



# Preemption and Textualism

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# PREEMPTION AND TEXTUALISM

Daniel J. Meltzer\*

*In the critically important area of preemption, the Supreme Court’s approach to statutory interpretation differs from the approach it follows elsewhere. Whether in politically salient matters, like challenges to Arizona’s immigration laws, or in more conventional cases, such as those in which state tort liability overlaps with federal regulation, the Court’s preemption decisions reflect a highly purposive approach to reading statutes, most notably through the application of “obstacle preemption” analysis. Recently, however, Justice Thomas has objected to the Court’s failure in preemption cases to respect its more textualist approach to issues of statutory interpretation, and he has urged that obstacle preemption be abandoned. Although three other justices have endorsed some aspects of Justice Thomas’s approach, no dramatic shift in the Court’s approach has yet occurred.*

*This Article examines recent preemption decisions and seeks to explain why textualist premises have so little grip in this domain. One might therefore view this Article as, in part, a case study of the feasibility of textualism. I argue that Congress lacks the capacity, foresight, and linguistic tools to be able adequately to specify in statutory text the proper resolution of the range of preemption issues that invariably arise under regulatory statutes of any complexity. Consequently, the task of fashioning a workable legal system that integrates state and federal law necessarily falls to courts (with assistance in some instances from federal administrative agencies). This Article concludes by examining recent challenges to the presumption against preemption that Professor Nelson posed and Justice Thomas endorsed. It criticizes the Nelson/Thomas understanding that the Supremacy Clause calls for rejection of the presumption against preemption and explains the significant role that that presumption continues to play.*

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#### INTRODUCTION

Federal preemption doctrine has few fans,<sup>1</sup> and critics attack it from many different directions. Proponents of state sovereignty—a viewpoint often associated with political conservatives<sup>2</sup>—view the doctrine and its application as threatening to the federal structure,<sup>3</sup> a point that can embrace multiple concerns, from abstract questions of sovereignty to the claimed virtues of experimentation to protection against the risk that an exclusively federal regime will be subject to regulatory capture. As evidence that the politics of preemption make strange bedfellows, proponents of regulation, who are generally viewed as political progressives, also criticize preemption doctrine as too often deployed in service of an antiregulatory, laissez-faire agenda.<sup>4</sup>

On the other side, skeptics about regulation, or about the viability of subjecting multistate actors to differing state regulatory requirements,<sup>5</sup> are often enthusiastic about preemption of state law. Enthusiasts include those

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1. Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in *FEDERAL PREEMPTION* 166, 187 (Richard A. Epstein & Michael S. Greve eds., 2007).

2. See Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 446–52 (2002).

3. See, e.g., Ernest A. Young, *“The Ordinary Diet of the Law”: The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 301–02; see also S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685 (1991) (arguing, from a civic republican perspective, for confining the scope of federal preemption).

4. See Samuel Issacharoff & Catherine M. Sharkey, *Supreme Court Preemption: The Contested Middle Ground of Products Liability*, in *FEDERAL PREEMPTION*, *supra* note 1, at 194 (noting the criticism).

5. See *id.* at 195 (discussing regulation of products liability); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 732 (2008); Alan Schwartz, *Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense*, 2 AM. L. & ECON. REV. 1 (2000). There is sometimes an associated criticism of the capacity of juries administering state law to reach sensible judgments that do not interfere with federal statutory regimes. See *Wyeth v. Levine*, 555 U.S. 555, 604 (2009) (Alito, J., dissenting).

who see it as one means to preclude states from imposing the external costs of their regulatory schemes on the nation as a whole.<sup>6</sup>

With a plethora of cases known for their lack of consistency, a complex set of crosscurrents, a broad set of subject matters, and a recent significant shift in the stance of the executive branch (represented by a 2009 presidential memorandum issued by President Obama),<sup>7</sup> generalizations about the direction of preemption law are hazardous; it is not easy to say who is winning the war.<sup>8</sup> But in the midst of these developments, Justice Thomas has emerged with a clear, strong, and reasonably consistent message. In a series of recent opinions, he has presented an agenda that takes on the prevailing orthodoxy. First, he suggests that interpretation of an express preemption clause should not be informed by a presumption against preemption.<sup>9</sup> And second, he advocates a sharp retrenchment in the doctrine of implied preemption,<sup>10</sup> particularly in so-called “obstacle preemption” cases.<sup>11</sup> These positions flow from a methodological approach that emphasizes textual interpretation and seeks to limit the decisionmaking authority of courts.<sup>12</sup>

Justice Thomas’s textualist approach, which draws on a distinguished and influential law review article by Professor Nelson<sup>13</sup> (who served as a law clerk to Justice Thomas), merits careful examination for a number of reasons. First, Justice Thomas has become an island of relative consistency in a sea of shifting frameworks and inconsistent decisions. Professor Sharkey asked, in the title of a recent article, “*Is Justice Clarence Thomas the Lone Principled Federalist?*”<sup>14</sup> The question thus arises whether textualism holds more promise than other methodologies as a means of creating a consistent judicial approach to the decision of preemption questions. Second, the textualist underpinnings of Justice Thomas’s approach, while having not yet

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6. See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1353–54 (2006); Merrill, *supra* note 1, at 167.

7. Memorandum on Preemption, 2009 DAILY COMP. PRES. DOC. 1 (May 20, 2009), available at <http://www.gpo.gov/fdsys/pkg/DCPD-200900384/pdf/DCPD-200900384.pdf>.

8. See Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43 (2006).

9. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753–54 (2011) (Thomas, J., concurring) (reading a textual saving clause narrowly, without invoking a presumption against preemption); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 91–107 (2008) (Thomas, J., dissenting).

10. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (declining to join those portions of the majority’s opinion that discussed and rejected a claim of implied preemption).

11. See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 582–604 (2009) (Thomas, J., concurring in the judgment).

12. See Catherine M. Sharkey, *Against Freewheeling Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 N.Y.U. J.L. & LIBERTY 63, 68 (2010).

13. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231–32 (2000) (calling for the end of obstacle preemption).

14. Sharkey, *supra* note 12.

gained consistent adherents in preemption cases, have been increasingly influential (though not entirely dominant)<sup>15</sup> on the Supreme Court in other settings. The formulation of implied preemption doctrine that currently prevails on the Court dates to the early 1940s; at that time, and for a number of decades thereafter, the Supreme Court frequently followed a purposive approach to statutory interpretation in general.<sup>16</sup> But while there has been a considerable shift toward textual statutory interpretation in recent decades,<sup>17</sup> preemption doctrine and practice have resisted that shift. For example, in the Supreme Court's recent preemption decision concerning an Arizona statute directed at undocumented aliens, while Justice Thomas stuck to his textualist guns,<sup>18</sup> the majority (which included Chief Justice Roberts and Justice Kennedy) found three of the four challenged provisions preempted under a muscular version of implied preemption,<sup>19</sup> and Justice Alito agreed that one of those three was impliedly preempted.<sup>20</sup> It is thus worth examining just why a textualist framework, so influential elsewhere, has been so much less important in preemption cases to date.

Most writing seeking to assess textualist interpretation can be viewed as largely deductive, reasoning from general concepts about the Constitution's structure or the nature of interpretation.<sup>21</sup> This Article is, in substantial part, more inductive. I will examine recent preemption decisions to try to extract an understanding of why textualist premises have not (at least yet) gained traction with Justice Thomas's colleagues. I will argue that preemption cases pose particular challenges for textualist theories; in that respect, my choice of topic is stacked against textualism. But the challenges that preemption cases pose for textualism, if especially pronounced, are not discontinuous with broader challenges to textualism. Thus, the Article can also be seen, in part, as a case study of the feasibility of textualism.

A third reason to examine the textualist approach to preemption is that there is some chance that other justices will follow Justice Thomas's lead. In the recent decision in *PLIVA, Inc. v. Mensing*,<sup>22</sup> the Chief Justice and Justices Scalia and Alito joined Justice Thomas in a plurality opinion that was notable in several respects. The Court in *PLIVA* held that a state law tort suit

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15. See, e.g., Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 30–36 (2006); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992).

16. See WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 125–49 (1999).

17. See *id.* at 157–89; Molot, *supra* note 15, at 23–43.

18. See *Arizona v. United States*, 132 S. Ct. 2492, 2522–24 (2012) (Thomas, J., concurring in part and dissenting in part).

19. See *id.* at 2501–10 (majority opinion).

20. *Id.* at 2524–25 (Alito, J., concurring in part and dissenting in part).

21. See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001); Molot, *supra* note 15; Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117 (2009).

22. 131 S. Ct. 2567 (2011) (plurality opinion in part).

against a generic drug manufacturer, alleging a failure to warn, was preempted by the Federal Food, Drug, and Cosmetic Act.<sup>23</sup> But the plurality, reaching well beyond that narrow holding, endorsed an important aspect of the argument made in Professor Nelson’s article. The plurality reasoned that the Supremacy Clause, on which preemption doctrine rests, should be understood as a constitutional “non obstante” provision.<sup>24</sup> A non obstante provision in a statute directs courts interpreting that statute not to apply the traditional presumption against implied repeals of other statutory provisions. The plurality in *PLIVA* contended that the Supremacy Clause had a similar purpose with regard to possible conflicts between federal and state law; accordingly, any presumption against preemption is misplaced, and courts “should not strain to find ways to reconcile federal law with seemingly conflicting state law.”<sup>25</sup> Finally, turning to the scope of implied preemption, the *PLIVA* Court (here joined by Justice Kennedy) did not address a standard component of implied preemption—obstacle preemption—under which a state law that conflicts with the purposes of a federal statute is found to be preempted.<sup>26</sup> Instead, the Court said that it has found conflict between state and federal law “where it is ‘impossible for a private party to comply with both state and federal requirements,’”<sup>27</sup> a circumstance it determined was present on the facts of the case.<sup>28</sup>

The *PLIVA* Court’s limited description of the reach of implied preemption could be viewed simply as all that the Court thought was necessary to resolve the case. This limited language, however, contrasts with other opinions that recited a broader doctrine of implied preemption,<sup>29</sup> and it takes on added significance in light of an earlier opinion of Justice Thomas (this time for himself alone) that also relied on Professor Nelson’s article and urged a limited role for implied preemption. In *Wyeth v. Levine*,<sup>30</sup> which also involved a state law tort suit for failure to warn (although in this case, the defendant drug company manufactured “name brand” rather than generic

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23. *PLIVA*, 131 S. Ct. at 2580–81 (majority opinion).

24. *See id.* at 2579–80 (plurality opinion) (citing Nelson, *supra* note 13, at 238–40 & nn.43–45).

25. *Id.* at 2580. Justice Kennedy joined the Court’s opinion except for the subsection in which the plurality both rejected the presumption against preemption and endorsed Professor Nelson’s theory. *See id.* at 2579–80.

26. The majority stated that an argument resting on obstacle preemption was presented in state court but was not pressed before the Supreme Court. *Id.* at 2581 n.7. In contrast to the dissent, however, the majority did not refer to obstacle preemption even as part of its recitation of standard preemption doctrine. *Id.*

27. *Id.* at 2577 (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)).

28. *Id.* at 2577–78; *accord* *Mut. Pharm. Co., Inc. v. Bartlett*, No. 12-142, 2013 WL 3155230, at \*6 (U.S. June 24, 2013) (in a case turning on impossibility, similarly limiting the opinion’s description of preemption doctrine).

29. *See, e.g., Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1136 (2011) (“Under ordinary conflict pre-emption principles a state law that ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives’ of a federal law is preempted.” (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))).

30. 555 U.S. 555 (2009).

drugs), Justice Thomas's opinion concurring in the judgment drew on three familiar aspects of his jurisprudence: First, he emphasized the limited, enumerated powers of the federal government.<sup>31</sup> Second, he reiterated his belief in a textualist approach to statutory interpretation, arguing that implied preemption doctrine, based as it often is on conflict between state law and federal purposes, is inconsistent with the proper interpretation of federal statutes, which should rest on the text that passed through Article I's law-making processes.<sup>32</sup> Third, and relatedly, he criticized what he called the "freewheeling, extra-textual, and broad evaluations [by courts] of the 'purposes and objectives' embodied within federal law" both as illegitimate and as giving rise to unduly broad preemption.<sup>33</sup>

A number of Justice Thomas's colleagues, in opinions in other settings, have endorsed his premises about the limited scope of federal power,<sup>34</sup> textualist interpretation,<sup>35</sup> and the limited scope of judicial lawmaking.<sup>36</sup> And in another recent preemption case, the Chief Justice's opinion for the Court echoed Justice Thomas's concern in *Wyeth* that "[i]mplied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'"<sup>37</sup>

Thus, it is possible, though far from clear, that Justice Thomas's approach will gain support from his colleagues.<sup>38</sup> However the crosscurrents

31. *Wyeth*, 555 U.S. at 584–85 (Thomas, J., concurring in the judgment).

32. *Id.* at 586–88.

33. *Id.* at 604. That argument has been advanced by others. See, e.g., Hoke, *supra* note 3, at 714–18.

34. E.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2647–48 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); *accord id.* at 2593 (Roberts, C.J.).

35. E.g., *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

36. E.g., *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

37. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (plurality opinion) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

38. For example, the Court's recent decision in *Hillman v. Maretta*, 133 S. Ct. 1943 (2013), rested squarely on obstacle preemption, *see id.* at 1949, and only Justice Thomas distanced himself from that reasoning, *see id.* at 1955–56 (Thomas, J., concurring in the judgment). As Professor Young has noted in reviewing recent preemption decisions, "even when . . . Justices sign on to a more theoretically ambitious opinion, they seem to feel relatively unconstrained to follow that theory in future cases." Young, *supra* note 3, at 305. Some commentators (including me) have suggested that the willingness of some justices who are generally sympathetic to state autonomy to find preemption may result from their sympathy for minimizing the state regulatory burdens to which businesses and others are subject. See, e.g., Fallon, *supra* note 2, at 471, 488; Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 344, 363–67; Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 948 (1994) ("[C]laims of federalism are often nothing more than strategies to advance substantive positions . . . people declare themselves federalists when they oppose national policy, and abandon that commitment when they favor it."); Sharkey, *supra* note 12, at 64–65. The pattern of results in preemption cases does not

play out, Justice Thomas's approach has given prominence to a striking phenomenon: in an era in which textualist statutory interpretation has grown enormously in significance,<sup>39</sup> a purposive approach to statutory interpretation remains powerful, indeed dominant, in preemption cases.<sup>40</sup> In this Article, I will seek to examine why that might be.

Part I begins with an examination of recent preemption decisions and highlights the limited role of textualism in resolving the statutory interpretation questions these cases presented. It then seeks to assess the explanation for this phenomenon, emphasizing the inability of Congress to provide textual specification of preemption questions in advance in a fashion that can be regarded as workable or adequate to a modern, complex polity. In doing so, Part I seeks to demonstrate that the approach advocated by Professor Nelson and Justice Thomas, although it claims to restrict the scope of judicial discretion, would ultimately be considerably more porous and less constraining than it appears at first.

Part II elaborates and responds to the criticisms directed at the prevailing, more purposive methodology in preemption decisions and argues that, although obstacle preemption may seem to enhance the scope of judicial authority, it plays an appropriate and indeed almost inescapable judicial role in our modern polity. As a general matter, given the range of preemption issues that almost invariably arise under regulatory statutes of any complexity, the task of fashioning a workable legal system—one that integrates state and federal law—will necessarily require a significant decisional role for the courts.

Part III then explores the analogy of the preemptive effect of federal law, under the Supremacy Clause, to statutory non obstante clauses and argues that the analogy is not a sound basis on which to erect preemption doctrine. The non obstante interpretation presents a host of difficulties, including the existence of profound differences between implied repeals of statutes in a unitary system and preemption of state law in a federal system—particularly our modern, complex federal system with its pervasive interdependencies and overlaps of federal and state law.<sup>41</sup> This Part contends, contrary to the non obstante position, that there remain good reasons for a presumption against preemption—reasons that lie not simply in fundamental concerns about state sovereignty or maintenance of the states as critical components of our federal system but also in the nature of federal lawmaking.

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map perfectly, however, onto any ideological perspective. Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1 (2011).

39. See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997).

40. See Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163, 206–17 (2011).

41. Young, *supra* note 3, at 323.

One cautionary note is necessary: preemption doctrine cuts across many fields, often fields of great complexity involving distinctive federal regulatory schemes. Indeed, much scholarly commentary focuses on a particular field.<sup>42</sup> Writing broadly about preemption calls to mind William Blake’s comment that “to generalize is to be an idiot.”<sup>43</sup> Nonetheless, this Article strives to avoid idiocy while offering an analysis and prescription that cuts across doctrinal areas.

### I. THE INEVITABLE FAILURE OF TEXTUAL EXCLUSIVITY

A familiar theme in preemption doctrine is that the decision to preempt must be made by Congress. Thus, the cases frequently state that “[t]he purpose of Congress is the ultimate touchstone’ in every pre-emption case,”<sup>44</sup> and commentators opine that the decision to preempt state law must be “meaningfully traceable to Congress.”<sup>45</sup> The critical question that remains, however, is just what it means to meaningfully trace a decision to Congress: What degree of textual explicitness and specificity is required?<sup>46</sup>

Preemption doctrine typically distinguishes between express preemption—in which preemption rests upon a textual preemption clause enacted by Congress—and implied preemption—in which, quite apart from any such clause, the statute is interpreted as preempting state law.<sup>47</sup> And implied preemption cases have been deemed to embrace not only the (rare) situation in which it is impossible to comply with both state and federal requirements but also the (more common) situation in which state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>48</sup>

Although Justice Thomas does not disavow all implied preemption, he suggests that its use should be scaled back considerably. In particular, he has placed obstacle preemption in his target sights. His attack is rooted in interpretive premises that derive from textualism and from his understanding of the respective roles of Congress and the courts.<sup>49</sup> In his separate opinion in

42. Nelson, *supra* note 13, at 233.

43. WILLIAM BLAKE, *Blake’s Marginalia*, in BLAKE’S POETRY AND DESIGNS 429, 440 (Mary Lynn Johnson & John E. Grant eds., 1979).

44. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Retail Clerks Int’l Ass’n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963)); accord *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

45. Stuart Minor Benjamin & Ernest A. Young, Essay, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 *DUKE L.J.* 2111, 2134 (2008).

