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"THE ORDINARY DIET OF THE LAW": THE PRESUMPTION AGAINST PREEMPTION IN THE ROBERTS COURT

In 2001, the Supreme Court decided a quiet little case about whether the beneficiary rules of a pension plan established under the federal Employee Retirement Income Security Act[1] (ERISA) trumped a Washington statute providing that designation of a spouse as a beneficiary of a nonprobate asset was automatically revoked upon divorce.[2] The majority held that it did. In dissent, Justice Breyer stepped back for a moment to discuss the broader importance of statutory preemption cases for federalism. He stressed "the practical importance of preserving local independence, at retail, that is, by applying pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute's language and purpose with federalism's need to preserve state autonomy."[3] This task, Breyer suggested, is more consequential for federalism than "the occasional constitutional ef-

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[1] 29 USC § 1001 et seq.

[2] *Egelhoff v Egelhoff*, 532 US 141 (2001).

[3] Id at 160 (Breyer, J, dissenting).

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fort to trim Congress' commerce power at its edges"[4] or "to protect a State's treasury from a private damages action."[5] He concluded that "in today's world, filled with legal complexity, the true test of federalist principle may lie . . . in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law."[6]

Justice Breyer's observation—condemned to the hopeless obscurity of an ERISA case—is the most important statement that the Supreme Court has made about federalism in a very long time. It speaks to the needs of federalism doctrine in the post-New Deal era, which largely views the national government and the states as exercising *concurrent* powers. Despite occasional relapses in particular doctrinal areas, we have generally given up on the old regime of "dual federalism," which required the courts to identify and police the boundaries of separate and exclusive spheres of national and state authority.[7] Nowadays, Congress's affirmative commerce authority is extremely broad, and the negative or dormant Commerce Clause that once forbade state regulation of the interstate market has become a nondiscrimination principle rather than a jurisdictional restraint. In this world of concurrent jurisdiction, "the key task of federalism is to manage the overlap of state and federal law."[8] The doctrine of preemption, grounded in the Supremacy Clause rather than in Article I's scheme of limited and enumerated powers, is the key instrument by which the law manages this overlap.

So it is that while cases about the reach of the Commerce Clause or the scope of state sovereign immunity grab the headlines, preemption cases make up the functional heart of the Court's federalism doctrine. As Garrick Pursley has observed, "preemption may be the most important issue for modern federalism theory because it reallocates regulatory authority between the national and state

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[4] Id, citing *United States v Morrison* 529 US 598 (2000) (striking down part of the federal Violence Against Women Act as outside Congress's commerce power).

[5] *Egelhoff*, 532 US at 160–61, citing *Board of Trustees of the University of Alabama v Garrett*, 531 US 356 (2001) (holding that state sovereign immunity barred damages suits against a state government under the Americans with Disabilities Act).

[6] *Egelhoff*, 532 US at 160–61, citing *AT&T Corp. v Iowa Utilities Board*, 525 US 366, 427 (1999) (Breyer, J, concurring in part and dissenting in part).

[7] See generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 Va L Rev 1 (1950) (describing the old dual federalist regime and observing its evaporation after 1937).

[8] Robert A. Schapiro, *From Dualism to Polyphony*, in William W. Buzbee, ed, *Preemption Choice: The Theory, Law, and Reality of Federalism's Core Question* 33, 42 (Cambridge, 2009).

governments."[9] Some of the most important federalism choices that Congress and executive actors make have to do not so much with the scope of federal regulation, but rather with the extent to which that regulation will displace state law. As Professor Pursley explains, "[p]reemption . . . shapes the regulatory environment for most major industries—drugs and medical devices, tobacco, banking, air transportation, securities, cars, and boats[,] to name a few," and it "determines the diversity, scope, and delivery of a wide variety of important government services to citizens"; as a result, "it is the issue of constitutional law that most directly impacts everyday life."[10]

Preemption cases have been strikingly numerous on the Roberts Court's docket, if not always high profile. Last Term, the Court decided five—count 'em—five preemption cases. Moreover, while preemption scholars (including this one) once lamented the Court's failure to see preemption as a coherent area of doctrine—as opposed to simply seeing these cases as raising issues about particular federal statutory schemes—the Court does increasingly seem to see preemption cases as raising a common set of issues deserving at least somewhat unified treatment.

In this essay, I assess the current state of the Roberts Court's preemption jurisprudence, situate it within the broader context of constitutional federalism doctrine, and hazard some guesses about where the Court may be headed. Most observers consider the law in this area to be, in the words of a leading practitioner, "a muddle."[11] Part of my descriptive purpose here is to suggest that the admittedly divergent results and approaches in the Court's preemption cases do not generally stem from confusion, incompetence, or the subordination of legal principle to result-oriented preferences. They reflect, instead, the fact that any overarching framework of preemption principles must be applied to interpret a range of quite diverse statutory regimes, including many in which courts must share interpretive duties with federal agencies. Congress's preemptive intent, in other words, varies by context, and courts faithful to interpreting that intent will thus produce varying results from one context to another. Moreover, even though the Justices are beginning to develop broadly principled frameworks for deciding

[9] Garrick B. Pursley, *Preemption in Congress*, 71 Ohio St L J 511, 513 (2010).

[10] Id at 513–14.

[11] Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 Tulane L Rev 1257, 1257 (2010).

preemption cases, the different methodological commitments held by individual Justices have thus far prevented the Court from coalescing around a single theory. Textualists approach these cases differently from purposivists, and Justices willing to defer to administrative agencies will embrace distinct approaches from those who view the agencies with more skepticism. Without denying that preemption is a muddle, I hope to make the case that this muddle is fundamentally faithful to the statutory and methodological complexity that this area of the law presents.

That said, my normative project is to urge that preemption doctrine should align more closely to the broader imperatives of constitutional federalism doctrine in the post-New Deal era. Those imperatives, as I see them, can be captured in three broad propositions: First, national and state authority is largely concurrent, not limited by exclusive subject-matter spheres. Second, the limits of national authority stem primarily (although not exclusively) from the representation of the states in Congress and the Constitution's rigorous procedural constraints on federal lawmaking. And, third, it follows that the courts' role in protecting federalism should focus on facilitating and enhancing the operation of these political and procedural checks on national authority. These imperatives highlight the critical importance of the "presumption against preemption" developed in *Rice v Santa Fe Elevator Corp.*[12] and similar cases. My doctrinal focus here is thus to defend that presumption against its most prominent critics and to suggest how it might be applied more effectively going forward. I also suggest that tying preemption doctrine more firmly to the broader imperatives of federalism might help the Court transcend its current, more overtly political divisions over tort reform, aggregate litigation, immigration policy, and similar issues.

The analysis has four parts. Part I places preemption within its broader constitutional context, tracing the development of preemption doctrine alongside more general changes in the constitutional law of federalism. Part II then surveys the Court's five preemption cases decided in the 2010 Term. Although these cases cannot be said to present a coherent set of preemption principles, they do provide a window into the Court's evolving thinking on the underlying controversies of preemption doctrine. Part III fo-

[12] 331 US 218 (1947).

cuses on the debate concerning the legitimacy and scope of *Rice*'s anti-preemption presumption and underlying arguments about the original understanding of the Supremacy Clause. Part IV concludes with some comments on the politics of preemption in the Roberts Court.

I. Preemption Doctrine in Constitutional Context

It is only in the last few years that preemption cases have been considered constitutional cases at all. Although a preempted state law is technically unconstitutional under the Supremacy Clause, the cases are generally exercises in statutory construction. But the construction of federal statutes plays a critical role in our federal structure. Our founding document sketches only the barest outlines of our federalism, leaving the rest to be worked out through statutes, judicial decisions, executive branch regulations, and governmental practices.[13] Preemption cases thus significantly shape our federal balance, and preemption *doctrine* has been critically influenced by broader changes in constitutional law.

A. From Dual Federalism to Concurrent Jurisdiction

For most of our history, federalism has been about drawing lines. For a century and a half between the Founding and the New Deal, judges, politicians, and scholars all understood the Constitution to mandate "two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States. The two authorities confront[ed] each other as equals across a precise constitutional line, defining their respective jurisdictions."[14] In this world of "dual federalism," challenges to state or federal measures required judges to determine whether the right government was acting within the right sphere: States were prohibited from acting on matters that were "in their nature national, or admit only of one uniform system,"[15] and the national government was fore-

[13] See generally Ernest A. Young, *The Constitution Outside the Constitution*, 117 Yale L J 408 (2007).

[14] Alpheus Thomas Mason, *The Role of the Court*, in Valerie A. Earle, ed, *Federalism: Infinite Variety in Theory and Practice* 8, 24–25 (1968); see also Anthony J. Bellia Jr., *Federalism* 183 (Aspen, 2011) ("The *dual federalism* paradigm understands federal and state governments to operate in different spheres of authority.").

[15] *Cooley v Board of Wardens of the Port of Philadelphia*, 53 US (12 How) 299, 319 (1852).

closed from regulating matters "essentially local."[16] Legislative and executive actors confronted similar choices: President Herbert Hoover, for example, rejected broad national action to ameliorate the effects of the Depression not because he was opposed to government economic intervention, but rather because he viewed it as predominantly a state responsibility.[17]

In practice, dual federalism was not always categorical. In *Cooley v Board of Wardens*, for instance, the Court distinguished between matters within Congress's commerce power, which required uniform national regulation and therefore excluded the states, and other matters that might be regulated by the states unless and until Congress chose to act.[18] The categories seemed to harden by the end of the nineteenth century.[19] In any event, dual federalism put a premium on line-drawing, and as the economy became more integrated and governments intervened in the market more frequently, the lines became increasingly difficult to draw.

The problem was not simply that the Court needed to know where to draw the lines, but also that the lines drawn needed to appear determinate—to be the product of objective "judgment" rather than judicial "will."[20] As conflict intensified over the reach of the New Deal into traditional spheres of state regulation, proponents of broader national authority pointed to plausible disagreements about the boundaries of national power as evidence that the Court was simply striking down laws that it opposed on policy grounds. President Franklin Roosevelt, for example, cited dissenting opinions in cases striking down New Deal legislation

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[16] See id at 326 (Daniel, J, concurring in judgment); see also *United States v E. C. Knight Co.*, 156 US 1, 13–14 (1895) (rejecting national power to regulate local activities that affect interstate commerce).

[17] See, e.g., William J. Barber, *From New Era to New Deal: Herbert Hoover, the Economists, and American Economic Policy, 1921–1933* 98–99 (Cambridge, 1988) (observing that "Hoover insisted that no American should be allowed to go hungry or cold," but he believed that "[c]are for the needy was properly the responsibility of private organizations and of state and local officials").

[18] 53 US at 319.

[19] See *E. C. Knight Co.*, 156 US at 11 ("[T]he power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals . . . is a power originally and always belonging to the States . . . and essentially exclusive. . . . On the other hand, the power of Congress to regulate commerce among the several States is also exclusive.").

[20] See Federalist 78 (Hamilton) in Jacob E. Cooke, ed, *The Federalist* 521, 522–23 (Wesleyan, 1961); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 Wm & Mary L Rev 1733, 1836–40 (2005) (discussing the judiciary's institutional need to decide according to determinate rules).

to say that "there is no basis for the claim made by some members of the Court that something in the Constitution has compelled them regretfully to thwart the will of the people."[21] Larry Lessig has thus argued that the indeterminacy problem ultimately helped undermine the legitimacy of the Court's stand against the New Deal.[22] After the Court's famous "switch in time" in 1937, it never again sought to draw such restrictive boundaries on national power, and it also significantly dialed back the rigor of its "dormant" Commerce Clause restrictions on state regulation.[23]

After the switch in time, the Court's federalism doctrine has generally abandoned dual federalism's notion of separate spheres in favor of a regime of *concurrent* jurisdiction.[24] The Court's new cases broadened Congress's Commerce Clause authority to reach all activity that "substantially affects" interstate commerce, and the Court expanded this category to include activities that were small in themselves but, in the aggregate, had substantial economic effects.[25] A national regulatory power this broad, however, could no longer be exclusive without wiping out virtually all state regulatory authority. Hence the Court shifted its dormant Commerce Clause jurisprudence from a rule categorically excluding state regulation wherever federal power could reach to a more modest antidiscrimination principle.[26] This meant that both state and national authorities have power to address most subjects of regulatory concern.

