1681g(e).

258. § 1681g(e)(6).

259. §§ 1681g(e)(6), 1681s.

260. *Wyeth v. Levine*, 555 U.S. 555, 574 (2009).

261. §§ 1681n, 1681o.

262. *See, e.g., Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990) ("Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area . . .").

263. § 1681t(b)(1).

264. *See supra* text accompanying notes 147 to 153.

265. § 1681i(a)(1)(A), (B).

standards, states could still motivate consumer reporting agencies to be more accurate (and thereby withhold identity theft-related data) by imposing a stricter initial standard of accuracy, or by enhancing the penalties available for inaccuracy, neither of which is covered by the Act's express preemption provision.

Nor should such provisions, or any of the other kinds of legislative protections described *supra*, be preempted under either an implied impossibility or implied obstacle preemption analysis. Pursuant to *PLIVA* and *Mutual Pharmaceutical*, the standard for impossibility preemption would require the regulated party to show that it could not simultaneously comply with the federal and the state standard. But none of the proposed courses of action would impose that kind of conflict.

To succeed in an implied obstacle preemption analysis, a regulated party would have to show that Congress's purpose sufficiently differed from that of the state that complying with the state law would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>266</sup> However, keep in mind that the FCRA is, at its heart, a consumer protection statute, not a consumer reporting agency industry protection statute nor a furnisher or user protection statute.<sup>267</sup> Along with the savings clause language,<sup>268</sup> the fact that consumer protection is an area traditionally left to the states,<sup>269</sup> and the ample room that the FCRA has left for states to regulate, the area differs significantly from that of *Rome*, where Congress sought to deregulate, rather than regulate; to clear the table of restrictions on trucking whether they be federal or state. Accordingly, states should take advantage of the invitation implicit in the introduction to the FCRA's preemption section, which states that except as explicitly provided, the FCRA does not "exempt any person . . . from complying with the laws of

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266. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

267. See § 1681(a)(b) ("It is the purpose of this [act] to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner *which is fair and equitable to the consumer.*") (emphasis added).

268. § 1681t(a).

269. See, e.g., *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990) ("Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area . . .").

any State . . . for the prevention or mitigation of identity theft. . . .” Rigorous accuracy requirements on consumer reporting agencies would not only reduce identity theft but would benefit consumers *and* the users that rely on consumer reports.

In sum, though the FCRA’s preemption provisions might appear at first glance to present pervasive obstacles to state regulation of reports about consumer’s financial information, in fact the Act leaves lots of room for states to craft legislation that will protect consumers’ privacy and reputations without hindering legitimate commercial uses for consumer reports.

#### V. CONCLUSION

The Great Recession may have revealed to us the extent of the baggage that attaches to our identities, and the effect of that heft on our opportunities to gain or advance in jobs, acquire credit, find a place to live, or insure our belongings. Those revelations have motivated many state legislatures to adjust the balance between the legitimate interests of those who investigate consumers and the privacy interests of consumers.

To be effective, though, state provisions must avoid preemption by the federal Fair Credit Reporting Act. The breadth of those provisions turns not just on their words, but the interpretation of those words given the Supreme Court’s preemption jurisprudence. Broad statutory enactments that impose general duties, such as state deceptive practices act laws, may be less likely to fall victim to preemption. Furthermore, states can strengthen the likelihood that their measures will succeed by aligning the statutory purposes of their legislation with that of the federal Act—ensuring the accuracy of credit reports and promoting consumer protection. States will benefit from the Supreme Court’s “purpose presumption,” which prefers to avoid preempting legislation in those areas of states’ “historic police powers,”<sup>270</sup> one of which is consumer protection.

Given this backdrop, the types of provisions most likely to succeed are those that focus on forbidding users of reports from using a credit report for certain purposes, such as employment.

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270. *See supra* text accompanying notes 131 to 134.

Limits on the content of consumer reports are more vulnerable to preemption, but should survive so long as the FCRA's content preemption provisions receive a justifiably tight reading. Accordingly, states should be able to restrict consumer reporting agencies from placing specific criminal record information in credit reports. However, state regulation of identity theft-related debt will likely fall to the FCRA's preemption provisions, which give the federal act nearly a monopoly over such information. Nonetheless, states could achieve the objectives sought by most identity theft credit report provisions by regulating in an area that the FCRA does not protect through its preemption provisions, such as by tightening overall accuracy requirements imposed on consumer reporting agencies or enhancing remedies available to injured consumers.

States should evaluate the legitimate needs of employers, creditors, landlords, and ascertain the level of access to consumers' information that will both fulfill those needs while cloaking those aspects of their citizens' lives that individuals prefer to keep private.