46. See *id.* at 2139; Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 *DUKE L.J.* 2023, 2094 (2008).

47. See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *Fid. Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 152–53 (1982).

48. E.g., *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (internal quotation marks omitted).

49. Sharkey, *supra* note 12, at 68–69.

*Wyeth*, he contended that state autonomy is protected both by the limits on federal legislative authority and, more to the point in preemption cases, by “the complex set of procedures that Congress and the President must follow to enact ‘Laws of the United States.’”<sup>50</sup> He continued by arguing that “[t]he Supremacy Clause thus requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures.”<sup>51</sup> Accordingly, he objected that “the Court has pre-empted state law based on its interpretation of broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law.”<sup>52</sup> He criticized preemption decisions for improperly evaluating federal law, ignoring the compromises inherent in the legislative process, and “giving improperly broad pre-emptive effect to judicially manufactured policies.”<sup>53</sup> Preemption, he insisted, must come from Congress, not the courts.<sup>54</sup>

In this Part, I consider just what it means to say that Congress must be responsible for a decision to preempt. First, I will highlight the persistence of implied preemption, even in the hands of judges who generally share a concern about excessive judicial lawmaking authority and a concomitant attraction to textualism in interpretation. Second, I will suggest that there are inherent difficulties in the preemption area that make it unworkable for judges to rely on a purely textual approach, or on any approach presupposing that particular preemption decisions will be tightly linked to a specific congressional decision whether to preempt. Third, in an effort to highlight the difficulties of relying purely on text, I will examine the way that textual preemption clauses have been written and interpreted. Finally, I will argue that Justice Thomas’s suggested approach would have limited capacity to restrain judicial discretion or to link the outcomes of cases tightly to congressional decisionmaking. In the end, as Professor Merrill has noted, “the key question in most preemption cases entails a discretionary judgment about the permissible degree of tension between federal and state law, a

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50. *Wyeth v. Levine*, 555 U.S. 555, 586 (2009) (Thomas, J., concurring in the judgment).

51. *Id.*

52. *Id.* at 587.

53. *Id.* at 604.

54. Others attack obstacle preemption from a somewhat different angle, that of constitutional federalism. For them, the key concern is less the division of responsibility between Congress and the courts, or the proper methodology for interpreting federal statutes, but rather the importance of preserving the states’ autonomy and capacity for action. On this view, locating the power to preempt state law in Congress (in which the states have influence), rather than in courts or agencies, is less likely to result in unwarranted displacement of state regulatory authority. See generally Young, *supra* note 3.

The separation of powers and federalism arguments, though distinct, are also overlapping. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1427–30 (2001).

question that typically cannot be answered using the tools of statutory interpretation.”<sup>55</sup>

A. *Recent Decisions and the Persistence of Implied Preemption*

One way to suggest that the textualist project is not likely to succeed is simply to review recent preemption decisions by the Supreme Court. These decisions are not, of course, a representative sample of all preemption cases, nor does the Court’s approach prove that a different approach is impossible to implement. Nonetheless, the Court’s recent preemption decisions at least raise a serious question about the workability of a textualist approach. For even though many of the justices are generally attracted to textualist premises, the Court has tended to rest its preemption decisions on a much more open-ended, purposive approach to interpretation—both in reading preemption clauses (where they exist) and in interpreting statutes that include no such clause.

In *Arizona v. United States*,<sup>56</sup> all but two participating justices found at least one provision of Arizona’s law regulating unauthorized aliens to be impliedly preempted.<sup>57</sup> In his dissent, Justice Thomas stood his ground, stating that nothing in the text of the federal immigration law precluded enforcement of any of the provisions of the Arizona law.<sup>58</sup> But Justice Kennedy’s opinion for the majority (which included the Chief Justice) found three of the four challenged provisions to be impliedly preempted,<sup>59</sup> and Justice Alito agreed as to one of those three.<sup>60</sup>

The provision that six justices agreed was preempted would have made it a state crime to “fail to complete or carry an alien registration document” in violation of federal law—a failure that federal law also criminalizes.<sup>61</sup> In finding preemption, the Court emphasized two points: First, federal law impliedly provided for field preemption<sup>62</sup> of state registration requirements (a point with which Justice Alito agreed).<sup>63</sup> Second, to permit Arizona to criminalize the conduct might frustrate the federal scheme by leading to state criminal charges when federal officials had determined that prosecution would impair federal objectives.<sup>64</sup>

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55. Merrill, *supra* note 5, at 729.

56. 132 S. Ct. 2492 (2012).

57. *Arizona*, 132 S. Ct. at 2510. Justice Kagan did not participate in the case. *Id.* at 2497.

58. *Id.* at 2522 (Thomas, J., concurring in part and dissenting in part).

59. *Id.* at 2510 (majority opinion).

60. *Id.* at 2529–30 (Alito, J., concurring in part and dissenting in part).

61. *Id.* at 2501 (majority opinion).

62. *Id.* at 2502–03.

63. *Id.* at 2524–25 (Alito, J., concurring in part and dissenting in part).

64. *Id.* at 2503 (majority opinion). The Court also noted that Arizona law (unlike federal law) barred probation as a sanction for a violation and also prevented the issuance of a pardon. *Id.*

In effect, the Court read federal law as creating both a floor and a ceiling with regard to registration requirements. In doing so, it relied less on specific statutory text and more on certain purposes or attributes of the federal immigration laws: the need for a single voice in immigration matters; the comprehensiveness of the federal regime—a feature that should be understood to preclude state supplementation; and the need to preserve federal enforcement discretion as a means of protecting immediate human concerns.<sup>65</sup> Justice Thomas (and Justice Scalia) clearly disagreed with that reading of federal law.<sup>66</sup> The key point here, however, is that the Court engaged in a highly purposive interpretation in reaching its conclusion of implied preemption,<sup>67</sup> and it did so in an opinion authored by Justice Kennedy, who has been described as being “if not an outright textualist . . . at least a fellow traveler.”<sup>68</sup>

The recent decision in *PLIVA, Inc. v. Mensing*<sup>69</sup> similarly exemplified the Court’s reliance on implied preemption. The case involved, as noted, a suit for an alleged failure to warn by generic drug manufacturers. The companies’ defense was that federal law precluded them from unilaterally changing drug labeling and instead permitted them to do so only with Food and Drug Administration (“FDA”) approval.<sup>70</sup> Hence, they contended that it was physically impossible for them to comply with both federal law and state law (insofar as the latter required different warnings from those on the federally approved label).<sup>71</sup> The majority agreed and found the state tort suit preempted.<sup>72</sup> The dissent, by contrast, contended that the manufacturers, having failed to petition the FDA to change the label, could not establish that

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65. See *id.* at 2502.

66. See *id.* at 2522–24 (Thomas, J., concurring in part and dissenting in part); *id.* at 2517–19 (Scalia, J., concurring in part and dissenting in part).

67. Both the majority and Justice Alito relied on the key precedent of *Hines v. Davidowitz*, 312 U.S. 52 (1941), in which the Court had found a Pennsylvania alien registration scheme preempted. But as Justice Scalia’s dissent noted, *Hines* was ambiguous as to whether it rested broadly on field preemption (as the majority and Justice Alito found) or on the narrower view that Pennsylvania’s law, which (unlike Arizona’s law) imposed different requirements than those under federal law, conflicted with the federal scheme. See *Arizona*, 132 S. Ct. at 2518 (Scalia, J., concurring in part and dissenting in part). Justice Alito could point to the *Hines* opinion’s emphasis on the predominant federal interest in this domain and on the comprehensiveness of federal regulation, while Justice Scalia could stress the opinion’s detailed emphasis on the history and purpose of the federal law (and its limits), and in particular the *Hines* Court’s discussion of how the state law did not square with Congress’s purpose of protecting “the personal liberties of law-abiding aliens,” *Hines*, 312 U.S. at 74; see also Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 188 (reading *Hines* as an obstacle preemption case).

68. John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1312 (2010).

69. 131 S. Ct. 2567 (2011).

70. See *PLIVA*, 131 S. Ct. at 2573.

71. See *id.* at 2573–78.

72. *Id.* at 2577–78.

compliance with both federal and state law was impossible.<sup>73</sup> The dispute was a narrow one, but again it was not based on a reading of statutory text; it was about the scope of implied preemption.<sup>74</sup>

Two cases decided within a few months of each other applied quite different approaches to the interpretation of a textual saving clause—a clause that explicitly declares that the federal statute is not meant to preempt certain state laws or remedies. In *Chamber of Commerce of the United States v. Whiting*,<sup>75</sup> the Court addressed a provision of the federal immigration laws that prohibits states from imposing civil or criminal sanctions on employers who hire unauthorized aliens other than through licensing and similar laws.<sup>76</sup> In deciding that an Arizona statute authorizing the withdrawal of business licenses of employers who hire unauthorized aliens was a valid licensing law and hence fell within the scope of the saving clause, the majority objected that the dissenters' more limited interpretation of the saving clause was "untethered from the [statutory] text."<sup>77</sup> A plurality also stated that the precedents "establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act."<sup>78</sup>

By contrast, in *AT&T Mobility LLC v. Concepcion*,<sup>79</sup> the majority interpreted the saving provision of the Federal Arbitration Act ("FAA")—which makes arbitration clauses "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"<sup>80</sup>—as not extending to a California rule under which a contractual provision barring class litigation

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73. *Id.* at 2587–88 (Sotomayor, J., dissenting).

74. A similar decision, *Mutual Pharmaceutical Co., Inc. v. Bartlett*, No. 12-142, 2013 WL 3155230 (U.S. June 24, 2013), also illustrates that even cases presenting claims of impossibility, which are thought to be rare but straightforward preemption questions, do not eliminate the possibility of interpretive disagreement. As in *PLIVA*, the *Bartlett* majority found that a drug manufacturer could not market its product consistently with both federal requirements and state tort law, and hence it found the state tort law (in this case relating to design defects) preempted. The dissenters did not disagree that the state and federal requirements conflicted but found that compliance with both was not impossible because the company could either withdraw the drug from the state's market or continue to sell and just pay damages for violating state tort law. *See id.* at \*13 (Breyer, J., dissenting); *id.* at \*17 (Sotomayor, J., dissenting). Justice Sotomayor's dissent viewed the majority as having incorrectly interpreted the federal law as giving the company a right to be free from state liability when selling a drug in accordance with federal requirements. *Id.* at \*17 (Sotomayor, J., dissenting). In response, the majority said that the Court's preemption cases presume that the "ability to stop selling does not turn impossibility into possibility." *Id.* at \*10 n.3 (majority opinion). The Court also observed that it would welcome Congress's explicit resolution of the scope of preemption in the prescription-drug context but that here it was forced "to divine Congress' will." *Id.* at \*12. As in *PLIVA*, the statutory text did not resolve the matter, and the justices differed on the scope of implied preemption based on impossibility.

75. 131 S. Ct. 1968 (2011) (plurality opinion in part).

76. *Whiting*, 131 S. Ct. at 1975 (majority opinion).

77. *Id.* at 1980 n.6.

78. *Id.* at 1985 (plurality opinion) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

79. 131 S. Ct. 1740 (2011).

80. 9 U.S.C. § 2 (2006).

was, in the circumstances presented, deemed to be unconscionable.<sup>81</sup> The Court found in the FAA in general (rather than in any particular textual provision) a purpose of resolving disputes speedily and informally, which was incompatible with class arbitration—even where, given the small stakes, it was likely that the alternative to class arbitration was not informal speedy arbitration but no claim resolution at all.<sup>82</sup> Unlike in *Whiting*, the majority (including Justice Thomas) did not hesitate to read the saving clause narrowly in light of purposes attributed to the federal statute.<sup>83</sup>

Another pair of cases, decided eleven years apart, both involved the question whether a regulation of the federal Department of Transportation (“DOT”) concerning passive restraint systems for automobiles preempted state tort actions for failure to install particular safety devices. In *Geier v. American Honda Motor Co.*,<sup>84</sup> the Court considered the 1984 version of a DOT safety standard, which required manufacturers to install either automatic seatbelts or airbags in a specified percentage of motor vehicles.<sup>85</sup> The statute contained two clauses relevant to preemption: One displaced state authority<sup>86</sup> to enforce “any safety standard . . . which is not identical to” a federal standard regulating the same matter.<sup>87</sup> The other was a saving clause, providing that “[c]ompliance with” a federal safety standard “does not exempt any person from any liability under common law.”<sup>88</sup> A broad reading of the preemption clause, the majority thought, would entirely negate the saving clause.<sup>89</sup> At the same time, the Court reasoned that if the saving clause narrowed the scope of the express preemption provision, it did not displace the operation of implied preemption principles.<sup>90</sup> The Court then turned to interpreting the DOT standard and determined that its purpose was to give carmakers a choice among alternative protection systems; put differently, federal law gave carmakers a right to manufacture a portion of

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81. See *Concepcion*, 131 S. Ct. at 1748.

82. See *id.* at 1749–50.

83. For criticism both of the majority’s implied-preemption ruling and of the lower courts’ conclusion that the particular arbitration clause was unconscionable, see Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 3–21.

84. 529 U.S. 861 (2000).

85. See *Geier*, 529 U.S. at 864–65.

86. The case actually involved possible preemption of the tort law of the District of Columbia, but the Court treated the question as no different from the preemption of state tort law. See *id.* at 865.

87. 15 U.S.C. § 1392(d) (1988) (repealed 1994).

88. *Id.* at § 1397(k) (repealed 1994).

89. See *Geier*, 529 U.S. at 867–68. On this point, the dissent disagreed, arguing that the term “standard” should be understood, at least in light of the saving clause, as limited to legislative or administrative regulation rather than including common law actions that serve a compensatory function. *Id.* at 896 (Stevens, J., dissenting).

90. See *id.* at 870–71 (majority opinion).

their fleet with automatic seatbelts rather than airbags.<sup>91</sup> Consequently, a tort action premised on the failure to install airbags was preempted.<sup>92</sup>

But in *Williamson v. Mazda Motor of America, Inc.*,<sup>93</sup> which involved a later version of the same DOT standard, the Court held that a federal requirement that manufacturers install either a lap belt or a lap and shoulder belt for inner rear seats did not preempt a state tort action for failure to install lap and shoulder belts.<sup>94</sup> The later DOT standard, the Court held without dissent, gave carmakers a choice not because DOT deliberately sought variety (as in *Geier*) but rather because DOT thought that lap and shoulder belts, although clearly superior in promoting safety, would not be cost-effective, at least when the requirement was first established.<sup>95</sup> Given the underlying purpose of the standard, the Court held that the regulation did not preclude a state tort action in which a jury might, at a later date, reach a different judgment.<sup>96</sup>

One could multiply the examples of highly purposive statutory interpretation, whether of an express preemption clause, a saving clause, or a statutory scheme more broadly. Put differently, often the critical issue in a preemption case is the degree of textual explicitness and specificity that is required to interpret a statute as having a particular substantive meaning.<sup>97</sup> And in general, the Court has not required great explicitness and specificity.

Of course, showing the prevalence of implied obstacle preemption or of purposive interpretation does not show its inevitability. And indeed, one account for at least some of these results might stress a legal realist or substantive view: that whatever a justice's articulated commitments to particular interpretive methodologies or conceptions of the separation of powers or of federalism, those commitments yield in the face of (stronger) substantive commitments to particular outcomes—such as general attitudes about state regulation, tort liability, or stricter governmental policy toward unauthorized aliens.<sup>98</sup> But I do not believe that that kind of explanation is the entire story. And here I wish to offer an institutional account to explain why implied preemption and purposive interpretation have persisted in preemption cases—and why I believe that they will and should continue to persist.

### B. *The Challenge for Legislators (and Their Staffs)*

In assessing claims that the decision whether to preempt is one for Congress to make, one must consider how the preemption issue presents itself to

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91. See *id.* at 875–79.

92. *Id.* at 886.

93. 131 S. Ct. 1131 (2011).

94. *Williamson*, 131 S. Ct. at 1136–40.

95. *Id.* at 1137–39. Justice Thomas concurred in the judgment.

96. *Id.* at 1139.

97. See Benjamin & Young, *supra* note 45, at 2139; Metzger, *supra* note 46, at 2094.

98. See Rubin & Feeley, *supra* note 38.

a member of Congress (or perhaps a congressional staff member)<sup>99</sup> considering a bill creating a new federal statutory scheme. How, that is, might a legislator seek to decide whether to preempt state law? Of course, putting it that way is a great oversimplification because preemption typically is not an all-or-nothing decision, and the answer to the question could differ considerably depending on the content of the particular state law. Accordingly, the pertinent question is how might a member of Congress decide just which state laws (if any) should be preempted?

First, the member of Congress would have to identify all of the state and local laws in existence in fifty states and countless localities that might intersect in some significant way with the new federal statutory scheme. A legislator or staff member—particularly if aided by lobbyists—might be able to identify some of those laws some of the time. But in a system in which few legislators even know much about the content of the federal statutes for which they are voting,<sup>100</sup> it is unimaginable that they generally would be aware of the relevant array of state and local laws.<sup>101</sup> (A further difficulty, discussed below, is that many preemption cases involve state or local laws that were enacted *after* the effective date of the federal statute claimed to preempt them.)

Second, in order to think intelligently about how far to preempt, the member of Congress often would have to be able to predict how a new and untested federal statutory regime is going to operate. That would frequently be inordinately difficult, especially in cases in which important matters remain to be specified by administrative regulation. Third, the legislator would often wish to know how private actors subject to the new federal scheme would respond. Fourth, there may be important facts in the real world (e.g., the cost, cost-effectiveness, and safety of airbags as compared to other devices) that are unknown at the time of enactment and that are subject to rapid change over time. Fifth, in light of all of the foregoing information, a legislator would need to assess the extent to which operation of a state scheme would impair the effectiveness of the federal scheme.<sup>102</sup> Sixth, in many cases, the member of Congress would want to assess the force of the argument that a particular state-law scheme is so important, or so integrally interwoven with other parts of state law, that it should not be displaced, even if it does interfere to some extent with the federal statutory scheme. It should be clear that asking a legislator to try to specify in advance a textual

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99. See Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 584–86 (2002) (reporting on results of a case study finding that staff members saw themselves as having principal responsibility for drafting legislation and that the participation of senators in drafting, as distinguished from articulating concepts, was very limited).