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[21] Franklin Delano Roosevelt, Fireside Chat on Reorganization of the Judiciary, March 9, 1937, online at http://www.mhric.org/fdr/chat9.html (concluding that "[i]n the face of such dissenting opinions, it is perfectly clear that, as Chief Justice Hughes has said, 'We are under a Constitution, but the Constitution is what the judges say it is'").

[22] See Lawrence Lessig, *Translating Federalism: United States v Lopez*, 1995 Supreme Court Review 125, 176–80 ("[T]he retreat of the 'Old Court' tracks the collapse of what made it possible for the Court to sustain [formal legal distinctions] in the name of translating federalism. The formalisms themselves had been rendered political. They now seemed more the result of extra-judicial judgments than entailed by the legal material.").

[23] See *Wickard v Filburn*, 317 US 111 (1942); Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U Chi L Rev 483 (1997) (explaining how the New Deal revolution expanded the regulatory authority of *both* federal and state governments).

[24] See Corwin, 36 Va L Rev at 17–23 (cited in note 7) ("According to [the post-New Deal] conception, the National Government and the States are mutually complementary parts of a *single* governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problem in hand.").

[25] See *Wickard*, 317 US at 127–28.

[26] See, for example, *City of Philadelphia v New Jersey*, 437 US 617, 624 (1978) (stating that "[t]he crucial inquiry" is "whether [the state law] is basically a protectionist measure").

Vestiges of dual federalism remain. The Court often suggests that foreign relations is an exclusively federal field[27]—notwithstanding the myriad state activities that daily affect foreign relations and the inherent difficulty of drawing lines between "foreign" and "interstate" commerce in a globalized economy.[28] The Court's dormant Commerce Clause jurisprudence still forbids in principle—but only infrequently strikes down in practice—state actions that impose an excessive "burden" on interstate commerce, even absent discrimination against out-of-staters.[29] Since all economic regulation burdens commerce to some extent, this vestigial doctrine suggests that state regulation of interstate activity is somehow suspect. The Court's "intergovernmental immunity" jurisprudence likewise rests on dual-federalist premises,[30] although that doctrine has been narrowed significantly since the New Deal.[31] And the Court occasionally speaks in dual federalist terms in its affirmative Commerce Clause jurisprudence, suggesting that federal legislation is constitutionally suspect where it intrudes into areas of "traditional state regulation."[32] The confusion and criticism that each of these remnants has engendered,[33] however, tends

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[27] See, for example, *Zschernig v Miller*, 389 US 429 (1968) (asserting that any state action that interferes with U.S. foreign relations is unconstitutional). For contemporary examples, see *American Insurance Assn. v Garamendi*, 537 US 1100 (2003) (holding state law preempted by implication from an executive agreement without any congressional action); *Crosby v National Foreign Trade Council*, 530 US 363 (2000) (finding preemption by federal statute more readily where foreign relations are at issue).

[28] See Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 Geo Wash L Rev 139, 178 (2001); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va L Rev 1617, 1670–80 (1997).

[29] See, for example, *Kassel v Consolidated Freightways Corp. of Delaware*, 450 US 662 (1981) (striking down an Iowa law regulating the length of trucks); *Pike v Bruce Church, Inc.*, 397 US 137, 142 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

[30] See Laurence H. Tribe, 1 *American Constitutional Law* § 6-33 at 1221–22 n 4 (3d ed 2000).

[31] Compare *Penn Dairies, Inc. v Milk Control Commission of Pennsylvania*, 318 US 261, 270–71 (1943) (acknowledging that intergovernmental immunity doctrine must recognize the concurrent authority of state regulators), with *Hancock v Train*, 426 US 167 (1976) (continuing to state the doctrine in broad terms).

[32] See *United States v Lopez*, 514 US 549, 567–68 (1995) (insisting on the need to preserve "a distinction between what is truly national and what is truly local"); see also id at 580 (Kennedy, J, concurring) ("[W]e must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.").

[33] See, for example, Neil S. Siegel, *Distinguishing the "Truly National" from the "Truly Local": Customary Allocation, Commercial Activity, and Collective Action*, 62 Duke L J (forth-

to confirm that the law of federalism has generally moved on to a concurrent model.

B. FROM JUDICIAL ENFORCEMENT TO POLITICAL AND PROCEDURAL SAFEGUARDS

The shift from dual federalism to concurrent state and national jurisdiction coincided with two additional changes in how we think about the division of authority between the state and national governments. Although it seems fair to say that these changes began in the New Deal period, they were not acknowledged by the Court until much later—primarily in its 1985 decision in *Garcia v San Antonio Metropolitan Transit Authority*.[34] The first change was from a federalism defined by hard jurisdictional boundaries to one maintained by political competition. Without dual federalism's sharp limits on Congress's power, state authority is maintained by a variety of political dynamics, including states' representation in Congress, underlying attachments of citizens to the state governments, bureaucratic resistance by state officials charged with implementing federal law, and federal governmental inertia induced by onerous constitutional procedures for making federal law.[35] Federalism becomes not so much a matter of drawing lines as one of calibrating incentives, enforcing procedural rules, and interpreting the output of the national political process in a way that respects the system's structural safeguards for states.

The second and related change concerned the role of the courts in enforcing federalism. As the post-New Deal Court largely gave up review of national legislation under the Commerce Clause and transformed its dormant Commerce Clause jurisprudence into a nondiscrimination principle, "the courts no longer played a central role in managing the relationship of the states and the federal government," and, in particular, "became much less active in pa-

coming 2012) (criticizing the effort to identify traditional subjects of state regulation as "indeterminate and thus unworkable").

[34] 469 US 528 (1985).

[35] See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Röle of the States in the Composition and Selection of the National Government*, 54 Colum L Rev 543 (1954) (political representation); Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 Ohio St L J 1669 (2007) (popular attachments); Jessica Bulman-Pozen and Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L J 1256 (2009) (bureaucratic resistance); Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 Notre Dame L Rev 1681 (2008) (procedural safeguards).

trolling the bounds of federal power."[36] The Court articulated the reasons for its retreat in *Garcia*, where it said that the Constitution's protection for federalism lies primarily in the states' representation in Congress—not in judicially enforceable boundaries for national power.[37] Consequently, as Herbert Wechsler argued, "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress."[38] Although many observers viewed *Garcia* as an abdication of any judicial enforcement of limits on national power, it is better viewed as a shift from efforts to impose substantive limitations on national power to a focus on process.[39]

Preemption takes on particular importance in light of these shifts in our theory of federalism and the role of the courts. One reason has to do with the impact of preemption on a federal balance that is determined primarily by politics. *Garcia* built upon James Madison's much older theory of federalism as a competition between the national government and the states for the loyalty of their mutual citizens.[40] Notwithstanding the jurisdictional limitations that the Constitution placed on national power, Madison understood that the ultimate balance would be determined by politics—that is, by which level of government could best earn the electorate's trust by providing government services and ben-

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[36] Schapiro, *From Dualism to Polyphony* at 40 (cited in note 8).

[37] See 469 US at 550–51.

[38] Wechsler, 54 Colum L Rev at 559 (cited in note 35). This "political safeguards" thesis is highly contested. See, for example, *Garcia*, 469 US at 574 n 17 (Powell, J, dissenting); Saikrishna B. Prakash and John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 Tex L Rev 1459 (2001); Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 Vill L Rev 951 (2001).

[39] Compare William W. Van Alstyne, *The Second Death of Federalism*, 83 Mich L Rev 1709, 1720 (1985) (seeing *Garcia* as the end of judicial enforcement of federalism) with Ernest A. Young, *Two Cheers for Process Federalism*, 46 Vill L Rev 1349, 1361–64 (2001) (finding a silver lining). To say that a "process federalism" model based on *Garcia* can actually go a long way toward promoting state autonomy is emphatically *not* to concede that substantive limits on national power are unnecessary or undesirable.

[40] See Federalist 45, 46 (Madison), in *The Federalist* at 308–23 (cited in note 20) (arguing that federal encroachment "will be easily defeated by the State Governments[,] who will be supported by the people"); see generally Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 Vand L Rev 329 (2003) (discussing Madison's theory).

eficial regulation.[41] He thought the states would always have an advantage in this competition, however, because "[t]he powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."[42] The "political safeguards of federalism," in other words, depend on the states retaining important regulatory responsibilities and government functions that touch the daily lives of their citizens.[43]

Preemption, however, has the potential to alter these vital dynamics. As Garrick Pursley summarizes the argument, "[c]onstricting state regulatory authority reduces states' capacity to provide benefits to their citizens, which in turn diminishes states' effectiveness at checking national expansionism in the political process—a critical prerequisite for a functioning set of 'political process' safeguards for federalism."[44] Under dual federalism, preemption of state authority within areas delegated to national control could not unbalance the system, because the states retained their own realm of exclusive authority in which they could provide

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[41] Federalist 46 (Madison), in *The Federalist* at 315–16 (cited in note 20). Madison reminded his readers that because "the ultimate authority . . . resides in the people alone," the question whether the states or the national government "will be able to enlarge its sphere of jurisdiction at the expense of the other" would ultimately "depend on the sentiments and sanction of their common constituents." Id. Madison's principle that governments compete by offering services and regulations to their constituents anticipated the contemporary economic theory of regulation. See Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public Choice Explanation of Federalism*, 76 Va L Rev 265 (1990).

[42] Federalist 45 (Madison), in *The Federalist* at 292–93 (cited in note 20). Hamilton similarly observed that because state governments "regulate all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake," the states are assured of possessing the "affection, esteem and reverence" of their citizens. Federalist 17 (Hamilton), in *The Federalist* at 107 (cited in note 20).

[43] I have developed this argument at greater length elsewhere. See generally Young, 46 Vill L Rev at 1349 (cited in note 39), and Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 Supreme Court Review 1, 43–47.

[44] Pursley, 71 Ohio St L J at 513 (cited in note 9). See also Ernest A. Young, *Federal Preemption and State Autonomy*, in Richard A. Epstein and Michael S. Greve, eds, *Federal Preemption: States' Powers, National Interests* 249, 252–54 (2007); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 Supreme Court Review 341, 404 ("[T]he vitality of the participatory state institutions depends in part on the types of substantive decisions that are left for the states. Should the federal government preempt them from most fields that touch directly on the life of local communities, the states would become but empty shells within which no meaningful political activity could take place.").

government services and beneficial regulation to their citizens.[45] Preemption must be cabined more carefully, however, in a concurrent world where preemptive federal action threatens to cut off state access to the wellsprings of popular support.

Preemption's potential to undermine the structural safeguards of federalism also highlights the need for courts to play an independent role in this area. Our federalism has always relied on the courts to umpire the tug-of-war between national and state authority,[46] and while the nature of the courts' role has changed, its importance has not. Moreover, it has become clear that *Garcia*'s "process federalism"—that is, a constitutional model relying on the states' representation in the legislative process rather than on substantive limitations on national legislation—did leave a role for courts.[47] But that role consists in a John Hart Ely-esque form of "representation reinforcement"[48]—not the substantive line-drawing that prevailed under dual federalism.[49] *Garcia* said that the states' primary protection was "one of process rather than one of result,"[50] suggesting that judicial review should focus on ensuring that the political process did in fact operate to protect states' interests.

As the next section demonstrates, preemption doctrine fits readily within this process paradigm. In a world of concurrent power, federal legislation will frequently determine the actual allocation of responsibility between the federal and state authorities, and the courts are frequently called upon to interpret the allocation that

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[45] Indeed, courts frequently invalidated state governmental activity within federal spheres, even in the absence of congressional action, under the dormant Commerce Clause and similar doctrines. See, for example, *Brown v Maryland*, 25 US (12 Wheat) 419 (1827).

[46] See John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S Cal L Rev 1311 (1997); Young, 46 Wm & Mary L Rev at 1753 (cited in note 20) (noting that the Supreme Court has intervened to maintain balance in our federal system throughout our history); see also Brief of Constitutional Law Scholars as Amici Curiae in Support of Respondents, *Gonzales v Raich*, No 03-1454, *9–10 (US filed Oct 13, 2004) (collecting examples of other federal systems that rely on judicial review to resolve conflicts between subnational units and the central authority).