100. See Robert A. Katzmann, Madison Lecture, *Statutes*, 87 N.Y.U. L. REV. 637, 653 (2012).

101. See Meltzer, *supra* note 38, at 376–77.

102. The limited jurisdiction (and expertise) of particular legislative committees may prevent considered judgment about the arguments for or against preemption of a particular kind of state regulation. See Sharpe, *supra* note 40, at 181.

preemption standard that is responsive to these considerations is asking the impossible.

One can see these difficulties vividly by examining Justice Stevens's dissent in the *Geier* case. In arguing against preemption of a state tort suit for failure to install airbags, he mocked the majority by characterizing its opinion as holding that the federal statute provided as follows:

No state court shall entertain a common-law tort action based on a claim that an automobile was negligently or defectively designed because it was not equipped with an airbag;

Provided, however, that this rule shall not apply to cars manufactured before September 1, 1986, or after such time as the Secretary may require the installation of airbags in all new cars; and

Provided further, that this rule shall not preclude a claim by a driver who was not wearing her seatbelt that an automobile was negligently or defectively designed because it was not equipped with any passive restraint whatsoever, or a claim that an automobile with particular design features was negligently or defectively designed because it was equipped with one type of passive restraint instead of another.<sup>103</sup>

And of course, Justice Stevens's criticism could today be bolstered today by adding that the revised DOT rule, which was at issue in the *Williamson* case, does not preclude a claim based on the failure to install lap and shoulder belts, rather than lap belts, in the inner rear seat.<sup>104</sup>

But the rule that Justice Stevens mocked was hardly crazy as a matter of statutory and administrative policy. And indeed, it was a rule informed by the experience of regulators and the evolving experience of the marketplace in the years since the statute was enacted. It was a rule, however, that Congress could not conceivably have enacted.

The challenge facing legislators is harder still, for, as already noted, federal law preempts state law that was not on the books at the time a federal statute was enacted. The recent decision in *Cuomo v. Clearing House Ass'n, L.L.C.*,<sup>105</sup> for example, involved the National Bank Act, which was enacted in 1864 to deal with the national government's revenue needs during the Civil War.<sup>106</sup> Nearly a century and a half later, New York's attorney general sought nonpublic information from a national bank concerning possible discrimination in the extension of credit, in violation of a New York statute first enacted in 1974.<sup>107</sup> The federal Office of the Comptroller of the Currency brought suit to enjoin the state attorney general's action, contending that

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103. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 887 (2000) (Stevens, J., dissenting) (internal quotation marks omitted).

104. *See Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1137–39 (2011).

105. 557 U.S. 519 (2009).

106. National Bank Act, ch. 106, 13 Stat. 99 (1864) (codified as amended in scattered sections of 12 U.S.C.).

107. N.Y. EXEC. LAW. § 296-a (McKinney 2013) (enacted 1974).

the action was preempted by a provision dating back to the original enactment of the National Bank Act and that, in its current version, provides:

No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.<sup>108</sup>

When the case reached the Supreme Court, it provoked a debate between the majority and the dissent about the meaning of the term “visitorial powers” as well as about the proper degree of deference to the Comptroller’s interpretation of the statute.<sup>109</sup> But for present purposes, the key point is just how unrealistic it is to think that Congress in 1864—before the end of the Civil War, before ratification of the Reconstruction Amendments, before the enactment of the first federal Civil Rights Act during Reconstruction, before the civil rights movement of the twentieth century, and before the enactment of a broad array of modern federal and state civil rights legislation, including the New York law at issue—could have intelligibly addressed whether national banks should be shielded from efforts by state officials to obtain records when seeking to enforce state fair-lending laws.

Recall Justice Thomas’s description of the legislative process as making a judgment about just how far to go in serving a range of possibly conflicting purposes, with that judgment reflected in the statutory text, and his contention that the courts’ responsibility is to apply the text embodying that judgment.<sup>110</sup> A case like *Cuomo* illustrates just how fruitless it is to seek the answer to the preemption question in the statutory text or to imagine that there was a legislative compromise in the course of enactment that answers the question. For beyond the fact that individual members of Congress frequently prefer punting to actually taking a view, or that there may not be consensus among different members of Congress,<sup>111</sup> there is simply no way that any member of Congress in 1864 could even have been aware of the problem that arose more than a century later.

In theory, of course, Congress could revisit the question of the preemptive effect of a statute enacted in the past, and it could add, delete, or modify a preemption clause in light of the full range of experience and changed circumstances, legal and material. But congressional time is one of the scarcest commodities in Washington and inertia perhaps the capital’s

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108. 12 U.S.C. § 484(a) (2006). The current version differs only slightly from the original 1864 language, which provided that a national bank association “shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery.” National Bank Act § 54, 13 Stat. at 116.

109. See *Cuomo*, 557 U.S. at 524–25.

110. See *supra* text accompanying notes 49–54.

111. See Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 450–51 & n.4 (2008) (quoting JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 424 (5th ed. 2004)). See generally Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295 (1987).

strongest force. To be sure, it was part of the Framers' design of the legislative process to create hurdles to legislation.<sup>112</sup> But additional hurdles not contemplated by the Framers have arisen by virtue of the committee structure, the filibuster, other complexities of the legislative process, and often (especially in times of divided government) the party system. Another key change whose importance cannot be overstated is the vastly greater scope of legislative action called for in a country whose scale, population, legal density, and economic complexity could not have been anticipated more than two centuries ago. Indeed, this latter set of developments in large part drove the acceptance of administrative regulation, a departure from the constitutional structure envisioned in 1789.<sup>113</sup>

For all of these reasons, Congress lacks the time and capacity to consider, and reconsider, the scope of preemption as regulatory schemes evolve over time.<sup>114</sup> Thus, it is no surprise to find that Supreme Court preemption decisions, although frequently closely divided and sometimes sharply controversial, are virtually never overridden by congressional enactments.<sup>115</sup> This is one aspect of the broader phenomenon that statutes are infrequently revised;<sup>116</sup> proposals, dating back many decades, for new institutional mechanisms to facilitate such revisions have largely (although not entirely) fallen

112. See, e.g., John F. Manning, *Continuity and the Legislative Design*, 79 NOTRE DAME L. REV. 1863, 1881–89 (2004).

113. See, e.g., Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 331 (1987).

114. The difficulty is aggravated by the difficulty of reassembling, in a new Congress, the coalition that originally succeeded in running the legislative gauntlet. See JERRY L. MASHAW, *GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 103 (1997) (stating that because an initial decision “rearrange[s] the status quo,” “it is most unlikely that [the legislature] will ever be able to reverse an interpretation such that it reinstates the precise policy that was adopted originally”); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L. REV. 1119, 1165 (2011).

115. Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1612–13 (2007); see also William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1458–59 (2008); Sharpe, *supra* note 40.

The general point is not impeached by the existence of some, occasionally significant, counterexamples. See, e.g., Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 555–58 (2012) (discussing the modification of the scope of preemption with respect to national banks and their subsidiaries included in the Dodd–Frank Wall Street Reform and Consumer Protection Act). In *Mutual Pharmaceutical Co., Inc. v. Bartlett*, No. 12-142, 2013 WL 3155230 (U.S. June 24, 2013), Justice Sotomayor’s dissent contended that “Congress is perfectly capable of responding when it believes state tort law may compromise significant federal objectives under a scheme of premarket regulatory review for products it wants to make available.” *Id.* at \*27 (Sotomayor, J., dissenting). But the single example she provided—the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-22(b)(1) (2006), which conferred on drug manufacturers an immunity from tort suits they had not previously enjoyed, while substituting for tort law a no-fault federal compensation program funded by an excise tax—failed to establish her more general claim. See *id.*

116. See Eskridge, *supra* note 115, at 1458–59; Richard Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. (forthcoming 2013),

on deaf ears.<sup>117</sup> The mounting proliferation of legal issues with which courts must wrestle<sup>118</sup> only reduces the likelihood that a Congress with finite resources will find the time, will, consensus, and momentum to respond to preemption decisions with updated statutory preemption clauses.

This background explains, I believe, why the Supreme Court, including (at least until the recent apparent defection of Justice Thomas) its textualist members, has taken a purposive approach to preemption issues—both in construing express preemption clauses and, when no textual clause calls for preemption, in determining whether state or local laws are nonetheless impliedly preempted. Of course, efforts by Congress to draft legislation confront a familiar set of challenges in general<sup>119</sup>—including the press of time; the realities of coalition politics; complex drafting processes that include, for example, formulating floor amendments “on the fly” or making significant changes in conference with little deliberation or scrutiny;<sup>120</sup> the sometimes limited role of professional drafting staff; and a persistent level of errors, incompleteness, or ambiguity, driven in part by time pressure and in part by the need to achieve consensus.<sup>121</sup> In these respects, preemption cases are not categorically different, but there may be a significant difference in degree; the formulation of well-targeted preemption clauses presents a distinctive set of challenges—particularly when federal statutes cover broad terrain<sup>122</sup>—which it is particularly unrealistic to expect Congress to surmount. I do not mean to suggest that all of these shortcomings of legislative drafting are inevitable or that Congress could not possibly have provided greater clarity or sown less confusion and contradiction about the preemptive effect of particular statutes. I do suggest, however, that there are serious limits to what can realistically be expected by way of congressional specification and legislative foresight.

### C. Linguistic Tools and Their Limits

A different way to explore the plausibility of a textual approach to preemption is to examine the linguistic tools available to Congress in crafting a

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available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2130190](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130190) (finding (1) a sharp drop in the percent of Supreme Court statutory decisions that Congress overrides—a decline the author attributes primarily to the increasingly partisan character of Congress—and (2) that the rare recent instances of overrides have tended to be partisan actions taken during periods of unified government).

117. See Katzmman, *supra* note 100, at 684–93.

118. See Peter L. Strauss, Daniel J. Meador Lecture, *Courts or Tribunals? Federal Courts and the Common Law*, 53 ALA. L. REV. 891, 894–95 (2002).

119. For a useful recent summary, see Katzmman, *supra* note 100, at 646–55.

120. Nourse & Schacter, *supra* note 99, at 592–93 (internal quotation marks omitted).

121. *Id.* at 594–95 & n.38.

122. Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 95–96 (1996) (making a similar argument in the context of ERISA).

preemption clause. Different federal statutes have different preemption provisions, but Congress has resorted to some recurrent formulations, presumably because they appear to provide the best available language. It is thus worth taking a serious look at these textual provisions and considering, if Congress should make the preemption decision, and if the decision should be expressed in statutory text, just what it is that the text should say and how such language would operate in practice.

### 1. “Related to”

Among the broadest statutory clauses are those that preempt state law “related to” a subject of federal regulation. Broad phrasing, of course, maximizes the protection of a federal program from state interference. But a legislator considering using that phrase in a federal statute runs the risk of displacing state laws that in fact pose little threat to the federal program and that she and her colleagues would very likely not wish to displace had they fully understood the effect of such a preemption clause.

An example is supplied by the Interstate Commerce Commission (“ICC”) Termination Act of 1995,<sup>123</sup> which includes provisions regulating trucking. The Act’s express preemption clause displaces state laws “related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.”<sup>124</sup> In determining whether that language preempted a state law regulating the delivery by motor carriers of cigarettes to minors, the Supreme Court found that the statutory phrasing was borrowed from a federal preemption provision governing airline deregulation, which the Court had interpreted very broadly.<sup>125</sup> Accordingly, the Supreme Court gave equal breadth to the motor-carrier provision and held that it preempted the state law.<sup>126</sup> One doubts that anyone in the enacting Congress even considered, much less entered into a legislative compromise concerning, the effect of the Act on a state’s ability to protect the health of minors. Justice Ginsburg’s concurring opinion, with some understatement, highlighted the obvious: there was a large regulatory gap left by the federal preemption provision, which was “perhaps overlooked by Congress.”<sup>127</sup>

The most frequently litigated “related to” preemption clause is found in the Employee Retirement Income Security Act (“ERISA”),<sup>128</sup> which supersedes state laws “insofar as they may now or hereafter relate to any employee

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123. ICC Termination Act of 1995 tit. 1, Pub. L. No. 104-88, 109 Stat. 803, 804 (codified as amended in scattered sections of 49 U.S.C.).

124. *Id.* § 103, 49 U.S.C. § 14501(c)(1) (2006). The clause includes some exceptions not relevant to the issue presented in *Rowe*.

125. See *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 368–71 (2008) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

126. *Id.* at 370–71.

127. *Id.* at 377–78 (Ginsburg, J., concurring).

128. There were more than 4,300 judicial opinions written on the subject over the course of a decade. See JOHN H. LANGBEIN ET AL., *PENSION AND EMPLOYEE BENEFIT LAW* 818–19 (5th ed. 2010).

benefit plan.”<sup>129</sup> In its earliest decisions interpreting this provision, the Supreme Court gave a literal and hence broad construction to the term “relate to.”<sup>130</sup> But that literal approach “ma[de] it embarrassingly clear that Congress enacted ERISA while still oblivious to numerous problems related to benefit plans that the states had already recognized and addressed.”<sup>131</sup> Thus, in 1995, the Court retreated from literalism and ruled, *unanimously*, that “[w]e simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.”<sup>132</sup>

The Court’s two keenest textualists, Justices Scalia and Thomas, have been entirely on board with this shift in approach to preemption under ERISA. Indeed, in a case decided in 1997, Justice Scalia lamented that the Court “had not been emphatic enough in abandoning the literalism of the Court’s prior preemption cases.”<sup>133</sup> In so arguing, he said that “applying the ‘relate to’ provision according to its terms was a project doomed to failure” and “[t]he statutory text provides an illusory test, unless the Court is willing to decree a degree of pre-emption that no sensible person could have intended—which it is not.”<sup>134</sup>

A few years later, Justice Thomas’s dissenting opinion in *Rush Prudential HMO, Inc. v. Moran*<sup>135</sup> took a nontextual, purposive approach. In *Rush*, a key question was whether the challenged state law fell within the scope of an exception to the preemption clause for “any law of any State which regulates insurance, banking, or securities.”<sup>136</sup> Justice Thomas stated that “because

129. 29 U.S.C. § 1144(a) (2006). The provision includes a few exemptions not relevant to the discussion in text.

130. See LANGBEIN ET AL., *supra* note 128, at 830–35.

131. Leon E. Irish & Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REFORM 109, 111 (1985).

132. N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995). An account of the legislative history of the clause suggests that the language was drafted in the Conference Committee; that it represented a significant modification of earlier language; that leading legislators thereafter expressed quite different views about the significance of the revision; that “[c]ongressional staff and a few lobbyists made a major decision about employee benefits policy . . . as if it were a technical issue”; and that in the end, the preemption policy was made “neither by accident nor quite by design” but “was the result of a process which permitted only some of the implications of a proposed law to be known.” Daniel M. Fox & Daniel S. Schaffer, *Semi-Preemption in ERISA: Legislative Process and Health Policy*, 7 AM. J. TAX POL’Y 47, 48–52 (1988). In particular, in seeking to achieve the relatively narrow purpose of protecting prepaid legal service plans from hostile regulation by the organized bar, Congress framed a drastically overbroad preemption provision. See LANGBEIN ET AL., *supra* note 128, at 825.

133. John H. Langbein, *What ERISA Means by “Equitable”: The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1331–32 (2003).

134. Cal. Div. of Labor Standards Enforcement v. Dillingham Const., N.A., 519 U.S. 316, 335–36 (1997) (Scalia, J., concurring). See generally Langbein, *supra* note 133.

135. 536 U.S. 355, 388 (2002) (Thomas, J., dissenting).

136. *Rush*, 536 U.S. at 364 (majority opinion) (quoting 29 U.S.C. § 1144(b)(2)(A) (2000)) (internal quotation marks omitted).

there is ‘no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional pre-emption analysis,’ the Court has concluded that federal pre-emption occurs where state law governing insurance ‘stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.’”<sup>137</sup> Thus, like his colleagues, he found it appropriate (at least within the confines of a preemption provision that he deemed to be “not a model of legislative drafting”)<sup>138</sup> to determine the scope of preemption based on the statutory purposes and objectives.

Justice Thomas’s approach here cannot be squared with his later insistence in *Wyeth* that the “Court has repeatedly stated that when statutory language is plain, it must be enforced according to its terms.”<sup>139</sup> Indeed, his approach to ERISA is the same one that he has argued is objectionable when invoked as the basis of implied preemption.<sup>140</sup> Perhaps Justice Thomas would no longer defend his earlier votes and would, in Justice Scalia’s view, “decree a degree of preemption that no sensible person could have intended.” But in addition to his pre-*Wyeth* votes and opinions in ERISA cases, this past Term Justice Thomas joined a unanimous ERISA decision reiterating that the Supreme Court has “refused to read the preemption clause . . . with an ‘uncritical literalism,’ else ‘for all practical purposes pre-emption would never run its course.’”<sup>141</sup> At least with respect to ERISA decisions, one would have to conclude that Justice Thomas, like Justice Scalia, has been a faint-hearted textualist.<sup>142</sup>

To understand why that is so, consider matters from the standpoint of a legislator in 1974, when Congress was formulating a broad new federal scheme regulating employee benefits, one that would overlap in manifold ways with existing state laws. As noted earlier, a member of Congress would have had to be able to foresee the set of state and local laws with which ERISA might intersect, which include, as it turns out, such diverse laws as those that (1) ban pension plans from reducing pension benefits by the amount of workers’ compensation benefits; (2) require the provision of certain benefits (for example, sick leave for employees unable to work because of pregnancy); (3) authorize the garnishment of wages from benefit plans; (4) bar termination of an employee to prevent the vesting of benefits; (5)

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137. *Id.* at 392–93 (Thomas, J., dissenting) (quoting *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 99 (1993)).

138. *Id.* at 392 (quoting *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 99 (1993)).

139. *Wyeth v. Levine*, 555 U.S. 555, 600 (2009) (Thomas, J., concurring in the judgment) (citing *Jimenez v. Quarterman*, 555 U.S. 113, 113 (2009); *Dodd v. United States*, 545 U.S. 353, 359 (2005); *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

140. Sharkey, *supra* note 12, at 95.

141. See *Dan’s City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655–56 (1995) (internal quotation marks omitted)).

142. Cf. Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64 (1989) (acknowledging that in a crunch, he may be a “faint-hearted originalist”).

impose surcharges on some plans as part of hospital-rate regulation; (6) tax gross receipts of medical facilities (including those operated by ERISA plans); (7) require large employers to spend a minimum percentage of total payroll on health insurance (or pay any shortfall to the state); (8) permit suit against health plans for denial of benefits or for medical malpractice; (9) prohibit fraud, as applied to a variety of alleged misrepresentations; and (10) limit the designation of beneficiaries.<sup>143</sup> Then the legislator would have to determine whether each of those laws should be preempted, which might depend on exactly how a particular state had framed its legislation.

And each of these questions includes subquestions. Consider just the last of these sets of issues—that of state-law rules governing the designation of beneficiaries. In *Egelhoff v. Egelhoff*,<sup>144</sup> the Court dealt with a state statute providing that the designation of a spouse as the beneficiary of a nonprobate asset is automatically revoked upon a subsequent divorce.<sup>145</sup> Notwithstanding the Court’s concession that ERISA’s preemption clause had to be interpreted in light of the objectives of the statute,<sup>146</sup> the majority ruled that the state statute, when applied to an ERISA benefit plan, was preempted because otherwise plan “[a]dministrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents.”<sup>147</sup>

This ruling was subject to a powerful dissent from Justice Breyer, who pointed out the breadth of its rationale. The Court’s opinion would seem to suggest that ERISA also preempts state slayer statutes, which bar those who feloniously and intentionally kill from obtaining benefits as a result of the killing.<sup>148</sup> For those statutes, too, would require administrators to pay benefits to those chosen by state law rather than by the plan documents. The majority in *Egelhoff*, squirming at this possible implication of its decision, suggested that perhaps slayer statutes were distinguishable because they have a long, historical pedigree and are more or less uniform nationwide, therefore possibly interfering less substantially with ERISA’s objectives.<sup>149</sup>

Whether or not that effort to distinguish is convincing, and whatever the fate of slayer statutes, consider the question again in light of Justice Thomas’s account of preemption in the *Wyeth* case:

Federal legislation is often the result of compromise between legislators and “groups with marked but divergent interests.” Thus, a statute’s text might reflect a compromise between parties who wanted to pursue a particular goal to different extents. . . . [O]ur federal system in general, and the Supremacy Clause in particular, accords pre-emptive effect to only

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143. See generally LANGBEIN ET AL., *supra* note 128, at 818–905.

144. 532 U.S. 141 (2001).

145. *Egelhoff*, 532 U.S. at 144.

146. *Id.* at 147 (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 325 (1997)).

147. *Id.*

148. *Id.* at 159–60 (Breyer, J., dissenting).

149. *Id.* at 152 (majority opinion).

those policies that are actually authorized by and effectuated through the statutory text.<sup>150</sup>

Without a doubt, some issues concerning preemption do draw focused legislative attention. But as a general description of congressional consideration of questions like whether to preempt slayer statutes, Justice Thomas's approach is entirely implausible.<sup>151</sup>

I use the example of the slayer statute because, as the majority acknowledged in *Egelhoff*, the rule barring killers from profiting from their misdeeds is found in most state probate codes (and where not codified would likely be followed in any event);<sup>152</sup> it is a broadly entrenched feature of American law; and it has been thought to fall within the traditional reach of state rather than federal law. No doubt there are some state law limits on the freedom of ERISA participants to designate beneficiaries that should be deemed preempted (the Court in *Egelhoff* provides the somewhat fanciful example of a state statute requiring that all benefits be paid to the governor).<sup>153</sup> But I doubt that any member of Congress would include slayer statutes among them.<sup>154</sup> Nonetheless, when applied to benefit plans regulated by ERISA, such statutes could be preempted simply because Congress did not foresee the issue when it drafted the preemption clause<sup>155</sup>—and these statutes *would be* preempted under a textualist approach to the matter.

ERISA may seem to be an extreme case because of the comprehensiveness and complexity of the regulatory scheme. But the difficulties it highlights can also arise in far less complex federal statutes, as the decision in *National Meat Ass'n v. Harris*<sup>156</sup> illustrates. The Federal Meat Inspection Act “regulates a broad range of activities at slaughterhouses to ensure both the safety of meat and the humane handling of animals.”<sup>157</sup> Although its ambit is reasonably focused, the Act's preemption clause broadly bars state requirements “with respect to premises, facilities and operations of any establishment at which inspection is provided under [the Act].”<sup>158</sup> In determining the

150. *Wyeth v. Levine*, 555 U.S. 555, 601–02 (2009) (Thomas, J., concurring in the judgment) (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002)).

151. The point holds quite apart from, but is reinforced by, what we know about the drafting history of ERISA. See *supra* note 132.

152. See, e.g., *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45 cmt. b (2011) (“If a case is not covered by a particular statute, it must not be supposed that the enrichment of the slayer is therefore to be allowed.”).

153. *Egelhoff*, 532 U.S. at 147 n.1.

154. For another situation in which it seems virtually certain that Congress would not have intended the preemptive effect of ERISA, see Meltzer, *supra* note 38, at 346–51.

155. See John H. Langbein, Essay, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 Nw. U. L. REV. 1315, 1334 (2007) (observing that the “related to” language threatens to suppress the state-law causes of action that existed for many such cases before ERISA).

156. 132 S. Ct. 965 (2012).

157. *Nat'l Meat Ass'n*, 132 S. Ct. at 968 (emphasis added).

158. 21 U.S.C. § 678 (2006) (emphasis added).

reach of that provision, the Supreme Court suggested in dictum, but considered dictum, that the clause would usually not bar state laws concerning, for example, building codes or worker safety.<sup>159</sup> That result, the Court suggested, followed from a saving clause in the preemption provision, under which states are not precluded “from making requirement[s] or taking other action, consistent with this chapter, with respect to any *other* matters regulated under this chapter.”<sup>160</sup> But read literally, the saving clause covers only regulations that govern matters “other” than the “premises, facilities, and operations” of slaughterhouses; building codes surely apply “with respect to” slaughterhouse “facilities,” just as worker safety regulations apply “with respect to” slaughterhouse “operations.”

The Court’s dictum provokes three observations. First, both when the statute was enacted in 1906 (in response to the horrors exposed by Upton Sinclair’s *The Jungle*), and when it was amended in 1978,<sup>161</sup> it is unlikely that legislators even considered whether the statute would preempt the application of standard state or local rules like building codes. Second, in opining that such laws would not be preempted, the Court was implicitly considering not text but statutory purposes (much as it does in obstacle preemption cases), determining that ordinarily nothing in building codes would impair the purposes of the federal Act. Third, the qualified nature of the Court’s statement—that “usually” building codes would not be preempted<sup>162</sup>—leaves open the possibility of preemption if, for example, a building code prescribed the use of a kind of material that was conducive to bacterial growth that could contaminate a slaughterhouse. The Act’s preemption clause, however, did not provide that degree of nuance, nor is it reasonable to expect that it would.

Some have suggested that the presumption against preemption, about which I will say more below,<sup>163</sup> “is designed to ensure that Congress deliberates about preemption and that preemption does not occur unless its proponents have surmounted the procedural obstacles to federal lawmaking.”<sup>164</sup> As desirable as such deliberation may be, examples like the foregoing suggest that efforts to realize it will often result in statutory provisions that the courts will be unwilling to enforce literally.

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159. *Nat’l Meat Ass’n*, 132 S. Ct. at 974 n.10. The Court stated that “the Government acknowledges that state laws of general application (workplace safety regulations, building codes, etc.) will usually apply to slaughterhouses.” *Id.*

160. 21 U.S.C. § 678 (emphasis added).

161. *Nat’l Meat Ass’n*, 132 S. Ct. at 968.

162. *Id.* at 974 n.10.

163. See *infra* Section III.B.

164. Young, *supra* note 3, at 331; accord Clark, *supra* note 54, at 1427–30.

## 2. Clauses That Preempt State Standards or Requirements

A second common textual pattern in federal statutes provides for preemption of a state law “requirement,”<sup>165</sup> a state “requirement or prohibition,”<sup>166</sup> or a state “law, rule, regulation, order, or standard”<sup>167</sup> that applies to the subject matter of the federal legislation. There are variations within this general pattern: sometimes the federal statute preempts only requirements that are different from or in addition to the federal standards; sometimes the federal preemption provision qualifies the general rule by authorizing states to regulate in some respects—in one case, to “adopt more stringent safety requirements ‘when necessary to eliminate or reduce an essentially local safety hazard,’ if those standards are ‘not incompatible with’ federal laws or regulations and not an undue burden on interstate commerce.”<sup>168</sup> But this family of linguistic formulations is common.

Generally, the Supreme Court has found that such language, standing alone, bars not only state statutory and administrative regulation but also common law tort actions.<sup>169</sup> Nonetheless, some justices have found variations in the precise formulations to be significant. For example, the Court read language that preempts a state “law or regulation establishing [an] equipment performance or other safety standard or imposing a requirement” as narrowing the scope of express preemption and, in particular, as not suggesting that common law tort actions were expressly preempted.<sup>170</sup>

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165. *E.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 316 (2008) (holding that absent exemption from the FDA, a state may not enforce, with respect to a medical device, “any requirement which is different from, or in addition to, any [federal] requirement applicable . . . to the device” (quoting 21 U.S.C. § 360k(a) (2006))).

166. *E.g.*, *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 530 (1992) (applying § 5(b) of the Federal Cigarette Labeling and Advertising Act, which states that “[n]o requirement or prohibition [regarding cigarette advertising] shall be imposed under State law”); *id.* at 548–59 (Scalia, J., concurring in the judgment); *see also* *Bates v. Dow Agrosiences LLC*, 544 U.S. 431, 443 (2005) (reaching a similar result but adding that “the use of ‘requirements’ in a preemption clause may not invariably” preempt common law actions). In *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), five justices treated such a formulation as having preemptive effect, but they differed on its scope. *See id.* at 503–05 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 512–14 (O’Connor, J., concurring in part and dissenting in part).

167. *E.g.*, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 662 (1993) (quoting 45 U.S.C. § 434 (1988)).

168. *Id.* (quoting 45 U.S.C. § 434 (1988)).

169. *See, e.g.*, *Riegel*, 552 U.S. at 324–35; *Bates*, 544 U.S. at 431, 443, 452 (construing a statute prohibiting the enforcement by states of “any requirements for labeling or packaging in addition to or different from those required under this subchapter” against inconsistent common law rules (quoting 7 U.S.C. § 136v(b) (2000))); *Cipollone*, 505 U.S. at 515, 530–31 (holding that a preemption clause providing that “[n]o requirement or prohibition . . . shall be imposed under State law with respect to the advertising or promotion of any cigarettes” preempted some common law claims presented by the plaintiff (quoting 15 U.S.C. § 1334(b) (1988)) (internal quotation marks omitted)).

170. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 58–59, 62–63 (2002) (quoting 46 U.S.C. § 4306 (2000)) (internal quotation marks omitted).

An uneven course of decisions has resulted, in part because, as Professor Sharkey notes, common law tort rules can be characterized as regulatory—as serving deterrent purposes and thus being similar to federal requirements or standards—or as compensatory—and thus serving a quite different purpose from federal regimes, especially when the federal regime lacks a private right of action.<sup>171</sup> Indeed, as Justice Stevens once contended, it could be viewed as perverse to treat a federal regulatory regime, adopted because Congress believed that more stringent regulation was needed in some domain, as entirely immunizing regulatees from tort liability that, absent the federal intervention, they would otherwise have faced.<sup>172</sup> But whatever the reason, the Court's decisions interpreting this family of provisions do not follow a straight path.<sup>173</sup>

Further complexity is introduced in those cases in which a federal statute that calls for preemption of state requirements or prohibitions also includes a saving clause providing that compliance with federal standards does not confer immunity from common law liability. This not uncommon pair of textual provisions<sup>174</sup> leaves hard questions of how best to read together two commands that seem, at the least, to be in tension. In the *Geier* and *Williamson* cases, the Court read the saving clause as requiring a narrow construction of the clause preempting state safety standards that are not identical to federal standards; accordingly, the Court held that the term “safety standard” might include state legislative or regulatory rules but does not include common law actions. But having found common law actions to fall outside the express statutory language, the Court proceeded to reason that they might nonetheless be preempted by implied preemption principles.<sup>175</sup> That reasoning was not uncontested; separate opinions in both cases claimed that the saving clause plainly shielded common law tort actions

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171. See Sharkey, *supra* note 111, at 459–71.

172. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996) (plurality opinion); see also *Mut. Pharm. Co., Inc. v. Bartlett*, No. 12-142, 2013 WL 3155230, at \*17 (U.S. June 24, 2013) (Sotomayor, J., dissenting) (arguing that a federal statute did not create a federal cause of action for damages because it assumed state tort law would remain in place, and asserting that the majority's finding that state tort law was preempted has the perverse effect of creating a shield from tort liability for an industry—pharmaceuticals—that, in Congress's judgment, required more stringent regulation); *Riegel*, 552 U.S. at 337 (Ginsburg, J., dissenting).

173. See *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1141–42 (2011) (Thomas, J., concurring in the judgment). Compare *Lohr*, 518 U.S. at 489 (plurality opinion) (finding that common law duty is not a requirement), with *Cipollone*, 505 U.S. at 524 (plurality opinion) (finding that common law duty is a requirement). See generally Sharkey, *supra* note 111, at 459–71.

174. See David A. Dana, *Democratizing the Law of Federal Preemption*, 102 Nw. U. L. Rev. 507, 509 n.9 (2008); see also *Sprietsma*, 537 U.S. at 62–63; *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 867–68 (2000).

175. *Geier*, 529 U.S. at 867–68; accord *Sprietsma*, 537 U.S. at 59, 63 (holding that a preemption clause barring state enforcement of “a law or regulation establishing [an] equipment performance or other safety standard” did not preempt a tort claim in view of the statutory saving clause providing that compliance with federal law “does not relieve a person from liability at common law or under State law” (quoting 46 U.S.C. § 4306, 4311(g) (2000)) (internal quotation marks omitted)).

from preemption, period.<sup>176</sup> But the majority was clear that here too, rather than following textual precepts, it would not “give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.”<sup>177</sup>

Standing back from the language of existing statutes and past decisions, it would not seem difficult in principle for Congress to indicate whether a federal regulatory regime does, or does not, preempt common law tort actions. Yet, in fact, that task is harder than it first appears, for there are a range of subsidiary questions that will arise: If the decision is to preempt, are state requirements that are identical to (or even less restrictive than) federal standards also preempted? Does a clause calling for preemption of state standards in addition to or different from federal standards displace state regulation directed at an entirely different aspect of the problem from that actually regulated by the federal standard?<sup>178</sup> If so, by what criterion does one measure whether a state law covers a “different” aspect of the problem? Does it matter whether the preemption clause is being invoked with respect to a federal statutory standard, whose content accordingly is known at the time of enactment, or to an administrative standard promulgated by a federal agency many years later, as in *Geier* and *Williamson*?

Relatedly, it is often difficult to ascertain from the text alone just what the “domain” is that is subject to preemption.<sup>179</sup> Does a federal provision barring states from providing a “requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter” bar a state-law action for fraudulent advertising?<sup>180</sup> Does a federal statute that expressly authorizes states to regulate the sale or use of pesticides (so long as they do not permit sales or uses prohibited under federal law), but that prohibits states from enforcing “any requirements for labeling or packaging in addition to or different from those required” by federal law, bar common law claims for defective design, manufacturing defect, and breach of express warranty?<sup>181</sup> Does a federal

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176. *Williamson*, 131 S. Ct. at 1141–42 (Thomas, J., concurring in the judgment); *Geier*, 529 U.S. at 887–88 (Stevens, J., dissenting).

177. *Geier*, 529 U.S. at 870 (majority opinion) (quoting *United States v. Locke*, 529 U.S. 89, 106 (2000)).

178. *Compare Lohr*, 518 U.S. at 505 (Breyer, J., concurring in part and concurring in the judgment) (“Congress could not have intended that the existence of one single federal rule, say, about a 2-inch hearing aid wire, would pre-empt every state law hearing aid rule, even a set of rules related only to the packaging or shipping of hearing aids.”), *with id.* at 513–14 (O’Connor, J., concurring in part and dissenting in part).

179. *See, e.g., id.* at 484 (majority opinion); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992).

180. *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 78–79 (2008) (quoting 15 U.S.C. § 1334(b) (2006)) (internal quotation marks omitted).

181. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 436, 443–53 (2005) (quoting 7 U.S.C. § 136v(b) (2000)) (internal quotation marks omitted) (finding that fraud and negligent failure-to-warn claims are preempted if they do not rely on standards that are equivalent to the

clause preempting state rules on the same “subject matter” as a federal regulation setting speed limits for trains on different kinds of tracks preempt a state tort action alleging that the speed was excessive for the crossing conditions, or are federal speed limits based on *track* conditions a different subject matter from those based on *crossing* conditions?<sup>182</sup>

Questions of this sort present considerable interpretive challenges. And although Congress may insert phrases using similar wording into separate statutory texts, these “cryptic [phrases] simply have no ‘plain meaning,’ despite the Court’s occasional assertions to the contrary. When the Court claims that it is simply carrying out the plain sense of such ambiguous phrases, it is being disingenuous, abdicating responsibility for decisions that need more justification than textualist window dressing.”<sup>183</sup>

In this regard, Professor Sharkey has carefully analyzed Justice Thomas’s interpretations of express preemption clauses, showing that he has tended to give the clauses broad preemptive effect.<sup>184</sup> And in reaching that conclusion, Professor Sharkey finds that Justice Thomas often interprets the preemption clauses in light of the statutory purposes and objectives that he assigns to them—notably, a legislative desire to promote uniform nationwide standards. Professor Sharkey concludes that “express language cannot bear the full weight given by [Justice] Thomas. Express preemption provisions at times seem to provide little more than a hook, upon which broader visions of national uniformity can be hung.”<sup>185</sup> The point here is not to criticize Justice Thomas for the particular substantive views that he smuggles in. It is rather to note the inevitability of the smuggling.

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federal standard, but that defective design, defective manufacture, negligent testing, and express breach-of-warranty claims are not preempted).