[47] See, for example, Rapaczynski, 1985 Supreme Court Review at 361 (cited in note 44) ("[T]he decision proposes to rely primarily on the political safeguards of federalism and to ground any future judicial intervention not in a defense of state sovereignty but in the idea of compensating for possible failings in the national political process." (footnote omitted)); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 Tex L Rev 1, 118–21 (2004) (discussing the process federalism strategies employed by the Rehnquist Court).

[48] See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

[49] See Young, 83 Tex L Rev at 15–16 (cited in note 47).

[50] 469 US at 554.

Congress has established. Preemption cases are the most significant category of these disputes, and the frequent ambiguities in Congress's preemptive intent afford the courts an opportunity to be more than just a mouthpiece for federal authority. As the next section recounts, the Court has developed doctrines for resolving preemption cases—in particular, the Court's "presumption against preemption" exemplified in *Rice v Santa Fe Elevator Corp.*[51]—that fit well within *Garcia*'s vision of process federalism. By requiring Congress to speak clearly in order to preempt state law, *Rice* ensures notice to legislative advocates of state interest that preemption is contemplated in proposed legislation, and it imposes an additional procedural hurdle to legislation that undermines state prerogatives.[52] Like other "clear statement rules" disfavoring legislation that alters the federal-state balance,[53] the *Rice* presumption operationalizes the political and procedural safeguards of federalism.[54]

C. THE DEVELOPMENT OF THE RICE PRESUMPTION

Stephen Gardbaum has written that "[t]he United States Supreme Court did not clearly and unequivocally recognize a congressional power of preemption until the beginning of the twentieth century."[55] In the nineteenth century, most cases that might raise preemption issues today would have been decided under the doctrine of dual federalism—that is, by determining whether a

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[51] 331 US 218 (1947).

[52] See Young, 46 Vill L Rev at 1385 (cited in note 49); see also David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 NYU L Rev 921, 944 (1992) (observing that interpretive canons disfavoring various kinds of change "increase the likelihood that a statute will not change existing arrangements and understandings unless the legislature—the politically accountable body—has faced the problem and decided that change is appropriate"); Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 Yale L J 2, 40 (2008) (noting "that judicial demands for a clear congressional statement . . . can serve to increase legislative enactment costs for constitutionally problematic policies").

[53] See, for example, *Gregory v Ashcroft*, 501 US 452 (1991). For overviews of the debate about clear statement rules and their role in federalism doctrine, see William N. Eskridge Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand L Rev 593 (1992); Ernest A. Young, *The Story of Gregory v. Ashcroft: Clear Statement Rules and the Statutory Constitution of American Federalism*, in William N. Eskridge Jr., Philip P. Frickey, and Elizabeth Garrett, eds, *Statutory Interpretation Stories* (Foundation, 2011).

[54] See, for example, Young, *The Story of Gregory v. Ashcroft* at 196 (cited in note 53).

[55] Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L Rev 767, 787 (1994). See also Lessig, 1995 Supreme Court Review at 166 (cited in note 22).

given exertion of regulatory authority fell within an area delegated to federal authority or the sphere reserved to the states.[56] The Court did recognize limited areas of concurrent authority, and in these areas federal law trumped state law in the event of a conflict, but these cases arose relatively infrequently.[57] As federal regulatory activity increased toward the end of the nineteenth century, however, the situation became more confused and pressure mounted to develop a coherent doctrine of preemption.[58]

The Court's first resolution of the matter was to establish a regime of automatic field preemption. As Professor Gardbaum explains, the Court applied a rule of "latent exclusivity" under which "preemption was an automatic consequence of congressional action in a given field."[59] In *Chicago, Rock Island & Pacific Railway Co. v Hardwick Farmers Elevator Co.*,[60] for example, the Court held that the federal Hepburn Act preempted state regulation of the delivery of interstate railroad cars. Chief Justice White argued that "it must follow in consequence of [the Hepburn Act] that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme."[61]

Some of the initial decisions laying out this position, like *Southern Railway v Reid*,[62] relied on actual conflict between state and federal law as an alternative ground. It did not take the Court long to make clear, however, that such conflicts were unnecessary. By 1915, Justice Holmes could dismiss arguments that there was

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[56] See Gardbaum, 79 Cornell L Rev at 785–86 (cited in note 55).

[57] Id. Professor Gardbaum's account defines this species of preemption—federal law trumping state law in the event of a conflict—as "supremacy" and sharply distinguishes it from preemption, which he takes to mean federal ouster of even nonconflicting state law. See id at 771 ("Preemption . . . means (*a*) that states are deprived of their power to act *at all* in a given area, and (*b*) that this is so *whether or not* state law is in conflict with federal law.").

[58] See id at 795–800.

[59] Id at 801.

[60] 226 US 426 (1913).

[61] Id at 435. As Professor Gardbaum demonstrates, this principle was not in fact "long settled" but rather new law. See Gardbaum, 79 Cornell L Rev at 804–05 (cited in note 55).

[62] 222 US 424 (1912).

no actual conflict between state and federal law as "immaterial": "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."[63]

During and after the New Deal, however, the Court changed course. In 1933, *Mintz v Baldwin*[64] rejected an argument that the federal Cattle Contagious Diseases Acts preempted state efforts to deal with the same problem. Justice Butler wrote that "[t]he purpose of Congress to supersede or exclude state action against the ravages of the disease is not lightly to be inferred. The intention so to do must definitely and clearly appear."[65] *Rice v Santa Fe Elevator Corp.*,[66] which Professor Gardbaum describes as "the *locus classicus* of modern preemption doctrine,"[67] followed fourteen years later, on the other side of the Court's 1937 switch in time. The Court's narrowing of federal law's preemptive force in *Mintz*, *Rice*, and similar cases may seem inconsistent with its expansion of federal power in *NLRB v Jones & Laughlin Steel Corp.*[68] and *Wickard v Filburn*,[69] which it decided at roughly the same time. As Gardbaum explains, however, the two developments actually went hand-in-hand:

> In this context of a revolutionary extension of federal legislative competence, the consequence of the preexisting preemption doctrine (established while there were still significant areas of exclusive state jurisdiction) would have been to threaten vast areas of state regulation of seemingly local matters with extinction. Instead, the new constitutional strategy replaced a strict division of powers version of federalism

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[63] *Charleston & Western Carolina Railway Co. v Varnville*, 237 US 597 (1915). See also Gardbaum, 79 Cornell L Rev at 805 (cited in note 55) (concluding, under prevailing doctrine in this period, "preemption eliminates the need to consider the content of state laws on the subject, to lay the two laws side by side to ascertain whether or not they conflict").

[64] 289 US 346 (1933).

[65] Id at 350.

[66] 331 US 218 (1947).

[67] Gardbaum, 79 Cornell L Rev at 807 (cited in note 55); see also Richard A. Epstein and Michael S. Greve, *Conclusion: Preemption Doctrine and Its Limits*, in Epstein and Greve, eds, *Federal Preemption* 309, 315 (cited in 44) (agreeing that "*Rice v Santa Fe Elevator* by all accounts offers the canonical statement of modern preemption doctrine").

[68] 301 US 1 (1937) (upholding the National Labor Relations Act and reversing the Court's prior tendency to construe the Commerce Clause narrowly).

[69] 317 US 111 (1942) (holding that the Commerce Power extended so far as to regulate individual growing decisions by small farmers).

> with a new version embodying the presumption that state powers, though no longer constitutionally guaranteed, survive unless clearly ended by Congress.[70]

The old presumptive preemption regime, in other words, could only work in a world still dominated by dual federalism. The *Rice* presumption translated the Supremacy Clause into the post-1937 world of concurrent power. "At a time when the exercise of the federal power is being rapidly expanded through Congressional action," Justice Stone pointed out in 1941, "it is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended . . . or by reference to our own conceptions of a policy which Congress has not expressed."[71]

Indeed, the shift in the Court's preemption jurisprudence may have actually facilitated the expansion of Congress's legislative role. David Shapiro has argued that canons of interpretation that disfavor radical change help to overcome the ordinary risk aversion of legislators. He points out that "the danger that any loose or vague language will be broadly interpreted to favor change over continuity may lead the drafters of legislation to be so fearful of the consequences of their actions (and of the political ramifications of those actions) that the process may become too cautious."[72] If this is right, then "the most productive relationship between courts and legislatures may well be one of providing some reassurance that continuity will not be inadvertently sacrificed, absent sufficient evidence of legislative purpose to do so."[73] Applied to the specific context of preemption, Professor Shapiro's point suggests that courts might have eased congressional fears about intruding on areas of traditional state regulatory authority by narrowing the preemptive impact of new federal statutes.[74]

As I have already discussed, a second aspect of the post-New Deal transformation had to do with the role and focus of judicial

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[70] Gardbaum, 79 Cornell L Rev at 806 (cited in note 55); see also Lessig, 1995 Supreme Court Review at 167 (cited in note 22) ("Just at the time the Court recognized the authority of Congress to reach far more than before, it also transformed the significance of the statutes that Congress had passed by radically cutting back on this automatic preemption.").

[71] *Hines v Davidowitz*, 312 US 52, 75 (1941) (Stone, J, dissenting).

[72] Shapiro, 67 NYU L Rev at 945 (cited in note 52).

[73] Id.

[74] By the same token, reining in the preemptive effect of federal statutes may have made it easier for courts to accept the expansion of federal legislative authority.

review in federalism cases. The latent exclusivity of congressional power in pre-New Deal preemption doctrine was not a function of congressional intent; rather, it was intrinsic to the way that Congress's power worked. It was, as Professor Gardbaum has explained, derived from the "paramount" nature of Congress's power under the Supremacy Clause.[75] Early doctrine thus did not examine closely Congress's preemptive intent in particular statutes. *Mintz* and *Rice*, by contrast, turned the spotlight squarely on Congress's intentions concerning preemption,[76] and it is now settled doctrine that "'the purpose of Congress is the ultimate touchstone' in every pre-emption case."[77] Preemption doctrine thus fits the concurrent nature of state and federal power after the New Deal and reflects the essentially political structure of federalism safeguards in contemporary constitutional law.[78] The task of preemption doctrine, as the next section explores, is to make sure those safeguards are honored.

D. THE CURRENT DOCTRINE AND ITS TENSIONS

In a concurrent world, two levels of government operate within the same regulatory sphere, and the task of the law is to adjudicate conflicts between the two authorities. As Brad Clark has observed, "[t]o succeed, [a concurrent] system requires a means of deciding when federal law displaces state law."[79] Two sets of questions are particularly salient: What counts as preemption? And which institutions have the authority to preempt state law? Both issues

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[75] Gardbaum, 79 Cornell L Rev at 801–02 (cited in note 55); see also id at 802 ("[Congressional] action itself was deemed to have automatic preemptive effect, rendering any determination of congressional intent irrelevant and unnecessary. Latent exclusivity was, therefore, understood more as a doctrine about the constitutional division of interstate commerce powers than as a general, discretionary power of Congress.").

[76] See id at 808 (describing the shift to "an intent-based test").

[77] *Medtronic, Inc. v Lohr*, 518 US 470, 485 (1996) (internal quotation marks omitted); see also *Wyeth*, 555 US at 565, quoting *Retail Clerks v Schermerhorn*, 375 US 96, 103 (1963).

[78] See generally Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 SC L Rev 967, 971 (2002) ("[P]reemption doctrine . . . has evolved over the last century from one based on an assumption of congressional legislative exclusivity and almost certain preemption of state regulation to a doctrine, in the mid-part of the century, based on a search for congressional intent to preempt so that state laws, particularly those based on historical police powers, were not needlessly displaced.").

[79] Bradford R. Clark, *Process-Based Preemption*, in Buzbee, ed, *Preemption Choice* 192 (cited in note 8).

highlight the critical separation-of-powers dimension of federalism.

1. *What counts as preemption?* The first set of issues focuses on the relation between legislative and judicial power in statutory construction. Preemption cases do not typically involve the reach of congressional power; the question, rather, is whether Congress has in fact exercised its power to preempt state law. In recent years, the Court has grappled with a series of questions at increasing degrees of distance from Congress's direct intent: How should the courts construe ambiguous statutory language in express preemption cases? What sort of evidence can establish Congress's implicit intent to preempt a whole field of regulation? How much of a conflict between state and federal law should suffice for preemption? As Congress's intent becomes more difficult to ascertain, the question becomes not whether but *how* judges should fill in the gaps, either by establishing default rules of statutory construction (presumptions against, or sometimes in favor of, preemption), by pursuing increasingly attenuated evidence of Congress's preferences, or by making their own judgments about policy conflicts.

At the outset, it will help to be a little more specific about the difference between express and implied preemption, especially as it bears on the application of the *Rice* presumption. Preemption cases involve two distinct kinds of express provisions, and hence two corresponding kinds of implication. Some statutes have express *preemption* provisions—that is, clauses that purport to spell out the preemptive effect of the legislation on state law. Just about all statutes, however, have express *substantive* provisions,[80] and these provisions may have preemptive effect to the extent that they create conflicts with state law. "Express preemption," as that term is used in current doctrine, deals only with the former situation—that is, the construction of statutory provisions that expressly address the preemptive effect of federal law. Everything else is "implied" preemption, even though such cases may involve

[80] Not all, however. For example, the Labor Management Relations Act, 61 Stat 156, 18 USC § 185, and the First Judiciary Act, 1 Stat 76–77, current version codified at 28 USC § 1331(1), created federal judicial jurisdiction over collective bargaining and admiralty disputes, respectively. Neither provided substantive rules of decision, but courts have interpreted each as authorizing creation of federal common law that broadly preempts state law. See *Textile Workers Union of America v Lincoln Mills of Alabama*, 353 US 448 (1957) (LMRA); *Southern Pacific Co. v Jensen*, 244 US 205 (1917) (admiralty).

painstaking construction of a statute's express terms.

An interpretive presumption like the *Rice* canon generally "serves as a kind of burden allocator or tie-breaker . . . but allows the court to look to all relevant information and, if appropriate, to find an answer implicit in the statute despite the absence of express language."[81] On the other hand, "[c]lear-statement rules operate less to reveal *actual* congressional intent than to shield important values from an *insufficiently strong* legislative intent to displace them"; "such rules foreclose inquiry into extrinsic guides to interpretation and even compel courts to select less plausible candidates from within the range of permissible constructions."[82] Courts and scholars (including this one) sometimes lump these two categories together,[83] and much of the literature on "clear statement" requirements should be taken as encompassing both categories.[84] Each category, moreover, both blurs around the edges and encompasses meaningful differences in degree. A presumption, for example, might permit a court to canvass a broad range of sources of statutory meaning yet still impose a hefty burden of proof; similarly, even when a statute explicitly deals with a matter like preemption, the text may itself be far from clear. The scope of the inquiry, in other words, is analytically distinct from the weight of the burden of proof.

For present purposes, however, the distinction between presumptions and clear statement rules is helpful in pinning down the sources to which a court may look when it evaluates Congress's preemptive intent. The presumption against preemption has generally been just that—a *presumption*, not a clear statement rule.[85] If *Rice* were a strong clear statement rule, then there would only be "express" preemption cases—if Congress did not include a textual provision spelling out the preemptive effect of legislation,

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[81] Shapiro, 67 NYU L Rev at 934 (cited in note 52) (footnote omitted).

[82] *EEOC v Arabian American Oil Co.*, 499 US 244, 262–63 (1991) (Marshall, J, dissenting).

[83] See, for example, id at 265 n 2 (noting prior cases in which the Court purported to apply a "clear-statement rule" but in fact "consulted the legislative history of the statutes at issue"); Young, *Gregory* (cited in note 53).

[84] See, for example, John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum L Rev 399, 407–08 (2010).

[85] See, for example, *Cipollone v Liggett Group, Inc.*, 505 US 504, 545 (1992) (Scalia, J, concurring in the judgment in part and dissenting in part) ("Though we generally 'assume that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress,' we have traditionally not thought that to require express statutory text.") (quoting *Rice*, 331 US at 230).

then the required clear statement would be lacking. Such a rule would most likely be unmanageable, as Congress would have to anticipate all the possible ways in which state law might undermine federal legislation.[86] It seems inevitable that courts will sometimes have to evaluate implicit conflicts—that is, conflicts between the practical action of federal and state legal rules.

One could argue that an interpretive presumption like *Rice* should have no place in express preemption cases. After all, if Congress has included an express preemption clause, then the legislature has clearly stated its intent to preempt at least *some* state law. Justice Scalia has thus argued that any presumption against preemption "dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself, and the only remaining question is what the *scope* of that pre-emption is meant to be. Thereupon, I think, our responsibility is to apply to the text ordinary principles of statutory construction."[87]

Justice Scalia's approach seems overly simplistic, however. Consider a federal statute governing medical devices that clearly states Congress's intention to preempt negligent design claims, for example, but is ambiguous as to whether it preempts additional tort claims. The clarity of Congress's intentions with respect to negligent design hardly establishes that Congress also meant to preempt claims for negligent manufacture or failure to warn. It is unclear why the presumption against preemption should "dissolve," in Justice Scalia's terms, when we move from the first question to the second—that is, why the same concerns for state autonomy that raise the interpretive bar to find *any* preemption should not also weigh against interpreting the *scope* of preemption too broadly. After all, viewing the latter question as a subset of the first will generally be artificial. One might as well say that although Congress has manifested an intent to preempt claims relating to the design of a device, Congress has manifested no preemptive intent *at all* with respect to manufacturing or warning claims. Every federal statute clearly preempts *some* possible state

[86] Alternatively, Congress could simply state a broadly preemptive default rule in the statutory text. But that would simply substitute a problem of over-inclusion for one of under-inclusion. If we want preemption that is actually tailored to the interaction of federal and state laws in any sort of fine-grained way, courts will have to consider implied conflicts.

[87] *Cipollone*, 505 US at 545 (Scalia, J, concurring in part and dissenting in part).

laws, even if preemption is limited to a state statute directly countermanding the federal provision.

Thus far, the Court has rejected Justice Scalia's position and applied the presumption against preemption even where Congress has included an express preemption clause in the relevant statute. As Justice Blackmun said in *Cipollone*,

> The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. In such cases, the question is not *whether* Congress intended to pre-empt state regulation, but to what *extent*. We do not, absent unambiguous evidence, infer a scope of preemption beyond that which clearly is mandated by Congress' language.[88]

As I will discuss shortly, however, this point remains controversial.

When we move from express to implied or conflict preemption cases,[89] we encounter a further distinction between those cases in which the action of state and federal law creates "direct" or "actual" conflicts, and those cases in which state and federal law simply serve potentially contradictory purposes. The case law reflects this distinction under the labels of "impossibility" and "obstacle" preemption.[90] Traditionally, the Court has defined "impossibility" very narrowly, limiting it to cases of "inevitable collision" between state and federal law, where "compliance with both federal and state [law] is a physical impossibility."[91] By contrast, the Court has often defined "conflicting purposes" or "obstacle" preemption quite broadly, holding state law preempted where it "stands as an

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[88] Id at 533 (1992) (Blackmun, J, concurring in part, concurring in the judgment in part, and dissenting in part); see id at 516–18 (majority opinion) (applying the *Rice* presumption in construing the statute's express preemption provisions).

[89] I do not consider field preemption as a distinct category here. A finding of field preemption simply represents a judgment that *any* state intrusion in the field would conflict with Congress's intent, because Congress meant for federal regulation in the field to be exclusive. Field preemption may be express or implied, but in either case does not pose any distinct problems for my purposes in this essay.

[90] See Richard H. Fallon Jr., John F. Manning, Daniel J. Meltzer, and David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 646 (Foundation, 6th ed 2009) ("*Hart & Wechsler*").

[91] *Florida Lime & Avocado Growers, Inc. v Paul*, 373 US 132, 142–43 (1963); see also *Wyeth*, 555 US at 573 (emphasizing that impossibility preemption "is a demanding defense"). The Court expanded this category somewhat last Term in *PLIVA, Inc. v Mensing*, 131 S Ct 2567 (2011). See Part II.B.

obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[92]

It is not obvious how *Rice* should apply in conflict cases. Courts generally formulate the *Rice* presumption as a rule of statutory construction—that is, a tool for interpreting the legal import of ambiguous statutory language. In conflict preemption cases, courts have no text dealing with preemption to construe. Rather, two sorts of uncertainty may exist: The substantive content of the federal law may be ambiguous, such that it is unclear whether that law actually creates a conflict with state law, or the conflict in question may be so minor that a court is unsure whether Congress would prefer for state and federal law to operate side by side.[93] In the former case, one could argue that *Rice* should be reserved for interpreting express preemption provisions alone, so that "ordinary" rules of construction—whatever those are—should govern what the federal law actually does.[94] That such an approach is logically possible does not mean it makes sense, however. As Cathy Sharkey has noted, a one-time trend against applying *Rice* in implied conflict cases was "paradoxical because an interpretive default rule or 'thumb on the scale' would seem warranted, if at all, where there is no express statutory language."[95] In express preemption cases, the Court has said that in choosing between "plausible alternative reading[s]" of a federal statute, courts "have a duty to accept the reading that disfavors pre-emption."[96] Applying the

[92] *Hines v Davidowitz*, 312 US 52, 67 (1941), citing *Savage v Jones*, 225 US 501, 533 (1912) ("If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.").

[93] A third sort of uncertainty is possible, concerning the correct interpretation of *state* law. Federal courts, however, do not enjoy the same latitude in interpreting state law that they possess with regard to federal law. They are, first and foremost, obligated to apply state law as construed by the state's highest court. Even where the state courts have not definitively construed state law, federal courts are not generally free simply to set aside the most likely reading of state law in favor of one that would avoid preemption (unless, of course, that approach has itself been endorsed by the state's highest court).

[94] That position would be the inverse of Justice Scalia's in *Cipollone*, which was that *Rice* should apply *only* when there is no express preemption provision. Remarkably, Scalia has in fact joined at least one opinion arguing that *Rice* should not apply in implied conflict cases. See, for example, *Wyeth*, 555 US at 565 & n 14 (Alito, J, dissenting with Roberts and Scalia).

[95] Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 Geo Wash L Rev 449, 458 n 34 (2008).

[96] *Bates v Dow Agrosciences, LLC*, 544 US 431 449 (2005).

same rule to construing federal law in conflicts cases would protect identical values of state autonomy.[97]

The second sort of ambiguity concerns the degree of tension between state law and congressional purpose. Almost any two laws will potentially undermine one another's purposes; indeed, in the Arizona immigration cases proponents of preemption have claimed that even state measures that precisely mirror federal requirements conflict with federal interests by adding a second and potentially contradictory level of enforcement.[98] The question in many conflict preemption cases is thus just how much conflict is tolerable.[99] Such an inquiry, practically speaking, is closer to a balancing of interests (the degree of impedance to national purpose versus the value of state autonomy) than to textual construction. In that context, *Rice*'s presumption becomes a "thumb on the scale" representing the value of state autonomy.

The Court has often seemed to say that the Supremacy Clause simply does not permit any such "balancing" of interests.[100] Generally speaking, as Mark Rosen has pointed out, "preemption is a 'unilateralist' doctrine that takes account of only one of the institutions whose interests are at stake: the federal government."[101] But the unilateralist character of preemption doctrine must be compromised once we recognize that virtually *all* preemption cases

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[97] Indeed, the Court has frequently applied clear statement rules to limit the substantive sweep of federal law. See, for example, *Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers*, 531 US 159 (2001); *United States v Jones*, 529 US 848 (2000); *Gregory v Ashcroft*, 501 US 452 (1991); *Will v Michigan Dept. of State Police*, 491 US 58 (1989).

[98] See *Chamber of Commerce v Whiting*, 131 S Ct 1968, 1990–91 (2011) (Breyer, J, dissenting).

[99] See, for example, *Crosby v National Foreign Trade Council*, 530 US 363, 373 (2000) (observing that "[w]hat 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").

[100] See, for example, *Gade v National Solid Wastes Management Association*, 505 US 88, 108 (1992) (observing that "under the Supremacy Clause . . . 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield'" and therefore rejecting "petitioner's argument that the State's interest in licensing various occupations can save from OSH Act pre-emption those provisions that directly and substantially affect workplace safety," quoting *Felder v Casey*, 487 US 131, 138 (1988)); *Fidelity Federal Savings & Loan Association v De La Cuesta*, 458 US 141, 153 (1982), quoting *Free v Bland*, 369 US 663, 666 (1962) ("The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.").