182. *Compare* CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 661 (1993) (finding preemption), *with id.* at 677 (Thomas, J., concurring in part and dissenting in part) (finding no preemption because “[s]peed limits based solely on track characteristics cannot be fairly described as ‘substantially subsum[ing] the subject matter of . . . state law’ regulating speed as a factor in grade crossing safety” (second and third alterations in original) (citation omitted) (quoting *id.* at 664 (majority opinion))). The Court has also wrestled with the question whether the breadth of a federal preemption clause affects the interpretation of its preemptive effect. In at least one case, the plurality found that preemption of common law actions was less plausible given the potential breadth of the displacement of state law (and the absence of a private federal damages action that could fill that gap). *See Lohr*, 518 U.S. at 486–92 (plurality opinion in part) (distinguishing *Cipollone* on this basis). A majority of the justices in *Lohr* may have disagreed with the plurality on this point. *See id.* at 504–05 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 509 (O’Connor, J., concurring in part and dissenting in part).

183. Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 67–68 (2007).

184. *See* Sharkey, *supra* note 12, at 95–102.

185. *Id.* at 100; *see also* Cuomo v. Clearing House Ass’n, L.L.C., 557 U.S. 519, 537 (2009) (Thomas, J., concurring in part and dissenting in part).

#### D. *The Nonexclusivity of Express Preemption Clauses*

The relationship between express and implied preemption provides another window into textualism's inconsistent application in preemption cases. In *Cipollone v. Liggett Group, Inc.*,<sup>186</sup> the Court suggested that when there is an express preemption clause—at least when the provision is a “reliable indicium of congressional intent with respect to state authority”<sup>187</sup>—there should be no implied preemption.<sup>188</sup> But in recent years the Court has consistently moved away from that application of the *expressio unius est exclusio alterius* canon.<sup>189</sup>

A stark example is found in *Buckman Co. v. Plaintiffs' Legal Committee*,<sup>190</sup> where plaintiffs injured by a medical device sued a consultant to the manufacturer for allegedly having made fraudulent representations to the FDA in the course of helping to secure the device's approval.<sup>191</sup> The Court unanimously found that the claim was impliedly preempted<sup>192</sup> and then said in a footnote that “[i]n light of this conclusion, we express no view on whether these claims are subject to express pre-emption under 21 U.S.C. § 360k.”<sup>193</sup> That statutory preemption provision appeared to be directed primarily at displacing state requirements concerning the safety or effectiveness of a medical device that differed from federal requirements and may well not have preempted the state tort action for fraud. But from a textualist standpoint, the obvious question is why, assuming that the preemption clause did not apply, that was not the end of the matter. After all, if statutory texts generally reflect legislative compromises, then one should assume that Congress chose to preempt state requirements about the safety and effectiveness of devices but not state prohibitions of misrepresentation to the FDA.<sup>194</sup> Not

186. 505 U.S. 504 (1992) (plurality opinion in part).

187. *Cipollone*, 505 U.S. at 517 (majority opinion) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978)) (internal quotation marks omitted).

188. *See id.*

189. *See, e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64–66 (2002); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287–88 (1995). *See generally* Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1158–65 (1998).

190. 531 U.S. 341 (2001).

191. *Buckman Co.*, 531 U.S. at 343.

192. *Id.* at 347–48; *id.* at 353 n.1 (Stevens, J., concurring in the judgment).

193. *Id.* at 348 n.2 (majority opinion). That provision stated that

no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—

(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and

(2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. § 360k(a) (2000).

194. The Court has taken a similarly purposive approach when the statutory text in question is not a preemption clause but a saving clause. *See United States v. Locke*, 529 U.S.

only, however, did none of the justices so reason (even Justice Stevens, who was generally a preemption skeptic);<sup>195</sup> they all took an approach that, instead of starting with the statutory text, started and finished with implied preemption principles.<sup>196</sup> And *Buckman* is not the only example of this approach.<sup>197</sup>

#### E. The “Logical Contradiction” Test for Implied Preemption

Like his colleagues, Justice Thomas acknowledges that the Supremacy Clause suggests that federal statutes can have preemptive force even when they contain no textual preemption clause.<sup>198</sup> But following Professor Nelson, he suggests that a court should find implied preemption only when there is a “logical contradiction” between state and federal law.<sup>199</sup> This test embraces two situations. The first is when it is impossible for an actor to comply with both state and federal requirements. The second reaches more broadly to embrace situations when federal law gives an actor a right to engage in conduct that state law prohibits; in this second situation, the actor could comply with both state and federal law, but only at the cost of giving up a federally bestowed right to act differently.<sup>200</sup>

A careful examination of preemption cases reveals, however, two important features of the logical contradiction standard. First, a great many preemption cases share a common structure that can be characterized as presenting a logical contradiction. Thus, this seemingly limited standard is not necessarily so in practice. Second, the application of the standard does not free a judge from the need to make rather open-ended judgments about the nature of congressional purposes.

Preemption based on impossibility, even if vanishingly narrow in practice,<sup>201</sup> occasions little dispute in principle. For example, given that the

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89, 106 (2000) (“We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.”); *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 493–94 (1987) (finding that a saving clause did not plainly preserve a state-law right of action and proceeding, in the absence of an express preemption clause, to consider and find implied preemption of state law).

195. See Ernest A. Young, *Two Cheers for Process Federalism*, 46 *VILL. L. REV.* 1349, 1380–95 (2001).

196. See *Buckman*, 531 U.S. at 348 n.2; *id.* at 353–55 (Stevens, J., concurring in the judgment).

197. See, e.g., *Hillman v. Maretta*, 133 S. Ct. 1943 (2013) (holding a state law impliedly preempted without addressing the reach of the federal statute’s express preemption clause); *Boggs v. Boggs*, 520 U.S. 833, 841 (1997).

198. E.g., *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1265–66 (2012); *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2579 (2011).

199. *Wyeth v. Levine*, 555 U.S. 555, 590 (2009) (Thomas, J., concurring in the judgment) (quoting Nelson, *supra* note 13, at 260–61).

200. See *id.* at 588–90; see also Nelson, *supra* note 13, at 260–61.

201. See *Wyeth*, 555 U.S. at 590 (Thomas, J., concurring in the judgment). I argue below that if logical contradiction provided the exclusive measure of preemption and obstacle preemption was otherwise abandoned, decisions under the “logical contradiction” standard

Federal Arbitration Act (“FAA”)<sup>202</sup> makes arbitration provisions in contracts involving interstate commerce generally enforceable, a state statute that instead requires adjudication in court would be preempted because it is not possible for the same dispute to be resolved both by arbitration (as the FAA prescribes) and by a court (as the state law requires). Preemption in such a case, as the Supreme Court has recognized, remains a form of implied preemption,<sup>203</sup> but the implication seems rather clear; indeed, the Supremacy Clause speaks rather directly to this situation by providing that federal law is the law of the land, “anything in [state law] to the contrary notwithstanding.”<sup>204</sup>

The second part of the Nelson/Thomas “logical contradiction” standard is, however, far more likely to occasion disagreement in application.<sup>205</sup> Consider the facts of *Barnett Bank of Marion County, N.A. v. Nelson*.<sup>206</sup> A federal law provided that certain national banks may sell insurance in small towns. A Florida statute prohibited banks in that class from selling insurance.<sup>207</sup> There was a logical contradiction between federal and state law *if* the federal statute conferred a right to operate that was not qualified by state requirements; no logical contradiction existed if the federal statute merely authorized national banks to sell insurance, subject to whatever regulations state law may have imposed. It seems implausible that the federal law was meant to grant a right to sell insurance regardless of *all* nonfederal laws—for example, state anti-bribery laws or municipal building codes. The question, then, was whether federal law was meant to grant a right to sell insurance without regard to whether state insurance law prohibited such sales. The federal statutory language—which provided that national banks, in addition to the

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would cover much of the abandoned territory and require similar kinds of discretionary judgments. To a more limited extent, something similar might well be true were the impossibility standard the sole measure of preemption. Thus, the narrowness of that standard in current practice may result from the existence of other bases on which state law can be displaced, and were they eliminated, the scope of the impossibility standard would likely expand in application.

202. 9 U.S.C. §§ 1–14 (2006).

203. See, e.g., *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

204. U.S. CONST. art. VI, cl. 2.

205. A rare example of disagreement about what impossibility means was presented in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011). There, it was possible for a generic drug manufacturer to propose to the FDA a label change that state law (if not preempted) would require and then to change the label *if* the FDA approved. See *id.* at 2576–77. But it was not possible for a generic manufacturer to comply with state law (insofar as it required a different label) and federal law without FDA approval. The dispute centered on whether the drug manufacturer had to try to comply with both state and federal law by seeking FDA approval (which it might or might not have obtained) or instead whether the manufacturer’s inability to ensure that action consistent with state law would ultimately satisfy federal law demanded preemption of state law. See *id.*

206. 517 U.S. 25 (1996).

207. *Barnett Bank*, 517 U.S. at 28–29.

powers vested in them under federal law, if located in a place whose population does not exceed five thousand, “may . . . act as the agent for any fire, life, or other insurance company authorized by the authorities of the State . . . to do business [there], by soliciting and selling insurance”<sup>208</sup>—provides no textual basis for distinguishing state insurance law from anti-bribery laws or building codes.

*Arizona v. United States*<sup>209</sup> posed a similar problem. One issue in that case was whether federal immigration law preempted a provision of Arizona law that made it a crime for an unauthorized alien to seek or engage in work.<sup>210</sup> Federal law penalizes employers, but not employees, when unauthorized aliens are hired.<sup>211</sup> If the federal statute merely restricts the scope of *federal* criminal liability, as Justice Alito argued in his dissent,<sup>212</sup> then there is no logical contradiction between federal and state law. But if federal law was meant to ensure that illegal aliens who work would not be punished at all, as the majority held, then a logical contradiction exists.<sup>213</sup> Here, too, no language in the federal statute makes clear which way the federal immigration laws should be read.

Much the same statutory uncertainty existed in the earlier challenge to a different Arizona law in the *Whiting* case. Although the challenge to the law was framed as resting on obstacle preemption, it would not be hard to reframe the (losing) argument for preemption as one of logical contradiction: the dissenters contended that under federal law, the “the E-Verify program,” through which employers could electronically check the immigration status of prospective employees,<sup>214</sup> was meant to be voluntary, giving employers a right to decide whether to participate. On that view, Arizona’s law mandating the use of E-Verify created a logical contradiction.<sup>215</sup>

Thus, a great number of preemption disputes share a common structure. The party challenging a state or local law, typically a federal regulatee, can generally restate the argument for preemption as a claim that federal law provides a right to be free of regulation by the state for conduct that complies with federal law; put differently, the claim is that federal law is both a

208. 12 U.S.C. § 92 (2006).

209. 132 S. Ct. 2492 (2012).

210. *Arizona*, 132 S. Ct. at 2503.

211. *Id.* at 2504.

212. *See id.* at 2530 (Alito, J., concurring in part and dissenting in part).

213. *See id.* at 2504–05 (majority opinion).

There is a similar structure to the dispute between the majority and dissent about a distinct issue in the case: whether the federal statutory limitations on the authority of federal officials to make warrantless arrests were meant to apply only to those officials—in which case Arizona’s authorization of warrantless arrests in other circumstances would not conflict—or instead were also meant to preclude state officials from engaging in warrantless arrests in circumstances other than those specified in the statute. *Compare id.* at 2531–35 (Alito, J., concurring in part and dissenting in part), *with id.* at 2507 (majority opinion).

214. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1975 (2011).

215. *See id.* at 1995 (Breyer, J., dissenting).

floor and a ceiling. That view, if accepted, will establish a logical contradiction. The party opposing preemption will contend that federal law does not create an unqualified right to act in accordance with federal law; federal law creates a floor but not a ceiling. As we have seen, even where textual clauses exist, they typically fail to resolve this difference of view. The absence of any statutory resolution is clearer still when statutes lack such a clause.<sup>216</sup>

Even the *Geier* decision, often viewed as the “high water mark for an expansive version of implied preemption,”<sup>217</sup> could be reframed as falling within the supposedly narrow “logical contradiction” standard. For there, the Court interpreted the DOT regulatory standard as giving car manufacturers a right to install automatic seatbelts rather than airbags.<sup>218</sup> On that understanding, there was a logical contradiction between that right and state tort liability for having failed to install airbags.<sup>219</sup> The key, of course, is whether the Court properly interpreted the federal rule. But the articulation of a “logical contradiction” test cannot resolve that issue,<sup>220</sup> nor can it spare courts from the need to identify and characterize the purposes of federal statutes or to assess whether the degree of conflict posed by state law is tolerable.<sup>221</sup>

Perhaps there are some cases of obstacle preemption that cannot be easily reformulated as “logical contradiction” cases, and so it might be an overstatement were one to suggest that the choice of approaches makes no difference whatsoever. But I hope that I have shown that any gap between the approaches is considerably smaller than it might appear and also that the “logical contradiction” test is unlikely to prevent judges from smuggling in subterranean value judgments. Indeed, if I am correct that, whatever the doctrinal standard, preemption decisions are going to rest heavily on judicial understandings of the purposes and objectives of federal legislation, then the lack of transparency of the “logical contradiction” standard in that regard must count as a serious disadvantage.

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216. See *Mut. Pharm. Co., Inc. v. Bartlett*, No. 12-142, 2013 WL 3155230, at \*25 (U.S. June 24, 2013) (Sotomayor, J., dissenting) (noting the need to determine whether a federal standard is both a floor and a ceiling—in Justice Sotomayor’s words, a “maximum safety standard”—or merely a floor—in her words, a “minimal safety threshold”—and that resolving that question requires a highly contested policy judgment).

217. Sharkey, *supra* note 12, at 89; see also Kenneth W. Starr, *Reflections on Hines v. Davidowitz: The Future of Obstacle Preemption*, 33 PEPP. L. REV. 1, 5 (2005) (calling *Geier* a “muscular” application of the approach of *Hines v. Davidowitz*, 312 U.S. 52 (1941)).

218. See *Geier v. American Honda Motor Co.*, 529 U.S. 861, 881–82 (2000).

219. See Meltzer, *supra* note 38, at 365.

220. Empirical studies have cast doubt more broadly on whether particular approaches to statutory interpretation, and textualism in particular, can generate predictable or consistent results that are unaffected by a judge’s attitudinal preferences. See, e.g., James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005); Frank B. Cross, Essay, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1991–95 (2007).

221. See Merrill, *supra* note 5, at 741–72; Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 132–33 (2004).

## II. ASSESSING OBSTACLE PREEMPTION

Having examined the limits of textualism in determining the scope of preemption, I wish to explore matters from the other end of the spectrum. Obstacle preemption—preemption based on a judicial determination that a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”<sup>222</sup>—is generally thought to be the most open-ended form of preemption. Unsurprisingly, Justice Thomas’s critique has targeted this particular form of implied preemption,<sup>223</sup> and one would expect it to be anathema to jurists who in general reject purposive statutory interpretation.

It is thus worth examining Justice Thomas’s indictment carefully. Section II.A considers that indictment and the appropriate role of courts in making preemption determinations. Section II.B then discusses the relationship between courts and administrative agencies in resolving preemption questions.

### A. *The Critique of Obstacle Preemption*

There are four key elements to Justice Thomas’s critique of obstacle preemption:

(1) Proceeding from his textualist commitments, he argues that the Constitution does not permit federal courts, when interpreting federal statutes, to rely on “perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law.”<sup>224</sup>

(2) Starting from the premises that federal powers under the Constitution are few and defined, that the states retain substantial authority, and that the power to preempt state law is extraordinary, he contends that state law should be displaced only by federal laws that have passed through the complex lawmaking procedures prescribed by Article I.<sup>225</sup>

(3) Focusing on judicial policymaking, Justice Thomas complains that obstacle preemption improperly relies on “legislative history [and] broad atextual notions of congressional purpose” and hence requires courts to embark on “freeranging speculation.”<sup>226</sup>

(4) Stressing that federal legislation often is the product of compromise, he contends that while Congress may decide to further a statutory objective to only a limited extent, courts applying obstacle preemption often assume that Congress sought to pursue such an objective at all costs.<sup>227</sup>

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

223. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2522–24 (2012) (Thomas, J., concurring in part and dissenting in part); *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in the judgment).

224. *Wyeth*, 555 U.S. at 583 (Thomas, J., concurring in the judgment).

225. See *id.* at 586. See generally Clark, *supra* note 54.

226. *Wyeth*, 555 U.S. at 594–95 (Thomas, J., concurring in the judgment).

227. *Id.* at 601 (citing Manning, *supra* note 39, at 104).

Some of these objections relate to very broad interpretive questions—for example, debates between textualists and purposivists—that have been well discussed elsewhere.<sup>228</sup> Rather than rehearse such debates in their broadest contours, I wish to focus here on points three and four above: that obstacle preemption involves freeranging judicial policymaking and that it may depart from compromises made during the legislative process. In Part III, I will consider questions about the undue displacement of state authority and the related question of the appropriateness of recognizing a presumption against preemption.

Obstacle preemption is one variety of implied preemption. And, as already noted, the Supremacy Clause itself is best read as authorizing implied preemption—that is, as invalidating state laws that are “contrary to” federal law, even if no federal statute expressly calls for preemption in its text.<sup>229</sup> Thus, the question whether implied preemption embraces obstacle preemption can be reframed as a dispute over how best to interpret when a state law is “contrary to” federal law. One can acknowledge the element of truth in Justice Thomas’s concerns about the risks of implied preemption—that it can ignore legislative compromise and invite excessive judicial policymaking discretion—while concluding that courts should continue to apply the doctrine of obstacle preemption. Whatever its risk or drawbacks, among various approaches to preemption, obstacle preemption remains “the lesser evil.”<sup>230</sup>

I have already noted that the “logical contradiction” test that Justice Thomas favors is both more expansive and more malleable than it might first appear.<sup>231</sup> And indeed, even some decisions viewed as expansive examples of obstacle preemption are among those that can be reframed as involving a logical contradiction. In *Crosby v. National Foreign Trade Council*,<sup>232</sup> for example, the Court ruled unanimously that a federal statute imposing economic sanctions on Myanmar preempted a similar set of economic sanctions previously imposed by the Commonwealth of Massachusetts.<sup>233</sup> Compliance with both schemes was possible,<sup>234</sup> but Massachusetts’s sanctions were broader in some respects.<sup>235</sup> Among a number of reasons for finding preemption, the one that was most central to the Court concerned

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228. See, e.g., POPKIN, *supra* note 16; William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001); Manning, *supra* note 39; Molot, *supra* note 15; Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117 (2009).