[101] Mark D. Rosen, *Contextualizing Preemption*, 102 Nw U L Rev 781, 785 (2008) (contrasting preemption with "multilateralist" doctrines that "ask[] the decisionmaker to take account of the concerns of all relevant institutions whose interests are implicated").

involve some degree of arguable conflict between state and federal law, and in some cases, the conflict between state and federal law is just not sufficiently serious to warrant preemption. Tom Merrill has noted, for instance, that preemption cases assess not simply whether "federal law . . . is in tension with state law" but also "whether this tension is sufficiently severe to warrant the displacement of state law."[102] Preemption doctrine thus cannot proceed without some standard for how much conflict is too much. If the Court were to reject *Rice*'s version of that standard, it would still have to come up with some other standard to replace it.

Rice survived an all-out assault from litigants in the Supreme Court in the 2008 Term.[103] In *Altria Group, Inc. v Good*,[104] the Court rejected a strong push from pro-preemption amici to eliminate the presumption in express preemption cases. And in *Wyeth v Levine*,[105] the Court turned back arguments that the presumption should not apply in implied preemption cases. *Altria* was a suit under the Maine Unfair Trade Practices Act by smokers of "light" cigarettes alleging that the cigarette manufacturers had fraudulently advertised that light cigarettes delivered less tar and nicotine than regular brands. The Court rejected both express and implied preemption arguments under the Federal Cigarette Labeling and Advertising Act and the Federal Trade Commission's regulatory activities, respectively. In the course of the express preemption argument, Justice Stevens's majority opinion reaffirmed that "[w]hen addressing questions of express or implied pre-emption, we begin our analysis 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[106] The Court explained, moreover, what this means in the express preemption context: "when the text of a pre-emption clause is

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[102] Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw U L Rev 727, 743 (2008); see also Untereiner, 84 Tulane L Rev at 1260 (cited in note 11) (observing that in conflict preemption cases, "courts make judgments about whether the degree of tension between federal and state laws rises to the level of an impermissible conflict under the Supremacy Clause").

[103] See generally Dan Schweitzer, *The Presumption Against Preemption Strikes Back: The Lessons of Altria Group v. Good and Wyeth v. Levine*, NAAGazette (2009), online at http://www.naag.org/the-presumption-against-preemption-strikes-back-the-lessons-of-altria-group-v.-good-and-wyeth-v.-levine.php.

[104] 555 US 70 (2008).

[105] 555 US 555 (2009).

[106] *Altria*, 555 US at 77, quoting *Rice*, 331 US at 230.

susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'"[107] In a dissent joined by Chief Justice Roberts and Justices Scalia and Alito, Justice Thomas insisted that, in recent years, "the Court's reliance on the presumption against pre-emption has waned in the express pre-emption context."[108] Noting that "[t]he Court has invoked the presumption sporadically" and ignored it in a number of cases,[109] Thomas complained that the presumption results in "artificially narrow construction[s]" of preemption provisions that "distort the statutory text."[110]

Wyeth, on the other hand, focused on implied preemption. Diana Levine brought a Vermont common law tort claim against Wyeth, alleging that the drug manufacturer had failed to provide adequate warnings that its antinausea drug Phenergan could cause gangrene if administered by an "IV-push" method. The Court rejected claims that federal law made it impossible to comply with state tort rules that required a better warning and that state liability would interfere with Congress's purpose in entrusting a federal agency, the Food and Drug Administration, with authority to approve new drugs and drug labels. Echoing arguments by Wyeth's amici,[111] Justice Alito's dissent argued that the only question in conflict cases is "whether there is an 'actual conflict' between state and federal law; if so, then pre-emption follows automatically by operation of the Supremacy Clause."[112] That question left no room for any presumption against preemption, and Alito asserted that the Court had in fact not applied any such presumption in its previous conflict preemption cases.[113] Justice Stevens's majority

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[107] *Altria*, 555 US at 77, quoting *Bates v Dow Agrosciences LLC*, 544 US 431, 449 (2005).

[108] *Altria*, 555 US at 98 (Thomas, J, dissenting).

[109] Id at 99.

[110] Id at 98, 101.

[111] See Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, *Wyeth v Levine*, No 06-1249, *27–28 (US filed June 3, 2008) (arguing that the federal courts should not apply a presumption against preemption); Brief of Amicus Curiae Products Liability Advisory Council, Inc., in Support of Petitioner, *Wyeth v Levine*, No 06-1249, *15–18 (US filed May 30, 2008) (arguing that the presumption against preemption does not apply to a conflicts preemption analysis).

[112] *Wyeth*, 555 US at 624 (Alito, J, dissenting). Chief Justice Roberts and Justice Scalia joined Justice Alito's dissent.

[113] Id at 624 n 14.

opinion, however, flatly rejected Alito's assertion, stating that "this Court has long held to the contrary."[114]

As a matter of current principle, then, *Rice* continues to apply in both express and implied preemption settings. Despite these express and recent reaffirmations of *Rice*, the Court frequently neglects to mention it. This occurs both in cases where the Court finds preemption and in cases where it does not. It thus seems fair to say that the legitimacy, strength, and scope of a presumption against preemption remains a live issue.

2. *Who can preempt state law?* The second set of issues implicates a distinct set of separation-of-powers concerns. Here the questions concern which branches of the federal government may preempt state law, and by what sorts of actions. The Supremacy Clause suggests that only Congress may preempt state law, by enacting "Laws of the United States made in Pursuance [of this Constitution]."[115] Nonetheless, the Court has said that federal administrative agencies, exercising authority delegated by Congress, may preempt state law in certain circumstances.[116] Likewise, federal courts may sometimes fashion federal common law rules that preempt state law.[117]

The limits of executive-agency and judicial preemption remain uncertain, however. Executive preemption occurs in a variety of scenarios, from an agency interpreting a statute to preempt state law to an independent preemptive action originating with the agency itself; such action, moreover, may take a range of forms from legislative rules promulgated after notice and comment to less formal agency actions.[118] When the agency interprets statutes as preempting state law, the issue becomes how much deference, if any, courts should accord to that judgment.[119] When the agency

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[114] Id at 565 n 3 (majority opinion), citing *California v ARC America Corp.*, 490 US 93, 101–02 (1989); *Hillsborough County v Automated Medical Laboratories, Inc.*, 471 US 707, 716 (1985); and *Rush Prudential HMO, Inc. v Moran*, 536 US 355, 387 (2002).

[115] US Const, Art VI, § 2. The Supremacy Clause also indicates that the President and the Senate, by negotiating and ratifying self-executing treaties, can also preempt state law. Id.

[116] *Fidelity Savings & Loan v De La Cuesta*, 458 US 141 (1982).

[117] See, for example, *Southern Pacific Co. v Jensen*, 244 US 205 (1917) (holding that federal common law rules in admiralty preempt state law).

[118] See Ernest A. Young, *Executive Preemption*, 102 Nw U L Rev 869, 881–900 (2008).

[119] See Nina A. Mendelson, *Chevron and Preemption*, 102 Mich L Rev 737 (2004) (arguing that "political accountability . . . agency expertise, self-interest, and the prospect of increased arbitrariness in decisionmaking . . . all weigh against an across-the-board pre-

takes preemptive action on its own, the broader question is what sorts of acts can have preemptive effects. On the judicial side, federal common law jurisprudence remains murky as to the precise circumstances that warrant judicial lawmaking.[120]

The separation-of-powers issues raised by both sets of preemption cases have major implications for federalism. In recent years, a burgeoning literature has addressed the important ways in which the federal separation of powers protects the autonomy of the states.[121] Contemporary federalism jurisprudence emphasizes the states' representation in Congress as the primary safeguard of federalism; on this view, Congress is structured so as to take state regulatory interests into account before it acts.[122] Federal agencies, on the other hand, have no such incentives and can generally increase their own power by preempting state law. William Eskridge's survey of Supreme Court preemption cases involving federal administrative agencies between the 1984 and 2005 Terms found that "agencies pressed pro-preemption positions in two-thirds of the cases."[123] The only surprising thing about that number is that it is lower than one might expect.

Scholars have also emphasized how the procedural difficulty of enacting federal legislation, the multiple veto-gates that legislative proposals must navigate, and the limited nature of Congress's agenda ensure that *all* federal legislation—including, of course, preemptive legislation—will be relatively rare.[124] The difficulty of

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sumption of deference to the agency"); Merrill, 102 Nw U L Rev at 769–79 (cited in note 102) (arguing that courts should defer to agency interpretations "only to the extent they are persuasive, thereby preserving judicial authority to maintain a uniform jurisprudence of preemption").

[120] Compare Louise Weinberg, *Federal Common Law*, 83 Nw U L Rev 805 (1989) (taking a very broad view), with Ernest A. Young, *Preemption and Federal Common Law*, 83 Notre Dame L Rev 1639, 1671–79 (2008) (considerably more skeptical).

[121] See, for example, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex L Rev 1321 (2001); Stuart M. Benjamin and Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 Duke L J 2111 (2008).

[122] See, for example, *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528, 550–51 (1985) (observing that "the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress"); Wechsler, 54 Colum L Rev at 559 (cited in note 35) (arguing that states' representatives "control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress").

[123] William N. Eskridge Jr., *Vetogates, Chevron, Preemption*, 83 Notre Dame L Rev 1441, 1484 (2008).

[124] See Clark, 83 Notre Dame L Rev at 1707 (cited in note 35) ("The federal government . . . may adopt 'the supreme Law of the Land' only by employing precise, constitutionally prescribed procedures."); Young, 46 Vill L Rev at 1363 (cited in note 39) ("Federal action

federal lawmaking, combined with at least some degree of congressional sympathy for state regulators, operates to ensure that federal law remains more interstitial than pervasive in nature[125]—although that arrangement is constantly eroding.[126]

From this standpoint, shifting preemptive authority away from Congress to judicial or executive institutions that do not represent the states and that can promulgate federal norms more easily than Congress amounts to a significant threat to state autonomy. When courts preempt state law based on implicit conflicts with federal policy or allow federal agencies to preempt state law by legislative fiat, they compound the central difficulty of contemporary federalism doctrine—that is, the Court's failure to articulate meaningful and sustainable limits on Congress's enumerated powers.[127] In this doctrinal landscape, it is critical that the Court fashion meaningful limits on the preemptive scope of the legislation that Congress does enact and on the ability of nonlegislative federal actors to extend that scope.

Of the two nonlegislative preemption problems, executive branch preemption is probably the more pressing. Preemption by administrative agency action became especially salient during the second Bush administration, which came to office with an extensive tort-reform agenda. When that agenda was largely stymied in Congress, the administration turned to the agencies, several of which issued broad interpretive "preambles" to federal regulations expressing the agency's judgment that federal regulatory decisions preempted further regulation—especially common law tort regulation—at the state level.[128] Similarly, the Bush administration

remains interstitial . . . not only because of political opposition from the states but because federal law is simply difficult to make." (footnote omitted)).

[125] See Henry Hart and Herbert L. Wechsler, *The Federal Courts and the Federal System* 435 (Foundation, 1st ed 1953).

[126] The current edition of *Hart & Wechsler*, for example, comments that "[i]n the more than fifty years since the First Edition was published, the expansion of federal legislation and administrative regulation . . . has accelerated; today one finds many more instances in which federal enactments supply both right and remedy in, or wholly occupy, a particular field." *Hart & Wechsler* at 459 (cited in note 90).

[127] See, for example, *Gonzales v Raich*, 545 US 1 (2005) (upholding Congress's authority to regulate medicinal use of homegrown marijuana); *South Dakota v Dole*, 483 US 203 (1987). See generally Ernest A. Young, *Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law*, 75 L & Contemp Probs no. 3, 157 (2012) (arguing that limits on the Commerce and Spending Powers are generally underenforced in contemporary federalism doctrine).