229. See, e.g., *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1265–66 (2012).

230. Cf. Scalia, *supra* note 142.

231. See *supra* text accompanying notes 205–222. Indeed, in the *PLIVA* case, the dissenters suggested that Justice Thomas’s rejection of obstacle preemption led him, as the author of the Court’s opinion, to endorse an unwarranted expansion of the doctrine of impossibility. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2590 n.13 (2011) (Sotomayor, J., dissenting).

232. 530 U.S. 363 (2000).

233. *Crosby*, 530 U.S. at 366.

234. *Id.* at 379–80.

235. *Id.* at 376–80.

preservation of the president's negotiating position.<sup>236</sup> Congress, the Court found, meant to give the president broad authority to impose sanctions, to lift them, or to use the prospect of lifting them as bargaining leverage;<sup>237</sup> Massachusetts's sanctions reduced the leverage that Congress intended the president to enjoy.<sup>238</sup>

The Court thus rested its holding on the ground that the state law was an obstacle to accomplishing congressional objectives,<sup>239</sup> and many have viewed the decision as a particularly expansive application of obstacle preemption.<sup>240</sup> But on the Court's understanding of the federal legislation, one could equally well say that there was a logical contradiction between the breadth of discretion that Congress bestowed on the president and the limits on that discretion that sanctions legislated by Massachusetts (and potentially other states) would impose. Thus, even in *Crosby*, it is doubtful that acceptance of a "logical contradiction" standard and rejection of obstacle preemption would have changed either the outcome or the essential rationale.

A second point to consider in assessing obstacle preemption is that one can exaggerate the advertence of the Article I process. It is true that lawmaking sometimes represents compromises among various goals and entails decisions to go so far and no further. But to say that legislation *may* reflect more or less advertent compromises hardly means that that is always, or even usually, the case. Beyond the tendency of legislators to leave statutory text deliberately ambiguous,<sup>241</sup> the preemption cases repeatedly tee up issues

236. *Id.* at 380–81.

237. *See id.* at 373–75.

238. *Id.* at 376–77.

239. *Id.* at 377, 385.

240. *See, e.g.,* Bradley W. Joondeph, *Bush v. Gore, Federalism, and the Distrust of Politics*, 62 OHIO ST. L.J. 1781, 1797–98 (2001); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 509–10 (2002); Carlos M. Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1287–88 (2001); Chang Derek Liu, Note, *The Blank Page Before You: Should the Preemption Doctrine Apply to Unwritten Practices?*, 109 COLUM. L. REV. 350, 358 (2009).

241. Professors Bressman and Gluck's empirical study of legislative drafting found little support for the proposition that staff members consciously deploy broad or ambiguous language in the hope that the courts will fill in the gaps, particularly as to "major" issues; rather, they found that drafters generally strive to use language that confines the courts as much as possible. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 STAN. L. REV. 901, 910, 941, 943, 959, 996–97, 1015 (2013). The comments they quote, however, recognize that sometimes, for a variety of reasons, statutory language is unclear, *see id.* at 943, in which case, when a court confronts the text, it has little choice but to resolve the ambiguity, whatever the wishes of the congressional drafters might be.

Most fundamentally, the point here is not to question that members of Congress (or their staff members) prefer statutory resolution and generally try their best to provide textual specification. It is, rather, that when, for all of the reasons previously noted, such resolution is impossible or at least is not forthcoming, judicial interpretation helps to effectuate congressional aspirations. In this respect, as Professors Bressman and Gluck note, the argument that it is desirable for courts to play that role does not rest on the premise that congressional staff members (or members of Congress) would state, at some high level of abstraction, that they desire judicial resolution of legal issues. (While it is not clear from the comments Professors

that, as I have noted, legislators could not reasonably have foreseen and about which, therefore, they could not have made legislative compromises. This fact is of critical significance when assessing various approaches to preemption.

The task of integrating state and federal law in our federal system, in which state statutory law builds on state common law and federal statutory and administrative regulation build on both,<sup>242</sup> poses issues of enormous complexity. Ever since the Founders considered James Madison's proposal for a national veto over state laws and substituted the Supremacy Clause for it, there has been a recognized need for a federal mechanism to knit the states together, to mesh state and federal law into a workable system, and to avoid the risk that actions by one state will impair national governance and impose external harms on fellow states.<sup>243</sup> Professor Merrill has suggested that the substitution of the Supremacy Clause for the Madisonian veto indicates that the Supremacy Clause applies to "a broader range of controversies than those involving outright nullification of federal law."<sup>244</sup> One might respond that, as Professor Merrill himself acknowledges,<sup>245</sup> the veto and preemption are different animals and the latter is more limited in scope.<sup>246</sup> Nonetheless, his point about functional equivalence retains some force; for example, at the Constitutional Convention, Roger Sherman found no need for the negative because "the Courts of the States would not consider as valid any law contravening the Authority of the Union, and which the legislature would wish to be negated."<sup>247</sup>

Some critics of the Madisonian veto noted the impracticability, even in 1787, of relying on Congress to police state laws, given their volume and the resulting number of congressional interventions that would be required.<sup>248</sup> More than two centuries later, it is more unrealistic still to expect that Congress will be aware of and able to address preemption issues (by legislative compromise or in any fashion) with any significant degree of specificity or comprehensiveness. Implied preemption doctrine, and obstacle preemption in particular, is the means by which, to echo Sherman, the national government can displace state laws that "the legislature would wish to be negated."

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Bressman and Gluck quote what it is that staffers expect courts to do, the comments do indicate that staffers generally disfavor strictly textualist approaches to interpretation, *see id.* at 929, 965, 974.)

242. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 492, 497–98 (1954).

243. *See* Alison L. LaCroix, *What If Madison Had Won? Imagining a Constitutional World of Legislative Supremacy*, 45 IND. L. REV. 41, 41–42 (2011).

244. Merrill, *supra* note 5, at 735.

245. *See id.*

246. *See* LaCroix, *supra* note 243, at 49–53.

247. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 27 (Max Farrand ed., 1911).

248. Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1900 (2011).

In applying obstacle preemption, the Court has not, *pace* Justice Thomas, attempted to uproot all state law that creates any tension with the purpose of a federal statute.<sup>249</sup> Rather, as the Court noted in *Crosby*, “What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.”<sup>250</sup>

But Justice Thomas is correct that acceptance of obstacle preemption vests considerable decisional discretion in the judiciary.<sup>251</sup> Determining whether a particular state law is preempted requires identifying the underlying federal purposes and (although the cases occasionally suggest the opposite)<sup>252</sup> assessing the extent to which state law interferes with those purposes.<sup>253</sup> Those assessments, in turn, may be influenced by broader concerns, including views about the importance of compensation for persons who are injured,<sup>254</sup> the capacity of juries to make decisions in complex areas,<sup>255</sup> the burdens that varying state regulations impose,<sup>256</sup> and the importance of nationwide uniformity.<sup>257</sup> On all of these matters, there is ample room for disagreement among judges, as is most clearly exemplified by the cases that make their way to the Supreme Court. Moreover, although the judicial voting alignments are complex,<sup>258</sup> some of those disagreements will be recurrent and linked to broad judicial attitudes, leading to patterns in which, for example, liberal judges are less likely than conservative ones to find state tort law preempted by federal regulatory schemes.<sup>259</sup>

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249. See Nelson, *supra* note 13, at 280.

250. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000); accord Merrill, *supra* note 5, at 743; Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 *TUL. L. REV.* 1257, 1260 (2010); Young, *supra* note 3, at 275–76.

251. See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 587–88 (2009) (Thomas, J., concurring in the judgment).

252. See, e.g., *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992); *Fid. Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153 (1982).

253. Young, *supra* note 221, at 132 (explaining that preemption disputes often turn on identification of the purpose of a federal regime and the acceptable degree of conflict between federal purpose and state law).

254. See Sharkey, *supra* note 111, at 466–71.

255. See *Wyeth*, 555 U.S. at 626–28 (Alito, J., dissenting) (doubting the capacity of juries in a lawsuit alleging failure to warn by a pharmaceutical manufacturer).

256. See, e.g., *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 671 (2003) (Breyer, J., concurring in part and concurring in the judgment); Young, *supra* note 3, at 275.

257. See Merrill, *supra* note 5, at 733.

258. See *Greve & Klick*, *supra* note 8, at 80–84; Metzger, *supra* note 46, at 37.

259. See Sharkey, *supra* note 12, at 65–73. Any focus on Supreme Court decisions will exaggerate the extent to which judges exercise broad discretion and to which outcomes depend on broad judicial attitudes. Cases in which the Court grants review, after all, are those on which judges can disagree and indeed ordinarily already have done so. But even in matters before the Supreme Court, one should not assume that the legal materials do not matter. Some decisions, after all, are unanimous, and as to others, there are reasons why the Court could find preemption of tort suits against generic drug manufacturers but not brand manufacturers, compare *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), with *Wyeth*, 555 U.S. 555 (2009), or why Department of Transportation safety standards for cars preempt some tort

Just as in the constitutional realm, where judicial restraint, rather than being a value that is consistently held whatever the makeup of the Supreme Court,<sup>260</sup> is likely to appeal to those who are out of sympathy with the prevailing direction of the Court,<sup>261</sup> so too in the domain of preemption, where objections to obstacle preemption will depend on who is applying the doctrine. For example, in the George W. Bush Administration, when a somewhat conservative federal judiciary addressed preemption cases and federal agencies took a position that was generally strongly pro-preemption, obstacle preemption may have appeared to be less attractive to progressives, at least in the large set of cases involving federal health and safety regulation and overlapping state statutory or common law rules. But a few years later, if the focus shifts to Arizona's legislation regulating unauthorized aliens,<sup>262</sup> the justices' views about the desirability of preemption are likely to differ.

Of course, unlike constitutional decisions, preemption decisions are subject to legislative override. But given the difficulty and hence the infrequency of such overrides,<sup>263</sup> one can overstate that difference.<sup>264</sup> Congressional power to override federal court statutory decisions remains important in theory, but in practice, judicial decisionmaking is likely to be final in the vast majority of instances.

For those allergic to judicial decisionmaking that involves any policymaking discretion, one possible alternative would be a penalty-default approach: only Congress can prescribe preemption. The premise is that by refusing to find implied preemption, even where the arguments for it seem powerful, courts would give Congress the incentive, when initially enacting new programs, to specify the scope of preemptive effect. This argument rests on the premise that it is only a lack of will that prevents Congress from specifying statutes' preemptive effect up front. I have already cast doubt on that premise by noting that participants in the drafting process, even if strongly motivated, lack the foresight, or sometimes the consensus, that

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suits but not others, *compare* *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), with *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011).

260. See Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 282–83 (2005); Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 142–44; Seth P. Waxman, *Essay, Defending Congress*, 79 N.C. L. REV. 1073, 1074 (2001) (noting the sharp increase in the Supreme Court's invalidation of federal statutes in the late 1990s); David A. Strauss, *Pop Con*, LEGAL AFF., Mar./Apr. 2005, at 60, available at [http://www.legalaffairs.org/issues/March-April-2005/review\\_strauss\\_marapr05.msp](http://www.legalaffairs.org/issues/March-April-2005/review_strauss_marapr05.msp). See generally Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519 (2012).

261. See Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 633 (2012). For a recent effort to articulate a theory of judicial restraint that would apply to both "liberal" and "conservative" outcomes, see J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY* (2012).

262. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492 (2012); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).

263. See *supra* text accompanying notes 112–118.

264. I may have been guilty in this regard. See Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1172–73 (1986).

would permit resolution of the range of preemption questions that will eventually arise under federal statutory schemes of any complexity.

Further doubt about this premise arises from skepticism about whether legislative drafting consistently responds to judicial interpretive approaches.<sup>265</sup> A recent study by Professors Bressman and Gluck finds the picture in this regard to be mixed. In the specific context of preemption, they find that the majority of legislative drafters already seek to resolve preemption issues when possible—and that the presumption against preemption serves to focus attention on the issue of preemption.<sup>266</sup> However, the respondents in their study did not understand that courts would use the presumption against preemption to tip the scales of ambiguous statutory language in a particular direction, and indeed more than twice as many expected that courts would resolve ambiguity *in favor of* rather than *against* preemption.<sup>267</sup> Thus, the penalty-default theory does not appear to be realized in practice.

Doubts about the likely efficacy of the penalty-default approach are reinforced by the limited effectiveness of a similar default approach in another area—that of implied rights of action. In 1979, Justice Rehnquist suggested in an opinion that from that point forward, “the ball, so to speak, may well now be in [Congress’s] court” and the judiciary “should be extremely reluctant to imply a cause of action absent” legislative specification.<sup>268</sup> Yet Professors Bressman and Gluck found that nearly all of the legislative drafters they interviewed were unaware that for more than thirty years, the courts have essentially followed Justice Rehnquist’s approach.<sup>269</sup> Those findings provide additional reasons to doubt the premise that a shift in judicial approach would lead to a shift in legislative behavior.

A related but distinct penalty-default argument addresses the possible effect of judicial approaches to preemption on congressional action not when a statute is initially enacted but rather after courts have addressed the scope of its preemptive effect. Professor Hills has offered a version of this argument, suggesting that a strong presumption against preemption may be justified by the prospect that those interests favoring preemption—typically regulated businesses—will have the political clout to put preemption on the legislative agenda and to induce Congress to override a judicial refusal to preempt.<sup>270</sup> I believe, however, that both theory and experience undermine this argument. For this approach to work, Congress would have to be aware of a judicial decision not to preempt and would have to muster the legislative energy to override it; and in so doing, Congress would have to overcome the powerful inertia of the federal legislative process, the intense competition

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265. See Nourse & Schacter, *supra* note 99, at 600–03 (reporting the limited extent to which committee and legislative drafting staff respond to judicial canons of construction).

266. Gluck & Bressman, *supra* note 241, at 943, 1004.

267. *Id.* at 944.

268. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring).

269. Gluck & Bressman, *supra* note 241, at 946 n.141.

270. See Hills, *supra* note 183, at 28.

for the limited time on the legislative agenda, and the numerous vetogates along the way.

The virtual absence in the current regime of legislative revision of decisions refusing to preempt state law—many of which are controversial and were rendered by divided courts—is surely strong evidence that a penalty-default regime is unlikely to lead to congressional action. Part of the reason may be that the distribution of political force is not as clearly one-sided as Professor Hills suggests; after all, a range of arguments associated with the concept of the political safeguards of federalism rest on the premise that the states, which would ordinarily oppose preemption of their laws, have particular clout in the national political process.<sup>271</sup> In addition, powerful interest groups frequently also favor state regulation; these groups are as diverse as civil rights groups (which would strongly oppose congressional efforts to override the decision that national banks can be subjected to state fair housing laws)<sup>272</sup> and groups that favor state efforts to regulate undocumented aliens (which would strongly oppose congressional efforts to override decisions that permit states, in important respects, to address the problem of undocumented aliens by imposing licensing requirements on businesses).<sup>273</sup> All in all, the likelihood of congressional action seems small.

Finally, even on the heroic assumption that Congress could eventually resolve all preemption issues, such an approach would come with considerable costs. Most importantly, there would be an interim period during which state laws that should be preempted would remain in effect, awaiting congressional engagement. For however long that period might be, the “wrong” legal regime would be in effect. And the consequent uncertainty about whether and when the law will change, as well as the transitional difficulties that might arise if and when Congress did take action, would create additional costs.

Thus, none of the default arguments seems to rebut the basic proposition that Congress lacks the capacity to address preemption issues in a comprehensive manner, particularly in schemes of some complexity. If that is correct, then considerable judicial discretion is inevitable. Indeed, no justice advocates abolition of all implied preemption, a position that might be viewed as in conflict with the Supremacy Clause. But once judges recognize

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271. See, e.g., JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 178–81 (1980); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

An additional difficulty is that any Congress-forcing strategy is likely to succeed only if there is a high degree of coordination among federal and state judges, a circumstance that is unlikely to arise. See Merrill, *supra* note 5, at 754 n.106 (discussing ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 118–48 (2006)).

272. See *Cuomo v. Clearing House Ass’n, L.L.C.*, 557 U.S. 519 (2009).

273. See *Arizona v. United States*, 132 S. Ct. 2492 (2012); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).

implied preemption, even under rubrics designed to limit its scope—like Justice Thomas’s “logical contradiction” test—judges will differ when applying the legal standards.<sup>274</sup> All of this suggests that judicial decisionmaking that involves some policymaking discretion is inevitable and also necessary to serve other important goals—here, the sensible integration of federal and state laws.<sup>275</sup>

### B. Courts Versus Agencies

If it is often unlikely that Congress will have clearly and specifically resolved the full range of preemption questions that a federal statute presents, it does not necessarily follow that the unresolved questions must be left for the courts to decide. For many controversies about preemption relate to federal legislative schemes involving administrative agencies. In this subset of preemption cases, if the legislature has not resolved the specific issue, an

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274. See *supra* Section I.E.

275. See generally Meltzer, *supra* note 38.

A thoughtful recent commentator has echoed Justice Thomas’s concerns, noting the tension between the methodology in preemption cases and that followed more generally in cases of statutory interpretation, and urging that the proper resolution of that tension is to follow a textualist approach to preemption issues. Note, *Preemption as Purposivism’s Last Refuge*, 126 HARV. L. REV. 1056 (2013). Beyond arguments that echo Justice Thomas’s objections, the Note’s author compares a sample of thirteen field and obstacle preemption cases decided since 2002 with statutory interpretation decisions in the same period and finds that in the former, the Supreme Court has been significantly less likely to be unanimous and that the average number of dissenting votes has been higher. *Id.* at 1063.