[128] See Thomas O. McGarity, *The Preemption War: When Federal Bureaucracies Trump Local Juries* 3–5 (Yale, 2008); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies*

resorted to agency action in an effort to overturn Oregon's "Death with Dignity Act" permitting physician-assisted suicide, after legislative efforts to preempt that law failed in Congress.[129] And the Obama administration has resorted to executive action—federal lawsuits alleging implied preemption claims—to combat restrictive state immigration policies, rather than pursuing legislative reform.[130]

Executive preemption has had a mixed reception in the Supreme Court. Professor Eskridge found that, in agency preemption cases between 1984 and 2006, "the Court rejected preemption claims in 47.3% (62/131 cases) of the cases and accepted preemption claims in 45.8% (60/131 cases), with 6.9% (9/131 cases) mixed," notwithstanding that the relevant agency favored preemption in two-thirds of the cases.[131] Six years ago, the Court rejected preemption in the Oregon case, emphasizing the states' traditional authority to regulate the medical profession.[132] In *Wyeth*, the Court refused to defer to an FDA preamble in construing the preemptive effect of federal law. The Court emphasized that while it has "given 'some weight' to an agency's views about the impact of tort law on federal objectives when 'the subject matter is technica[l] and the relevant history and background are complex and extensive,' . . . we have not deferred to an agency's *conclusion* that state law is pre-empted."[133] Justice Thomas made a similar point last Term in *PLIVA, Inc. v Mensing*, noting that "[a]lthough we defer to the agency's interpretation of its regulations, we do not defer to an agency's ultimate conclusion about whether state law should be pre-empted."[134] Nonetheless, it would be a stretch to say that the Court has come to rest on the complicated cluster of issues surrounding preemption by federal administrative agencies.

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and the Federalization of Tort Law, 56 DePaul L Rev 227, 230–42 (2007) (reviewing the preemption preambles in rules promulgated by the Food and Drug Administration, the Consumer Product Safety Commission, and the National Highway Traffic Safety Administration).

[129] See *Gonzales v Oregon*, 546 US 243, 252–53 (2006) ("Members of Congress concerned about ODWDA invited the DEA to prosecute . . . Oregon physicians who assist suicide.").

[130] Jerry Markon, *Obama Administration Widens Challenges to State Immigration Laws*, Washington Post (Sept 29, 2011), online at http://www.washingtonpost.com/politics/obama-administration-widens-challenges-to-state-immigration-laws/2011/09/28/gIQA8HgR7K_story.html.

[131] Eskridge, 83 Notre Dame L Rev at 1484 (cited in note 123).

[132] *Gonzales*, 546 US at 270.

[133] *Wyeth*, 555 US at 576–77, quoting *Geier*, 529 US at 883 (alteration in original).

[134] 131 S Ct at 2575 n 3, citing *Wyeth*, 555 US at 576.

Judicial preemption comes up somewhat less often than agency preemption, yet it remains important and in need of clarification by the Court. The critical decision here is, of course, *Erie Railroad Co. v Tompkins*,[135] which held that, in the absence of a federal statute or constitutional provision, federal courts may not ordinarily displace state law.[136] Notwithstanding *Erie*, federal courts have maintained their authority to formulate common law rules of decision in certain circumstances,[137] and unlike the "general" common law applied by federal courts in diversity cases prior to *Erie*, the "new federal common law" is "federal" within the meaning of the Supremacy Clause and therefore preempts state law.[138] Courts generally offer three distinct rationales in support of their authority to fashion federal common law: Much federal common lawmaking is interstitial, filling in "gaps" in federal statutes to achieve the ends intended by Congress;[139] sometimes Congress explicitly or (more often) implicitly delegates lawmaking authority to the courts;[140] and, finally, much federal common law rests on the asserted need to fashion a federal rule of decision to protect federal interests.[141]

This last category, which Tom Merrill has called "preemptive" lawmaking,[142] is the most troubling for preemption doctrine. Pre-

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[135] 304 US 64 (1938).

[136] See id at 78 ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law.").

[137] We lack an agreed-upon definition of federal common law. See generally *Hart & Wechsler* at 607 & n 1 (cited in note 90) (comparing definitions and "us[ing] the term loosely to refer to federal rules of decision whose content cannot be traced directly by traditional methods of interpretation to federal statutory or constitutional commands").

[138] See generally Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 NYU L Rev 383 (1964).

[139] See, for example, *D'Oench, Duhme & Co. v FDIC*, 315 US 447, 470 (1942) (Jackson, J, concurring) ("Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.").

[140] See, for example, FRE 501 (expressly delegating authority to the courts to formulate federal common law rules of privileges in federal question cases); *National Society of Professional Engineers v United States*, 435 US 679, 688 (1978) (interpreting the broad language of the Sherman Act as an implicit delegation of authority to courts to fashion a federal common law of antitrust).

[141] See, for example, *Banco Nacional de Cuba v Sabbatino*, 376 US 398 (1964) (formulating a federal common law "act of state" doctrine to protect federal interests in political branch control of foreign policy).

[142] Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U Chi L Rev 1, 36–39 (1985).

empting state law based on federal "interests"—not federal positive law, such as a statute or even an agency regulation—not only runs counter to the text of the Supremacy Clause but also end-runs the political and procedural safeguards at the center of contemporary federalism doctrine. I have argued elsewhere that this sort of federal common lawmaking, if it can be justified at all, should be viewed as a form of conflict preemption.[143] Preemptive common lawmaking thus occurs when state law would interfere with some federal regulatory scheme, but simply voiding the state law would leave an unacceptable gap. The court fills in the gap by fashioning a federal common law rule of decision, much as it might fill in an omission in an express statutory scheme, doing its best to conform that rule to Congress's overall intent in the field.[144] Perhaps recognizing that even this somewhat narrower view is tough to square with federalism doctrine, the Supreme Court has seemed to view preemptive federal common lawmaking with increasing skepticism in recent years.[145]

II. The Supreme Court's 2010 Term Preemption Bonanza

Preemption cases have not been scarce on the Court's docket in recent years, but last Term's output remains extraordinary by any measure. The Court issued five major decisions, addressing issues ranging from automobile and drug safety to class action litigation to the tug-of-war between the national and state governments over immigration policy. Factually speaking, several of these cases seemed to involve replays of recent important decisions, offering the Court a chance to define the limits of those earlier rulings. Moreover, the volume of preemption litigation—both last Term and in recent years—seems to be encouraging at least some of the Justices to think about preemption as a matter of general principle, rather than as a mass of largely unrelated issues of statutory construction arising under different regulatory regimes. That is not to say, however, that preemption battles can

[143] See Young, 83 Notre Dame L Rev at 1669–71 (cited in note 120).

[144] See id (analogizing to administrative law, where "the existence of a gap in a federal regulatory scheme is often construed as an implicit delegation by Congress to the agency that administers the statute of authority to make law that 'fills in' the gap" (footnote omitted)).

[145] See, for example, *Atherton v FDIC*, 519 US 213, 218 (1997); *Hart & Wechsler* 628–29 (cited in note 90).

ever fully transcend the statutory terrain on which they are fought; indeed, if there is any clear lesson from last Term's cases, it is that different statutes yield different results.

A. WILLIAMSON V MAZDA MOTOR

Williamson v Mazda Motor of America, Inc.,[146] involved the preemptive effect of Federal Motor Vehicle Safety Standard 208,[147] a Department of Transportation (DOT) safety regulation that required automobile manufacturers to install lap-and-shoulder seatbelts in the rear seats of passenger vehicles, but allowed those manufacturers the option of installing lap-only belts for rear inner seats. The case arose out of a tragic head-on collision between the Williamson family's Mazda minivan and another vehicle. Delbert Williamson and his daughter, Alexa, who were strapped in with lap-and-shoulder belts, survived the crash; Delbert's wife, Thanh, however, was wearing only a lap belt and died. The Williamsons sued Mazda on various state tort theories, all of which argued that the manufacturer should have provided a lap-and-shoulder belt for Thanh's rear interior seat as well. The case thus presented the question whether FMVSS 208, by allowing manufacturers a choice as to what sort of seatbelts to install in rear interior seats, preempted state common law actions that would effectively require the installation of lap-and-shoulder belts.

The California Court of Appeal thought that it had seen all this before, in the Supreme Court's 2000 ruling in *Geier v American Honda Motor Co.*[148] That case involved another provision in an earlier version of FMVSS 208 that required auto manufacturers to install passive restraints in cars, but left manufacturers a choice whether to use airbags, automatic seatbelts, or some other passive system. *Geier* held that FMVSS 208 preempted a state tort suit against Honda for failing to install a driver's side airbag that might have protected Alexis Geier from severe injuries in a crash.[149] Like many lower courts, the California appellate court in *Williamson* read *Geier* as holding that a federal regulatory decision to allow

[146] 131 S Ct 1131 (2011).

[147] Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 54 Fed Reg 46257–46258 (1989).

[148] 529 US 861 (2000).

[149] Id at 874.

manufacturers a choice preempts state tort theories that would require them to adopt a particular form of equipment.[150]

The Supreme Court reversed the California court—somewhat remarkably without dissent. Writing for the Court as he had in *Geier*, Justice Breyer followed the earlier decision's roadmap but arrived at a different destination. The first two questions concerned the language of the National Traffic and Motor Vehicle Safety Act,[151] which includes both an express preemption clause and a savings clause. The preemption provision says that "no State" may "establish, or . . . continue in effect . . . any safety standard applicable to the same aspect of performance" of a motor vehicle or item of equipment "which is not identical to the Federal standard."[152] The savings clause, on the other hand, provides that "[c]ompliance with" a federal safety standard "does not exempt any person from any liability under common law."[153] *Geier* read the savings clause to make clear that state tort suits fall outside the scope of the preemption clause, and *Williamson* reaffirmed that reading.[154] As in *Geier*, however, the Court rejected the proposition that the savings clause immunized state tort suits not only from the effect of the preemption clause but also from principles of *conflict* preemption.[155]

Geier held state tort suits preempted on the ground that liability for failing to provide airbags would stand as an obstacle to the purpose of FMVSS 208, which was to give manufacturers a choice as to which passive restraint system to install.[156] In *Williamson*, Justice Breyer conceded "that the history of the regulation before us resembles the history of airbags to some degree."[157] Specifically, DOT had ordered manufacturers to install lap-and-shoulder belts in rear outer seats but decided to leave manufacturers a choice as to which kind of belt to install in rear inner seats. The Court

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[150] 167 Cal App 4th 905, 914–17 (2008); see also *Carden v General Motors Corp.*, 509 F3d 227 (5th Cir 2007); *Griffith v General Motors Corp.*, 303 F3d 1276 (11th Cir 2002); *Heinricher v Volvo Car Corp.*, 809 NE2d 1094 (Mass App 2004).

[151] Pub L No 89-563, 80 Stat 718 (1966), codified as amended at 15 USC § 1381.

[152] 15 USC § 1392(d) (1988).

[153] 15 USC § 1397(k).

[154] See *Geier*, 529 US at 868; *Williamson*, 131 S Ct at 1135–36.

[155] *Williamson*, 131 S Ct at 1136.

[156] 529 US at 875–81.

[157] 131 S Ct at 1137.

determined, however, that manufacturer choice was not a "significant regulatory objective" of the seatbelt regulation in the way that it had been for the passive restraint regulation in *Geier*.[158] As Justice Breyer explained,

> DOT here was not concerned about consumer acceptance; it was convinced that lap-and-shoulder belts would increase safety; it did not fear additional safety risks arising from use of those belts; it had no interest in assuring a mix of devices; and, though it was concerned about additional costs, that concern was diminishing.[159]

As the last point indicates, the Court found no independent pre-emptive force in the agency's judgment that lap-and-shoulder belts in rear inner seats would not be cost effective. "[M]any, perhaps most, federal safety regulations embody some kind of cost-effectiveness judgment. While an agency could base a decision to pre-empt on its cost-effectiveness judgment, we are satisfied that the rulemaking record at issue here discloses no such pre-emptive intent."[160]

Finally, the Court accorded some degree of deference to the agency's view that FMVSS 208 did not preempt the state tort actions at issue. *Geier* had observed that "the agency's own views should make a difference,"[161] and *Williamson* reaffirmed that view, albeit without specifying exactly *how much* difference they should make. Justice Breyer did emphasize that the Solicitor General's position in the litigation was consistent with DOT's long-standing position on the matter.[162] The Court accordingly concluded that "even though the state tort suit may restrict the manufacturer's choice, it does not 'stan[d] as an obstacle to the accomplishment . . . of the full purposes and objectives' of federal law."[163]

All the sitting Justices except Justice Thomas joined Justice Breyer's opinion for the Court.[164] Justice Sotomayor wrote a short concurrence "only to emphasize the Court's rejection of an over-

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[158] Id.

[159] Id at 1338. Each of these factors had been otherwise in *Geier*.

[160] Id. *Williamson*, 131 S Ct at 1139.

[161] 529 US at 883.

[162] 131 S Ct at 1139.

[163] Id at 1139–40, quoting *Hines v Davidowitz*, 312 US 52, 67 (1941) (alterations in original).

[164] Justice Kagan was recused on account of her role in the case as Solicitor General prior to joining the Court.

reading of *Geier* that has developed since that opinion was issued."[165] She stressed that "*Geier* does not stand . . . for the proposition that any time an agency gives manufacturers a choice between two or more options, a tort suit that imposes liability on the basis of one of the options is an obstacle to the achievement of a federal regulatory objective and may be pre-empted."[166] Rather, "state tort suits are not obstacles" to federal law "[a]bsent strong indications from the agency that it needs manufacturers to have options in order to achieve a significant regulatory objective."[167]

Justice Thomas concurred only in the judgment, arguing that the savings clause "speaks directly to the [preemption] question and answers it."[168] As he had in *Geier*, Thomas maintained that the statutory savings clause was not directed only at limiting the scope of the express preemption clause, but rather independently saved all state common-law claims.[169] Thomas spent the majority of his concurrence criticizing the Court's reliance on "purposes-and-objectives pre-emption," noting that he had rejected this approach to preemption "as inconsistent with the Constitution because it turns entirely on extratextual 'judicial suppositions.'"[170] As Thomas put it, the majority's analysis asked "whether the regulators *really* wanted manufacturers to have a choice or did not really want them to have a choice but gave them one anyway"—a question that could be answered only by "a 'freewheeling, extratextual, and broad evaluatio[n] of the purposes and objectives' of FMVSS 208."[171] He complained, moreover, that the fact "[t]hat the Court in *Geier* reached an opposite conclusion reveals the utterly unconstrained nature of purposes-and-objectives pre-emption"; after all, "the only difference" between *Williamson* and *Geier*

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[165] 131 S Ct at 1140 (Sotomayor, J, concurring).

[166] Id (footnote omitted) (alteration in original).

[167] Id (internal quotation marks omitted). It was not completely clear from Justice Sotomayor's discussion whether this "strong indications" standard was a general judgment about when state common law claims should be preempted or a product of the statutory savings clause. See id at 1141 (indicating that respondents had not met the standard, "[e]specially in light of" the savings clause).

[168] Id at 1141 (Thomas, J, concurring in the judgment).

[169] *Williamson*, 131 S Ct at 1141–42, citing *Geier*, 529 US at 896–98 (Stevens, J, dissenting). Justice Thomas had joined Justice Stevens's dissent in *Geier*.

[170] *Williamson*, 131 S Ct at 1142, citing *Wyeth*, 555 US at 603 (Thomas, J, concurring in the judgment).

[171] *Williamson*, 131 S Ct at 1142.

"is the majority's 'psychoanalysis' of the regulators."[172]

B. PLIVA, INC. V MENSING

If *Williamson* seemed like a reprise of *Geier*, then *PLIVA, Inc. v Mensing*[173] arrived at the Court as an apparent rerun of *Wyeth v Levine*.[174] In *Wyeth*, the Court held that the federal Food and Drug Administration's (FDA) approval of a drug—and, in particular, of the warnings on the drug's label—did not preempt state tort suits for failure to warn of dangers associated with the drug's use.[175] *PLIVA* raised the same issue in the context of *generic* drugs. Under federal law, manufacturers of a new drug must obtain FDA approval by proving that the drug is safe and effective—an arduous and time-consuming process involving "costly and lengthy" clinical testing.[176] Although all drugs once had to go through this process, Congress amended the law in 1984 to provide an expedited approval process for "generic" forms of drugs that had already been approved by the FDA.[177] Such drugs must simply show "equivalence" to a "reference listed drug" that has already been approved.[178] Similar rules apply to the warnings on a drug's label. A new drug's manufacturer must show that the proposed label is accurate and adequate,[179] while a generic drug manufacturer must show simply that the "labeling proposed . . . is the same as the labeling approved for the listed drug."[180]

The defendants in *PLIVA* manufactured a generic form of the drug metoclopramide, a drug commonly used to treat digestive-tract disorders. The FDA approved metoclopramide in 1980 under the brand name "Reglan"; since that time, however, evidence emerged that the drug can cause a severe and often irreversible

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[172] Id at 1143, quoting *United States v Public Utility Commission of California*, 345 US 295, 319 (1953) (Jackson, J, concurring).

[173] 131 S Ct 2567 (2011).

[174] 555 US 555 (2009).

[175] See id at 559.

[176] 131 S Ct at 2574; see also 21 USC §§ 355(b)(1), (d).

[177] This legislation, formally entitled the Drug Price Competition and Patent Term Restoration Act, Pub L No 98-417, 98 Stat 1585, is "commonly called the Hatch-Waxman Amendments." 131 S Ct at 2574.

[178] 21 USC § 355(j)(2)(A).

[179] See id §§ 355(d)(6), (7).

[180] Id § 355(j)(2)(A)(v).

neurological disorder called "tardive dyskinesia." Over the years, the FDA approved several changes to Reglan's labeling to increase the strength of its warnings about tardive dyskinesia, culminating in 2009 with a "black box" warning that "[t]reatment with metoclopramide for longer than 12 weeks should be avoided in all but rare cases."[181] Prior to the development of the stronger labels, physicians prescribed generic forms of metoclopramide to Gladys Mensing and Julie Demahy, who each developed tardive dyskinesia after taking the drug for several years.[182]

Both patients sued the drug's manufacturers, in separate lawsuits, claiming that the manufacturers had failed to change their warning labels "despite mounting evidence that long term metoclopramide use carries a risk of tardive dyskinesia far greater than that indicated on the label."[183] The manufacturers defended on preemption grounds, arguing that federal law's requirement that their warning labels be the same as the brand-name drug's label made it impossible for them to carry out any state tort-law duty to adopt a stronger warning. The Fifth and Eighth Circuits both rejected the preemption defense.[184]

A divided Supreme Court consolidated the two cases and reversed in each. Justice Thomas wrote for the majority, which also included Chief Justice Roberts and Justices Scalia, Kennedy, and Alito. Because the prescription drug statutes expressly save state regulation in the absence of a "direct and positive conflict" with federal law,[185] controversy focused on conflict preemption and, in particular, on the little-used doctrine of "impossibility."[186] Prior cases had confined that concept to cases where "compliance with both federal and state [law] is a physical impossibility."[187] *PLIVA* grappled with what that standard meant in a complex regulatory setting where a state-law defendant's actions are subject to federal regulatory approval. In so doing, the Court arguably expanded the "impossibility" category.

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[181] 131 S Ct at 2573.

[182] Id.

[183] *Mensing v Wyeth, Inc.*, 588 F3d 603, 605 (8th Cir 2009).

[184] Id at 614; *Demahy v Actavis, Inc.*, 593 F3d 428, 449 (5th Cir 2010).

[185] See Drug Amendments of 1962, Pub L No 87-781 (1962), § 202, 76 Stat 780.

[186] The Court reserved the question "whether state and federal law 'directly conflict' in circumstances beyond 'impossibility.'" 131 S Ct at 2577 n 4.

[187] *Florida Lime & Avocado Growers, Inc. v Paul*, 373 US 132, 142–43 (1963).

The parties in *PLIVA* agreed that, taking the plaintiffs' factual allegations as true, "[s]tate law required the Manufacturers to use a different, safer label."[188] They disagreed, however, about the options that federal law left open for changing the label. Deferring to the FDA's view, the Court held that FDA regulations "prevented the Manufacturers from independently changing their generic drugs' safety labels."[189] It assumed for the sake of argument, however, that "federal law also required the Manufacturers to ask for FDA assistance in convincing the brand-name manufacturer to adopt a stronger label, so that all corresponding generic drug manufacturers could do so as well."[190] Even assuming that this requirement existed, however, the majority found impossibility preemption on the ground that "[i]t was not lawful under federal law for the Manufacturers to do what state law required of them [i.e., change the label]. And even if they had fulfilled their federal duty to ask for FDA assistance, they would not have satisfied the requirements of state law."[191]

The plaintiffs' argument against preemption asserted "that when a private party's ability to comply with state law depends on approval and assistance from the FDA, proving pre-emption requires that party to demonstrate that the FDA would not have allowed compliance with state law."[192] On this view, the manufacturers would have failed to establish preemption "because they did not even *try* to start the process that might ultimately have allowed them to use a safer label."[193] Justice Thomas reasoned that this approach "would render conflict pre-emption largely meaningless"; after all, even if federal law flatly prohibited compliance with state duties, defendants could have petitioned Congress to amend the law.[194] Instead, the majority concluded that "when a party cannot satisfy its state duties without the Federal Government's special permission and assistance, which is dependent on the exercise of judgment by a federal agency, that party cannot inde-

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[188] 131 S Ct at 2574.

[189] Id at 2577.

[190] Id.

[191] Id at 2577–78.

[192] *PLIVA*, 131 S Ct at 2578–79.

[193] Id at 2579.

[194] Id.

pendently satisfy those state duties for pre-emption purposes."[195]

This conclusion required the Court to distinguish *Wyeth*, in which the plaintiff also contended that the defendant drug manufacturers' FDA-approved warning label was insufficient to satisfy the manufacturers' duty to warn under state law. Federal law permitted manufacturers of a brand-name drug, however, "to unilaterally strengthen its warning" without advance approval from the FDA.[196] This made it possible for a regulated entity to comply with state law duties, and it made no difference that the FDA retained authority to *dis*approve the new label after its adoption by the manufacturer: "[A]bsent clear evidence that the FDA would not have approved a change to Phenergan's label, we will not conclude that it was impossible to comply with both federal and state requirements."[197] As the *PLIVA* Court described its earlier holding, "the possibility of impossibility was not enough."[198]

The Court acknowledged that its reasoning in *PLIVA* produced some odd results. Justice Thomas recognized that, "[h]ad Mensing and Demahy taken Reglan, the brand-name drug prescribed by their doctors, *Wyeth* would control and their lawsuits would not be pre-empted."[199] The disparity arose, however, from the reality that the statutory regimes for brand-name and generic drugs "are meaningfully different."[200] "We will not distort the Supremacy Clause," the majority insisted, "in order to create similar pre-emption across a dissimilar statutory scheme."[201]

Justice Sotomayor dissented, joined by Justices Ginsburg, Breyer, and Kagan, and accused the majority of "dilut[ing] the impossibility standard."[202] In particular, she saw no meaningful distinction between *PLIVA* and *Wyeth*. Because federal law permitted the generic drug manufacturers to ask the FDA to initiate a label change, the possibility that the FDA would have refused to do so "demonstrated only 'a hypothetical or potential con-

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[195] Id at 2581.

[196] *Wyeth*, 555 US at 73.

[197] Id at 571.

[198] 131 S Ct at 2581 n 8 (internal quotation marks omitted).

[199] Id at 2581.

[200] Id at 2582.

[201] Id.