Quite apart from any statistical questions that observers more sophisticated than I might raise, several comments about this contention seem appropriate. First, although it is difficult to make a global statement about whether preemption cases are inherently more likely to generate division than other statutory interpretation cases, it surely is true, as already noted, that preemption decisions are full of recurrent divisions—notably between proponents and skeptics of regulation—that many commentators have associated with attitudinal differences among the justices. See *supra* note 38. It is far from clear that those differences would disappear were the Court to follow a different approach to deciding preemption cases. Indeed, insofar as the critique of obstacle preemption rests heavily on the claim that judges are making policy and injecting their own ideological positions, I have noted that Professor Sharkey has found evidence of similar behavior in Justice Thomas’s own decisions interpreting express preemption clauses. See *supra* notes 184–185 and accompanying text. Moreover, for those critical of a court’s use of a purposivist approach to preemption decisions, the relevant comparison set is not statutory interpretation cases generally but rather preemption cases generally—or more specifically, if also more hypothetically—how decisions relying on obstacle preemption would be decided under some alternative approach. For example, I have argued that Justice Thomas’s suggested substitution of a “logical contradiction” test for obstacle preemption analysis is far less likely to lead to clear-cut resolutions than might first seem to be the case. See *supra* Section I.E.

Finally, a full assessment of the decisions and the methodologies underlying them would have to consider not only the relative degree of unanimity, but also, in a larger sense, the correctness the decisions generated under one approach or another. If all the justices agreed to interpret ERISA’s preemption clause according to its literal meaning, perhaps there would be fewer dissenters in preemption decisions. But any such consensus that might result would, in Justice Scalia’s words, “decree a degree of pre-emption that no sensible person could have intended.” See *supra* note 134 and accompanying text.

important question remains about how to distribute the authority to determine preemptive effect between courts and federal agencies.<sup>276</sup>

Without a doubt, broader deference by courts to an agency's view of a preemption question would, at least in some cases, reduce the judicial role in preemption disputes. But however one defines the role of agencies, courts will continue to play a central role in resolving preemption disputes.

A great deal of thoughtful writing has discussed the complex and important issue of the proper role of agencies and the extent to which courts owe them deference in preemption cases.<sup>277</sup> My views resemble those of Professor Merrill, who concludes that, on balance, courts are the least-worst institution to have primary responsibility for resolving preemption questions that Congress has not specifically and clearly resolved, but that courts should draw on the advantages of federal agencies to improve their performance.<sup>278</sup> He advocates judicial deference to agency views, but rather than support strong *Chevron* deference, he proposes a distinctive form of deference that would focus on those aspects of administrative decisionmaking in which agencies possess the greatest comparative advantage as compared to courts: agency views of the practical impact of state rules on the effectuation of federal statutory purposes. He also suggests that deference should be greater if the agency process has permitted all interested parties to participate.<sup>279</sup>

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276. As a case like *Geier* makes clear, state law is preempted when it conflicts not only with a federal statute but also with a valid federal administrative rule. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); see also *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153–54 (1982); *United States v. Shimer*, 367 U.S. 374, 382 (1961).

277. Leading articles include Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1948–83 (2008); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695 (2008); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737 (2004); Merrill, *supra* note 5; Metzger, *supra* note 46; and Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008).

278. Merrill, *supra* note 5, at 759.

279. See *id.* at 775–77; accord *Mut. Pharm. Co., Inc. v. Bartlett*, No. 12-142, 2013 WL 3155230, at \*14 (U.S. June 24, 2013) (Breyer, J., dissenting) (refusing to defer in part because the agency failed to hold hearings or to solicit the views of the public).

There are, as the Court noted in *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), two different issues of statutory interpretation that affect whether state law is preempted: “[T]he question of the substantive (as opposed to pre-emptive) meaning of a statute [and] the question of whether a statute is pre-emptive,” *id.* at 744. Professor Young suggests that courts may defer to agency interpretations of “what the relevant statute does,” but “*Chevron* should not be construed to require similar deference to agency conclusions about the law’s preemptive effect.” Young, *supra* note 277, at 870–72. That distinction, however, is often hard to maintain. To be sure, the interpretation of an express preemption clause ordinarily appears to be something other than what the statute does. But consider *Fidelity Federal Savings & Loan Ass’n v. De la Cuesta*, where a federal regulation effectively gave federally chartered savings and loan associations a right to enforce due-on-sale clauses in mortgages. 458 U.S. at 144. Had that case been decided after *Chevron*, presumably unless the statute spoke to the question, the agency’s view would have been entitled to *Chevron* deference. But the regulation, if valid, necessarily preempted state laws that limit the enforceability of due-on-sale clauses, showing the difficulty of separating the question of preemption from the question of what the statute does. Indeed, in

Some commentators have proposed similar approaches,<sup>280</sup> while others have suggested standards that are less deferential to agencies (at least when the agency's interpretation favors preemption).<sup>281</sup> For present purposes, two points are central. First, however authority is distributed between courts and agencies, someone other than Congress will often have to make decisions about preemption.<sup>282</sup> Second, however the question of deference to agencies is resolved, courts will retain a considerable decisional role: some preemption cases do not involve an agency at all, while others raise issues that the agency has yet to address, and in which the agency will not necessarily provide views as an amicus. (Too often commentators forget that many preemption cases originate in *state* court, where federal agency participation is

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at least some cases, an agency might be able to circumvent any less deferential standard governing whether a statute preempts by simply taking a broad view of what a statute does. As Professor Merrill stresses, the suggested distinction would be certain to produce complexity and confusion. Merrill, *supra* note 5, at 773.

Professor Merrill's approach of applying his *Skidmore*-like standard to issues both of substance and preemption creates a different conundrum. For while questions of statutory interpretation will generally be subject to strong deference under *Chevron*, the subset of interpretive questions that implicate preemption would be governed by a less deferential standard of review. Drawing that line and justifying it would be a challenge. *Cf.* *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868–71 (2013) (in rejecting the argument that *Chevron* deference does not apply to questions of the agency's jurisdiction, stressing the difficulty of distinguishing jurisdictional from nonjurisdictional statutory provisions). Moreover, in some situations, a question of statutory meaning may arise in a setting—for example, in a dispute between a federal agency and a regulatee—that does not immediately involve the prospect of preemption; perhaps the relevant state has not (yet) enacted a law that intersects with the federal regime, or the regulatee has not (yet) been sued for a common law tort. In such a case, *Chevron* deference would presumably apply. But if the same question of substantive meaning were to arise in a later case where preemption was at issue, should a court give only *Skidmore* deference—and ignore the earlier decision applying *Chevron* deference?

The simplest solution, of course, is to give *Chevron* deference to all agency determinations of statutory meaning, including whether a federal statute preempts. But if agencies are the most likely institution to find preemption, such an approach could dramatically expand the scope of preemption, at least with regard to some administrators in some administrations. That may be why the Supreme Court has yet to endorse that view. *See* *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 523–25 (2009); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 41 (2007) (Stevens, J., dissenting) (joined by Chief Justice Roberts and Justice Scalia in concluding that accepting *Chevron* deference on issues of preemption would too “easily disrupt the federal-state balance”); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495–96 (1996).

280. *See, e.g.*, Mendelson, *Chevron and Preemption*, *supra* note 277; Sharkey, *supra* note 115; Young, *supra* note 277, at 890 (suggesting the convergence of views results from the chameleon-like quality of the *Skidmore* standard).

281. *See* Young, *supra* note 277, at 892–93 (advocating, in addition, deference to state agency determinations as part of the application of *Skidmore*).

282. Professor Sunstein objects to *Chevron* deference on the ground that preemption decisions should be made politically, not bureaucratically. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000). At least with respect to the interpretation of statutes (rather than the exercise of delegated authority), the burden of this Article is that it is unrealistic to expect that particular decisions will invariably be made politically (in the sense of being specifically resolved by Congress) and hence that realistically, the choice is often one between judges and agencies.

particularly unlikely.)<sup>283</sup> Although broader deference to agencies would reduce the role of courts at the margin in a subset of preemption disputes, whatever the approach to the role of agencies, a robust judicial role will remain.

### III. THE SUPREMACY CLAUSE, NON OBSTANTE CLAUSES, AND THE PRESUMPTION AGAINST PREEMPTION

My doubts about the resolving power of textualism and my embrace of the type of purposivist approach reflected in obstacle preemption doctrine should not be taken to suggest that more preemption is better. Indeed, the discussion of the difficulties that broad language in statutory preemption clauses can pose, in which ERISA's preemption clause is the poster child, argued quite the contrary—that in that context, a more purposivist approach would appropriately restrict the reach of preemption.

But if, as I urge, courts are to play a large lawmaking role in preemption cases—one that necessarily involves their exercising judgment about complicated matters—there remains an important question about the attitude with which they undertake that responsibility. In particular, should courts strive to respect the traditional presumption against preemption of state law, or should they instead simply try to do their best in resolving the preemption question, free from any canon of interpretation or thumb on the scale?

In this Part, I address this question. An initial inquiry focuses on whether the constitutional text speaks to the appropriateness of a presumption against preemption. As noted above,<sup>284</sup> in *PLIVA, Inc. v. Mensing*,<sup>285</sup> Justice Thomas's plurality opinion adopted an analysis developed by Professor Nelson that takes issue with the presumption against preemption. The plurality accepted Professor Nelson's argument that the Supremacy Clause should be understood as a non obstante clause, designed to override what might otherwise have been an operative canon of statutory construction against implied repeals.<sup>286</sup> On this view, the Supremacy Clause directs that federal enactments be given their ordinary meaning, even if that approach results in the preemption of state law.<sup>287</sup> This interpretation of the constitutional language leaves no room for a presumption against preemption.

Section III.A assesses this argument challenging the presumption against preemption, concluding that it is not convincing. Section III.B then explores more specifically whether courts, in undertaking the purposivist approach

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283. It is also worth noting that state courts may be less sympathetic than federal institutions to preemption. See Keith N. Hylton, *Preemption and Products Liability: A Positive Theory*, 16 SUP. CT. ECON. REV. 205 (2008) (finding that, in products liability cases, the lower federal courts are significantly more likely than state courts to find preemption).

284. See *supra* text accompanying notes 22–25.

285. 131 S. Ct. 2567 (2011).

286. *PLIVA*, 131 S. Ct. at 2579–80 (plurality opinion); see also Nelson, *supra* note 13, at 232, 255–56.

287. Nelson, *supra* note 13, at 232.

that this Article favors, should be guided by a presumption against preemption.

A. *The Supremacy Clause as a Non Obstante Clause*

The Supremacy Clause reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>288</sup>

Professor Nelson contends that the Supremacy Clause provision was, in effect, a directive to the courts, particularly the state courts, about two matters: first, the priority to be assigned to federal over state law in cases of possible conflict;<sup>289</sup> and second, the proper interpretive methodology to be used when encountering a possible conflict between federal and state law.<sup>290</sup> No one would disagree that federal law trumps conflicting state law. It is Professor Nelson's second point that is novel and interesting.

Professor Nelson starts with the claim that there was a general presumption at the time of the nation's founding against finding that one statute impliedly repealed another, unless the later statute also included a non obstante clause—a clause directing courts not to apply that general presumption against implied repeals.<sup>291</sup> The Supremacy Clause, he contends, is a constitutional non obstante clause; its concluding words—“any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”<sup>292</sup>—direct courts (or at least state courts) that they need not try to avoid the conclusion that federal law conflicts with, and thereby overrides, state law.<sup>293</sup>

Although my approach to constitutional interpretation is not exclusively originalist or textualist,<sup>294</sup> let me first try to examine Professor Nelson's argument on its own terms and then proceed to assess it in light of its fit in the contemporary world. Professor Nelson's interpretation presents a number of difficulties. First, a strict textualist would note that the Supremacy Clause's final words, which Professor Nelson contends serve as a non obstante clause, are directed only to the “Judges in every State”; unless that phrase is read to embrace federal judges “in” a state, the clause would not apply to the federal

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288. U.S. CONST. art. VI, cl. 2.

289. *Nelson*, *supra* note 13, at 250.

290. *Id.* at 254–60.

291. *See id.* at 237–44.

292. U.S. CONST. art. VI., cl. 2.

293. *Nelson*, *supra* note 13, at 255–60.

294. I say exclusively because I do not mean to deny that text and at least some forms of argument that might be viewed as originalist are often important elements in constitutional interpretation. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

courts.<sup>295</sup> Second, a statutory non obstante clause would not apply to preemption of the common law, and hence would not set aside a different canon of construction—that statutes in derogation of the common law should be strictly construed. Whether the common law is viewed as it is today—as state law<sup>296</sup>—or as it may have been at the nation’s founding—as part of the general law<sup>297</sup>—it is hard to see a basis for distinguishing federal displacement of state statutes from displacement of common law rules. This is a point of some significance whether viewed from the perspective of 1789, when statutory law was less prevalent, or from today’s perspective, which features numerous cases involving the interplay of federal regulatory schemes and state tort claims.<sup>298</sup>

An additional question concerning Professor Nelson’s approach arises from the fact that many of the reasons commonly thought, within a unitary system, to underlie the maxim that repeals by implication are not favored, and hence that later-enacted statutes should be construed not to contradict earlier ones, apply weakly if at all in the context of preemption of state law in a federal system. Professor Nelson acknowledges this difference but does not accord, in my judgment, adequate weight to the distinctiveness of the federal–state setting.<sup>299</sup> He explains his conclusion this way:

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295. There is a grammatical uncertainty whether the language that Professor Nelson views as a non obstante provision addresses only state judges or extends more broadly. For his arguments why it has the broader application, but also why it would not be odd for it to be limited to state judges, see Nelson, *supra* note 13, at 257–60.

296. In discussing “the common law,” I am ignoring post-*Erie* federal common law.

297. See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

298. There has been an academic dispute about whether the Supremacy Clause’s reference to the “laws” of the states includes the common law at all. Professor Clark argues that the description of supreme *federal* law in the first part of the Supremacy Clause refers only to the Constitution, federal statutes, and treaties, and hence that that Clause’s text suggests limits on the preemptive effect of federal common law (as well as of federal administrative regulation). Clark, *supra* note 54, at 1331–38. In response, Professor Strauss argues that if Professor Clark’s textual argument is correct, it suggests that the second part of the Supremacy Clause permits displacement only of state constitutions and statutes but not of state common law. Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1570–71 (2008). Professor Clark replies that the common law was a separate body of law that, at least in many states, had to be “received” in a state by a receiving statute, and so the Supremacy Clause’s reference to the laws of the state encompassed, albeit indirectly, the common law by virtue of the reception statute. Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1685–91 (2008). The arguments back and forth are complex, as indeed are efforts to excavate original understandings of the common law and its relationship to the New Republic. See generally Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 768–77 (2010). In any event, the lack of a clear textual reference to the common law in the Supremacy Clause, and the need for considerable intellectual gymnastics to try to deal with this omission, reinforces the point in text that Professor Nelson’s interpretation of the Clause as implementing a statutory non obstante policy itself raises a difficult set of textual questions.

299. Professor Nelson notes several traditional reasons for this maxim. The first is that an earlier-enacted statute, “established with ‘gravity, wisdom and universal consent of the whole realm,’” should not be displaced by general and ambiguous language in a later enactment. Nelson, *supra* note 13, at 241 n.47 (quoting *Dr. Foster’s Case*, 77 Eng. Rep. 1222, 1242

To be sure, the reasons for reading one law to avoid contradicting another are weaker when the two laws were enacted by different legislative bodies; it makes more sense to presume that statutes enacted by the same legislature will be consistent with each other than that statutes enacted by Congress will always be consistent with statutes enacted by the states. But the Supremacy Clause did not rely upon state courts to reach this conclusion on their own.<sup>300</sup>

That is surely possible. But it is also possible that the differences in context were so great and so evident as to make it implausible that a global non obstante clause was thought necessary and hence implausible that the Supremacy Clause should be so understood.

Among the reasons why any analogy of preemption to implied repeals and non obstante clauses is severely strained is that a federal statute can preempt state law enacted *after* the federal law was first passed. A non obstante clause, by its nature, pertains only to previously enacted statutes; by contrast, federal law trumps state law, whatever the sequence of enactment.<sup>301</sup> The Supreme Court's recent decision concerning the preemptive effect of the 1986 federal immigration statute on a 2010 Arizona statute regulating undocumented aliens provides a prominent example.<sup>302</sup>

I have already questioned how well Professor Nelson's understanding of the Supremacy Clause fits with one body of *nonfederal* law that might potentially be preempted—the common law, as understood at the nation's founding. But moving from the founding era to today's world, that understanding also does not fit well with existing bodies of *federal* law. For example, a number of canons of construction instruct courts to interpret federal statutes in a fashion designed to minimize conflict with state policy and state law. Thus, the decision in *Gregory v. Ashcroft*<sup>303</sup> disfavored federal regulation of certain fundamental decisions by states in structuring their governmental operations, requiring a clear statement before a court will interpret a federal

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(K.B. 1614) (Coke, C.J.)). But in a federal system, a state law alleged to be preempted was not enacted by the "whole realm" or indeed necessarily with the interests of the whole realm in mind. Another traditional reason for the maxim is that courts should "resist the conclusion that [legislators] would either change their minds or show disrespect to the judgment of their predecessors." *Id.* But this reason, too, does not fit preemption because it is not the preceding federal legislators, but legislators of a separate, smaller jurisdiction whose judgment is "disrespected" by enactment of a preemptive federal statute that speaks for the nation as a whole. A final suggested reason for following the maxim is that "finding a repeal by implication would dishonor the *later* legislature, because it would indicate that the legislature had been either ignorant of the earlier statute or negligent in failing to include any express words of repeal." *Id.* Here, too, the point does not fully apply to federal preemption, for (as stressed above, *see supra* text accompanying note 101) there is no dishonor in recognizing that Congress cannot know all existing state and local law.

300. Nelson, *supra* note 13, at 255.

301. This is the ordinary rule, absent some form of contrary statutory specification. For discussion of a federal statute that, unusually, preempted past but not future state laws, see Hal S. Scott, *Federalism and Financial Regulation*, in FEDERAL PREEMPTION, *supra* note 1, at 139.

302. See *Arizona v. United States*, 132 S. Ct. 2492 (2012).

303. 501 U.S. 452, 460 (1991).

statute as doing so. A similar clear-statement policy, announced in *Penhurst State School & Hospital v. Halderman*,<sup>304</sup> governs the creation of binding conditions on federal grants. Although not usually discussed this way, both of these rules, where applicable, are presumptions against preemption of state policy and state law.<sup>305</sup> One might view these canons as specific, narrow presumptions that stand as exceptions to the general non obstante approach of the Supremacy Clause. Yet if one's methodology is textualist, then these "exceptions" raise the question of how one justifies overcoming the supposedly clear text of the Supremacy Clause. Thus, in the end, they are difficult to reconcile with a textually based, non obstante view of the Supremacy Clause.

A final question about the Nelson/Thomas approach concerns its implications for the interpretation of federal constitutional provisions. The Supremacy Clause does not distinguish between the effect of federal constitutional and federal statutory provisions when they conflict with state law.<sup>306</sup> Although we rarely speak this way, it would be entirely accurate to say that the First Amendment preempts state laws seeking to ban flag burning or that the Eighth Amendment preempts state laws authorizing capital punishment for juveniles. Does the Supremacy Clause, then, reverse Professor Thayer's rule of construction and provide that when there is a potential conflict between the federal Constitution and state law, there should be no presumption of constitutionality or deference to state governments?<sup>307</sup> And what would such an approach imply when there is a question about the consistency of a *federal* statute with the federal Constitution? That question would not be governed by the non obstante reading of the Supremacy Clause, but once a court had ruled, for example, that a state flag-burning law unconstitutionally limited free expression, it would be odd, at least in our postincorporation world, to reach a different result in a subsequent case involving an identical federal law on the ground that the Supremacy Clause does not apply.

This collection of questions about the Nelson/Thomas approach stands quite apart from larger questions that the approach raises, which require one to step outside the textualist and originalist methodology. In many other areas concerning the relationship of state and nation, prevailing contemporary arrangements and doctrines differ greatly from those at the nation's founding. To mention just one central and well-known development: the nineteenth- (and occasionally twentieth-) century conception of dual federalism—the conception of largely distinct spheres for federal and state

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304. 451 U.S. 1, 17 (1981).

305. A clear-statement rule that points in the other direction involves the presumption that a federal statute has not authorized state actions that, absent congressional authorization, would violate the dormant Commerce Clause. See *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984).

306. Hoke, *supra* note 3, at 755.

307. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1893).

authority—has given way.<sup>308</sup> In the early twentieth century, as Professors Hoke and Gardbaum have argued, preemption decisions reflected a conception of exclusive federal regulation—what Professor Gardbaum calls latent exclusivity. Once Congress had entered a field in which it was empowered to legislate and had enacted regulation, state lawmaking was deemed preempted in the field of legislative action, however defined, without regard to whether particular state laws conflicted with the substance of the federal regime.<sup>309</sup>

Neither dual federalism nor latent exclusivity governs today. Instead, there is an appreciation that the authority of state and national governments pervasively overlaps.<sup>310</sup> States have a broad general legislative authority whose scope is subject to only a few federal constitutional limits. Congress's legislative authority is vast; the constitutional limits on that power, despite a handful of recent decisions limiting its scope,<sup>311</sup> remain rather minor in the grand scheme of things.<sup>312</sup> The federal reach has been vastly augmented by the development and constitutional acceptance of federal administrative agencies. This marked expansion in federal authority—both its constitutional scope and its actual exercise by Congress and administrative agencies—has made untenable earlier approaches to preemption; automatic field preemption in the post–New Deal era would have threatened large swaths of established state law.<sup>313</sup>

What additional implications these developments may have for the appropriate scope of preemption doctrine remains contested, as I discuss below. The key point here is that it would be extremely odd if we accepted broad changes in the relationship of nation and state but then insisted on

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308. See, e.g., Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

Like many a discarded doctrine, however, its vestiges continue on occasion to haunt us. Peter M. Shane, Reuschlein Lecture, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 215 (2000) (reading *United States v. Lopez*, 514 U.S. 549 (1995), as resuscitating dual federalism); see also *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2659 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“[T]he Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the Federal Government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach.” (quoting *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 654–55 (1999) (Kennedy, J., dissenting)) (internal quotation marks omitted)); *United States v. Morrison*, 529 U.S. 598, 616 (2000) (suggesting that marriage is a domain of traditional state rather than federal regulation); *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 13 (1st Cir. 2012).

309. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 801–05 (1994); Hoke, *supra* note 3, at 738–39.

310. See, e.g., Corwin, *supra* note 308, at 17–23; Young, *supra* note 3, at 259.

311. See, e.g., *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2566; *Morrison*, 529 U.S. 598; *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Lopez*, 514 U.S. 549.

312. Young, *supra* note 3, at 321.

313. See Gardbaum, *supra* note 309, at 801–06. For a fuller account of the historical developments, see Young, *supra* note 3, at 257–69.

adhering to an originalist reading of the text of the Supremacy Clause with respect to the appropriate scope of federal preemption.<sup>314</sup>

### B. *The Presumption Against Preemption*

Rejection of the non obstante interpretation of the Supremacy Clause does not, in itself, resolve the broader question about the appropriateness of the presumption against preemption. That presumption has come upon hard times in recent years. First, it has been followed inconsistently, sometimes invoked, sometimes ignored.<sup>315</sup> Second, even when invoked, it has received different formulations: that Congress did not intend to displace “historic police powers of the States”;<sup>316</sup> that Congress “did not intend to displace state law”;<sup>317</sup> or sometimes that the presumption can be overcome only when preemption “was the clear and manifest purpose of Congress.”<sup>318</sup> Third, the presumption seems to be variable, having less force in some areas (for example, matters deemed to touch on federal foreign relations) than others—a variability that some have sharply criticized.<sup>319</sup> Fourth, some commentators have detected in the Court’s decisions, whatever the articulation of the doctrinal test, a “centralization default,” with the Court frequently upholding preemption in order to promote national uniformity.<sup>320</sup> And finally, quite apart from the course of decisions, some have argued that there is no good reason for the presumption; courts should simply interpret statutes to mean what they appear to mean.<sup>321</sup>

Although the approach to preemption that I have advocated does not necessarily entail acceptance or rejection of the presumption against preemption, I believe that the presumption serves a useful purpose, particularly given the robust role for courts in preemption decisionmaking that I have

314. See Hills, *supra* note 183, at 6 n.12.

315. E.g., Hoke, *supra* note 3, at 733; Merrill, *supra* note 5, at 741; Nelson, *supra* note 13, at 288–89; Sharkey, *supra* note 111, at 458; Young *supra* note 3, at 307. Of course, in some cases the matter may be so clear that the presumption is simply beside the point. See Young *supra* note 3, at 308–09.

316. Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (internal quotation marks omitted); see also Buckman Co. v. Plaintiffs’ Legal Comm., 531 U.S. 341, 347 (2001) (“Policing fraud against federal agencies is hardly ‘a field which the States have traditionally occupied.’” (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).

317. Maryland v. Louisiana, 451 U.S. 725, 746 (1981); see also Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 241 (1947) (Frankfurter, J., dissenting) (declaring that state authority over “matters that are the intimate concern of the state” should not be displaced “unless Congress has clearly swept the boards of all State authority, or the State’s claim is in unmistakable conflict with what Congress has ordered”).

318. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting Rice, 331 U.S. at 230 (majority opinion)).

319. See, e.g., Goldsmith, *supra* note 67; Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 142–52 (2001).

320. Sharpe, *supra* note 40, at 213–18.

321. See, e.g., Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000).

advocated. The appropriateness of the presumption is a complex and difficult question, however, in part because it involves the intersection of two distinct kinds of discourse. The first is a political discourse about preserving the role of the states as rival sources of power that can compete with the national government for the public's loyalty, serve as a protection against the abuse of power, and respond more directly to citizen preferences.<sup>322</sup> The second is a discourse about regulatory policy, and in particular about the desirability and effectiveness of uniform national regulation. Recent presidential administrations have offered sharply different views about regulatory policy: the George W. Bush Administration sought to use executive authority (including the mere issuance of regulatory preambles) broadly to preempt state regulation and promote uniformity<sup>323</sup>—a position that the Obama Administration rejected in turn.<sup>324</sup>

With respect to the discourse concerning effective regulatory policy, just as the Constitution “does not enact Herbert Spencer’s Social Statics,”<sup>325</sup> it also does not manifest a consistent bias for or against either regulation or national uniformity. But with respect to the discourse of abstract federalism, I think that there is a stronger case for the presumption. One argument commonly made in this regard is that the recognition of virtually unlimited federal legislative authority, and the mounting exercise of such authority by Congress and federal administrative agencies, threatens the capacity of states to play their designated role.<sup>326</sup> Fidelity to the federalist structure requires a compensating adjustment—a presumption against preemption—in order to preserve the federal balance and “to protect a meaningful role for the states.”<sup>327</sup>

This argument has some resonance for me, although it is not without weaknesses, well put by Professor Goldsmith: “Like all translation arguments, this one is difficult to evaluate because the object of translation (original meaning), the identification of the changed circumstances that warrant translation to preserve original meaning, and the selection of the proper translation are all generally contested.”<sup>328</sup> One might add that curtailing the preemptive effect of a plainly constitutional statute compensates only indirectly for the overall breadth of federal legislative power. Moreover, perhaps

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322. See, e.g., Galle & Seidenfeld, *supra* note 277, at 1941 & n.29 (labeling this “abstract federalism”); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1848–50 (2005).

323. See, e.g., *Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority? Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007); Metzger, *supra* note 46, at 2025 & n.3; Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007).

324. See Memorandum on Preemption, *supra* note 7.

325. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

326. E.g., Young, *supra* note 322, at 1848–50.

327. Young, *supra* note 277, at 872; accord Young, *supra* note 322.

328. Goldsmith, *supra* note 67, at 187 (citing Michael Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997)).

the federal balance has shifted appropriately, if in fact greater national regulation and uniformity and a reduced scope for the state regulation is the proper response of our constitutional system to today's regulatory challenges.

Nonetheless, there is a distinct but related concern that falls under the rubric of abstract federalism. The robust judicial role that I have advocated has to be played over a wider stage because the scale and complexity of federal legislative activity has expanded to a degree unimaginable to the Founders. Thus, a great deal of decisionmaking necessarily will be undertaken by federal judges, who are not subject to the same inertia and the same political influences as the federal legislative process.<sup>329</sup> That combination of factors seems to me to provide a reason for placing the thumb on the scale that the presumption against preemption provides.

A related but distinct argument for the presumption links the preceding concerns and the long history of concurrent regulation<sup>330</sup> to Professors Hart and Wechsler's key insight in 1953 about the interstitial nature of federal law, which "builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose."<sup>331</sup> That insight is, quite plainly, a generalization, not a universal rule, and today it has less force in some areas because federal law has grown vastly and is now sometimes more primary than interstitial.<sup>332</sup> Still, to take one cluster of recent controversies, Congress enacts federal regulatory schemes against the background of state tort law; it does not typically recreate state tort rules, nor, insofar as it has enacted legislation that could be taken to displace state tort law, does Congress routinely appear to consider whether some substitute federal compensatory mechanism (for example, a private right of action) is needed.<sup>333</sup> More broadly, the displacement of one state law rule may create peculiar intrastate disuniformities or have spillover effects, not always anticipated or understood, in other areas of state law that are not

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329. See, e.g., DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995); Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 *VILL. L. REV.* 951, 972–73 (2001); Bradford R. Clark, *Federal Lawmaking and the Role of Structure in Constitutional Interpretation*, 96 *CALIF. L. REV.* 699, 724 (2008); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 *COLUM. L. REV.* 847 (1979); sources cited *supra* note 271.

330. See Young, *supra* note 3, at 317.

331. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 435 (1st ed. 1953).

332. HENRY M. HART, JR. & HERBERT WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 459–60 (Richard H. Fallon, Jr. et al. eds., 6th ed. 2009).

333. Some confirmation of this proposition is found in a recent study suggesting that congressional drafters are unaware of the Supreme Court's case law sharply curtailing, if not eliminating altogether, implied private rights of action for the violation of federal statutes. See Gluck & Bressman, *supra* note 241, at 945 n.141.

preempted.<sup>334</sup> The presumption against preemption, like a number of other interpretive canons, here serves a useful role in protecting legal continuity.<sup>335</sup>

Like many standards of deference, it is unclear how much resolving power any articulation of the presumption will have. But in some ways, the central question is what suffices to overcome any presumption.<sup>336</sup> In cases of implied preemption, although courts have sometimes suggested that any conflict with federal law warrants preemption,<sup>337</sup> in fact because so much state law overlaps with, and might be viewed as conflicting with, federal law in minor ways, some measure of whether the conflict is sufficiently great to warrant preemption is needed.<sup>338</sup> In view of what I have argued about the limits of legislative capacity, a presumption articulated as a clear-statement requirement by Congress would make little sense. And where Congress has enacted an express preemption clause, courts should be wary of using the presumption to reach implausible constructions or to deny fair scope to the words of a statute; rather, courts should use it to resolve interpretive issues when a statute is unclear<sup>339</sup>—an approach that serves to blunt the objection that applying the presumption to express preemption clauses is likely to defeat the purpose of Congress.<sup>340</sup>

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334. See Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 828–32 (1957).

335. David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 937 (1992); cf. Merrill, *supra* note 5, at 748–49 (stressing the importance of stability).

336. See Young, *supra* note 3, at 271.

337. See, e.g., *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992); *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982).

338. E.g., *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 671 (2003) (Breyer, J., concurring in part and concurring in the judgment) (explaining that preemption must be grounded on more than a “modest” conflict).

339. Cf. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 98 (2008) (Thomas, J., dissenting) (contending that the Court in recent decisions has, appropriately, frequently ignored the presumption when interpreting express preemption clauses, and suggesting that courts should not unreasonably interpret such clauses in light of congressional purpose).

340. See Nelson, *supra* note 13, at 291–92.

As noted in text, the question whether any presumption against preemption should apply across the board has occasioned considerable controversy. Any suggestion that the scope of preemption should rest on a priori notions of what is for the states and what is federal (or international) is subject to the same criticism as the old doctrine of dual federalism. See Young, *supra* note 322, at 142–52. Indeed, any categories one might outline will prove to be highly malleable and overlapping; *Crosby* might be viewed as a case about foreign relations or about state procurement. And because states increasingly take action in areas with international repercussions, the effort to identify a category of foreign relations matters is a challenge. See Goldsmith, *supra* note 67, at 196.

Despite the force of the critique, the sense that preemption varies depending on the nature of federal involvement seems stubbornly ingrained. There remains what Professor Merrill terms a “geography” of federal–state relations, in which, for example, the federal government exercises dominant (although not exclusive) authority in such areas as foreign relations, immigration, and Indian affairs, and the states exercise dominant (although not exclusive) authority in such areas of domestic relations and inheritance. Merrill, *supra* note 5, at 748. A key aspect of that intuition relates to the depth of the federal presence: if one important reason

## CONCLUSION

Preemption cases are not known for their methodological consistency. As Professor Young has noted, “even when . . . Justices sign on to a more theoretically ambitious opinion, they seem to feel relatively unconstrained to follow that theory in future cases.”<sup>341</sup> Attitudinalists might ascribe this phenomenon in whole or in significant part to the substantive views of the justices about the desirability of state regulation. Indeed, conservative justices who are generally unsympathetic to state regulation of business will often adopt an approach that calls for preemption of such regulation, while liberal justices, who tend to be sympathetic toward regulation, will often vote against preemption. But the justices’ views about the desirability of preemption shift when their views about the desirability of state regulation shift—as, for example, when reviewing Arizona’s laws regulating undocumented workers.<sup>342</sup>

In the midst of these crosscurrents, Justice Thomas’s recent opinions in preemption cases have put a spotlight on a persistent and initially surprising phenomenon—the dominance in this area of a nontextualist approach to interpretation. Preemption cases highlight vividly the limits of textualism and the limited capacity of the legislature to prescribe, *ex ante*, a specific and comprehensive set of statutory directives that promise to provide a sensible, textually derivable set of outcomes to preemption decisions. The point is not that Congress can never effectively resolve some preemption issues but

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for the presumption against preemption is the notion that federal law is interstitial, that reason fades in force when federal law is more comprehensive. *See Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012). Moreover, when Congress has legislated and there is an uncertain issue about whether the federal statute preempts state law, there are likely to be concerns about the externalities that one state’s action imposes on other states and the nation and about the obstacles that state action poses to federal objectives; these concerns may be more salient in some areas than others. *See Merrill, supra* note 5, at 748–49. In my view, insofar as it is appropriate to have a variable preemption standard, the variable should be the nature of the federal presence rather than whether the subject of state regulation is thought to be traditional.

A dispute over the applicability of the presumption against preemption arose late last term in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013). The question there was whether the National Voter Registration Act’s requirement that states “accept and use” a federally prescribed voter registration form preempts a state’s requirement that persons submitting that form must also submit proof of U.S. citizenship. *Id.* at 2251. Acknowledging that the federal Act was ambiguous, Justice Scalia’s opinion for the Court refused to apply the presumption against preemption on the ground that the Court had never applied that presumption to legislation enacted under the Elections Clause of Article I, section 4: “When Congress legislates with respect to the ‘Times, Places and Manner’ of holding congressional elections, it necessarily displaces some element of a pre-existing legal regime erected by the States.” *Id.* at 2256–57. Both Justices Kennedy and Alito criticized that position. *See id.* at 2260–61 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2271–73 (Alito, J., dissenting).

341. Young, *supra* note 3, at 305.

342. *See Fallon, supra* note 2, at 471, 488; Meltzer, *supra* note 38, at 344, 363–67. The pattern of results in preemption cases does not map perfectly, however, onto any ideological perspective. *See Metzger, supra* note 38, at 9–18.

rather that, at least with respect to federal statutes of any complexity, Congress can rarely craft statutory language that will adequately resolve the full range of preemption issues. Thus, there remains a vital role for courts (and, to some extent, for federal agencies) in seeking to integrate federal legislation with state and local bodies of law so as to craft a working and effective legal order.

The challenge for legislatures in textually specifying the preemptive effect of statutes is particularly acute, given the range of state and federal laws with which they may interact (including laws not yet extant when Congress legislates). But the problems are not discontinuous from other problems faced by efforts to base statutory meaning exclusively on the language that legislatures enact. That is a larger claim, and the evidence offered here is at most suggestive. Nonetheless, there is considerable value in testing the abstract premises of textualism against a concrete body of decisions. The body of preemption decisions highlights the enduring importance, and indeed, I would say inevitability, of purposive interpretation by an engaged judiciary.