[202] 131 S Ct at 2582 (Sotomayor, J, dissenting).

flict.'"[203] This possibility of adverse action by the federal regulators was no different from the possibility that the FDA would have vetoed a changed label in *Wyeth*—a possibility that the earlier court found insufficient for preemption. Emphasizing the Court's prior statements that "[i]mpossibility pre-emption . . . 'is a demanding defense,'" the dissenters insisted that in this case, as in *Wyeth*, "the mere possibility of impossibility is not enough."[204]

The dissent also emphasized the importance of generic drugs, noting that "[t]oday's decision affects 75 percent of all prescription drugs dispensed in this country."[205] This meant that the Court's preemption ruling would create a large class of consumers without recourse in the event of injury.[206] The dissenters likewise predicted that the decision would undermine drug safety. Noting that "[t]he FDA has limited resources to conduct postapproval monitoring of drug safety,"[207] Justice Sotomayor asserted that "[t]oday's decision eliminates the traditional state-law incentives for generic manufacturers to monitor and disclose safety risks."[208] Moreover, "brand-name manufacturers often leave the market once generic versions are available, meaning that there will be no manufacturer subject to failure-to-warn liability."[209] These factors, finally, might well discourage physicians from prescribing generic drugs and patients from accepting them.[210]

C. BRUESEWITZ V WYETH LLC

The Court confronted yet another drug statute in *Bruesewitz v Wyeth LLC*.[211] In the National Childhood Vaccine Injury Act of 1986 (NCVIA),[212] Congress took vaccines out of the traditional prescription drug regime construed in *Wyeth* and *PLIVA*. That traditional regime generally relies on federal premarket approval combined with back-end state tort regulation. The NCVIA instead

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[203] Id at 2588, quoting *Rice v Norman Williams Co.*, 458 US 654, 659 (1982).

[204] 131 S Ct at 2587, quoting *Wyeth*, 555 US at 573 (Sotomayor, J, dissenting).

[205] Id at 2583.

[206] Id at 2592.

[207] Id at 2584

[208] Id at 2592 (Sotomayor, J, dissenting).

[209] Id at 2593 (citation omitted).

[210] Id.

[211] 131 S Ct 1068 (2011).

[212] Pub L No 99-660, 100 Stat 3758, codified as amended at 42 USC § 300aa et seq.

established "a no-fault compensation program" under which a person injured by a vaccine may seek compensation by filing a petition against the Secretary of Health and Human Services in the Court of Federal Claims. A special master reviews these petitions under the Court's supervision, after which a claimant may either accept the judgment or seek relief through the tort system.[213] This process affords compensation for a wide variety of medical expenses and injuries, including $250,000 for vaccine-related deaths, with awards paid out of a fund generated by an excise tax on vaccines.[214] As a "quid pro quo" for the establishment of this no-fault regime, however, the NCVIA provided "significant tort-liability protections for vaccine manufacturers."[215] These protections include immunity for failure to warn so long as manufacturers comply with regulatory requirements, a heightened standard of culpability for punitive damages, and elimination of liability "for a vaccine's unavoidable, adverse side effects."[216]

Hannah Bruesewitz was vaccinated for diphtheria, tetanus, and pertussis (DTP) in April 1992, when she was six months old. She experienced over 100 seizures, beginning within twenty-four hours of her vaccination. Hannah's parents filed a petition in the Court of Federal Claims in 1995, alleging that Hannah suffered from residual seizure disorder and encephalopathy injuries—disorders listed in the NCIVA's Vaccine Injury Table as compensable adverse side effects of the DTP vaccine. When a Special Master denied their claims, the Bruesewitzes filed a common law tort suit in Pennsylvania state court, alleging that the defective design of the DTP vaccine caused Hannah's injuries. Wyeth removed the case to federal court, which held the Bruesewitzes' claims preempted.[217]

Bruesewitz required the Court to decide whether the NCVIA's express preemption clause preempted state liability for defective design claims. The relevant provision of the NCVIA provides that

> No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine

[213] See 42 USC §§ 300aa-11(a)(1), 12(d), (e), & (g), 21(a).

[214] Id §§ 300aa-15(a), (i)(2); 26 USC §§ 4131, 9510.

[215] 131 S Ct at 1074.

[216] Id.

[217] See id at 1074–75.

> was properly prepared and was accompanied by proper directions and warnings.[218]

Justice Scalia's majority opinion, joined by Chief Justice Roberts and Justices Kennedy, Thomas, Breyer, and Alito, construed the "even though" clause to "clarif[y] the word that precedes it"—that is, it "delineates the preventative measures that a vaccine manufacturer must have taken for a side-effect to be considered 'unavoidable' under the statute."[219] This meant that "[p]rovided that there was proper manufacture and warning, any remaining side effects, including those resulting from design defects, are deemed to have been unavoidable. State-law design-defect claims are therefore preempted."[220]

In dissent, Justice Sotomayor (joined by Justice Ginsburg) rejected this reading of the statute: "Given that the 'even though' clause requires the absence of manufacturing and labeling defects, the 'if' clause's reference to 'side effects that were unavoidable' must refer to side effects caused by something other than manufacturing and labeling defects."[221] She reasoned that "[t]he only remaining kind of product defect recognized under traditional products liability law is a design defect";[222] therefore, the statute's preemptive effect should be confined to a subset of design defects that are "unavoidable"—that is, "side effects stemming from the vaccine's design [that] could not have been prevented by a feasible alternative design that would have eliminated the adverse side effects without compromising the vaccine's cost and utility."[223]

The majority and dissent sparred at length over the proper application of grammatical rules to the statutory text and the relevance and import of the statute's legislative history. Justice Breyer wrote a separate concurrence to emphasize the importance of "other sources, including legislative history, statutory purpose, and the views of the federal administrative agency, here supported by expert medical opinion."[224] In particular, he emphasized the FDA's

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[218] 42 USC § 300aa-22(b)(1).

[219] 131 S Ct at 1075.

[220] Id.

[221] Id at 1087 (Sotomayor, J, dissenting).

[222] Id.

[223] Id at 1093.

[224] Id at 1083 (Breyer, J, concurring). Justice Kagan took no part in the decision of the case.

view that the plaintiffs' claims were preempted; it was important, moreover, that "expert public health organizations support [the FDA's] views and the matter concerns a medical and scientific question of great importance."[225] Under these circumstances, Breyer suggested that deference was appropriate under *Skidmore v Swift & Co.*[226]

D. AT&T MOBILITY LLC V CONCEPCION

In *AT&T Mobility LLC v Concepcion*,[227] the Court considered whether the Federal Arbitration Act[228] (FAA) preempted a California rule that conditioned the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures. Vincent and Liza Concepcion purchased AT&T cellphone service in 2002. Although AT&T had advertised that the service contract would include free phones, it charged them $30.22 in sales tax based on the phones' retail value. In 2006, the Concepcions sued AT&T for false advertising and fraud in the U.S. District Court for the Southern District of California. The district court later consolidated the Concepcions' suit with a putative class action making similar allegations. AT&T moved to compel arbitration under a provision of the service contract providing "for arbitration of all disputes between the parties, but requir[ing] that all claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.'"[229]

Section 2 of the FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[230] The provision preempts state efforts to limit arbitration outright; it saves from preemption "'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not . . . defenses that apply only

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[225] Id at 1086.

[226] Id, citing 323 US 134 (1944). Although Justice Breyer cited *Skidmore*, he did not discuss why that level of deference was more appropriate than the more categorical deference accorded to agency views under *Chevron USA, Inc. v Natural Resources Defense Council*, 467 US 837 (1984).

[227] 131 S Ct 1740 (2011).

[228] 9 USC § 2.

[229] *AT&T*, 131 S Ct at 1744, quoting the contract.

[230] 9 USC § 2.

to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[231] The question in *Concepcion* was on which side of this line to place California's doctrine of unconscionability, as applied to class-action waivers in *Discover Bank v Superior Court*.[232] That case found class-action waivers to be unconscionable "in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."[233] In such circumstances, *Discover Bank* said, "the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.'"[234]

Writing for the majority, Justice Scalia found that the *Discover Bank* rule "interferes with arbitration" and was therefore preempted under the FAA.[235] Although the majority acknowledged the existence of classwide arbitration procedures, it held that "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[236] Moreover, while "class arbitration greatly increases risks to defendants" in much the same way as class litigation (i.e., by aggregating claims), arbitration provides only extremely deferential judicial review for both certification decisions and final judgments.[237] "We find it hard to believe," Scalia wrote, "that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision."[238] Hence, while parties remained free to agree to classwide arbitration, California's effort to require such procedures was preempted.

As he had in *Williamson*, Justice Thomas concurred to urge that

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[231] 131 S Ct at 1746, quoting *Doctor's Associates, Inc. v Casarotto*, 517 US 681, 687 (1996).

[232] 113 P3d 1100 (Cal 2005).

[233] Id at 1110.

[234] Id, quoting Cal Civ Code § 1668 (West, 1984).

[235] 131 S Ct at 1750.

[236] Id at 1751.

[237] Id at 1752.

[238] Id.

preemption be grounded in the actual text of the statute rather than on a conflict between state and federal law. "As I would read it," he said, "the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress."[239] He acknowledged, however, that this reading rested on a "not obvious" distinction between "revocability" of a contract and challenges to a contract's "validity and enforceability"—a distinction, moreover, that "has not been fully developed by any party."[240] Noting that "when possible, it is important in interpreting statutes to give lower courts guidance from a majority of the Court," Thomas provided a fifth vote by "reluctantly join[ing] the Court's opinion" while "adher[ing] to my views on purposes-and-objectives pre-emption."[241]

Justice Breyer dissented in an opinion joined by the rest of the Court's liberal wing. He first insisted that the "[t]he *Discover Bank* rule is consistent with the federal Act's language" because it "'applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in conctracts with such agreements.'"[242] He also argued that the California rule did not conflict with the FAA's purpose of "'ensur[ing] judicial enforcement' of arbitration agreements."[243] Debate centered on the extent to which class arbitration would, in fact, undermine the purposes of arbitration—especially that of reducing the cost and formality of litigation. The relevant comparison, Breyer suggested, was not between "the complexity of class arbitration [and] that of bilateral arbitration," but rather "between class arbitration and judicial class actions." Relying on American Arbitration Association statistics indicating that "'class arbitration proceedings take more time than the average commercial arbitration, but may take less time than the average class action in court,'" Breyer concluded that the *Discover Bank* rule's protection of class-wide procedures would not undermine the FAA's pro-arbitration policy.[244]

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[239] Id at 1753 (Thomas, J, concurring).

[240] Id at 1754.

[241] Id.

[242] Id at 1757 (Breyer, J, dissenting), quoting *Discover Bank*, 113 P3d at 1112.

[243] 131 S Ct at 1757, quoting *Dean Witter Reynolds Inc. v Byrd*, 470 US 213, 219 (1985).

[244] 131 S Ct at 1759–60, quoting Brief of American Arbitration Association as Amicus

E. CHAMBER OF COMMERCE V WHITING

A final case, *Chamber of Commerce v Whiting*,[245] scrambled the voting alignments from the Court's other preemption decisions. Reflecting widespread dissatisfaction with the rigor of federal enforcement efforts under the nation's immigration laws, a number of states have enacted laws to supplement federal immigration enforcement.[246] Public controversy has centered around Arizona's Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070),[247] which requires state and local officials to take various steps to enforce the national immigration laws, with the general import that those laws will be enforced more strictly in Arizona.[248] The United States has sued to challenge SB 1070 on preemption grounds, and the Supreme Court recently agreed to take up that case in the present Term.[249] *Whiting*, on the other hand, involved a lesser-known Arizona statute, the Legal Arizona Workers Act (LAWA),[250] which focuses on employers who hire unauthorized aliens. Although the relevant statutory regimes implicated by SB 1070 and the LAWA are meaningfully different, the Court's decision upholding the LAWA in *Whiting* may nonetheless foreshadow the Court's approach to SB 1070.

The LAWA, which the Arizona legislature enacted in 2007,

Curiae in Support of Neither Party, *Stolt-Nielson S.A. v AnimalFeeds International Corp.*, OT 2009 No 08-1198, *24 (US filed Sept 4, 2009).

[245] 131 S Ct 1968 (2011).

[246] See, for example, *United States v Arizona*, 703 F Supp 2d 980, 985 (D Ariz 2010) (citing "rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns" as giving rise to state intervention). For examples of action by other states, see Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala Acts 535, codified at Ala Code Ann §§ 31-13-1–30 (2011) (requiring officers to verify a person's immigration status during traffic stops or arrests if the officer has a reasonable suspicion that a person's presence is not lawful); Illegal Immigration Enforcement Act, 2011 Utah Laws Ch 21 (HB 497), codified at Utah Code Ann § 76-9-1001 et seq (2011) (requiring officers to verify the immigration status of persons arrested for certain misdemeanors and felonies, clarifying when an officer should question passengers about their immigration status, and giving grounds for a presumption of a person's lawful presence); Illegal Immigration Reform and Enforcement Act of 2011, Ga Laws 252 (HB 87), codified in various sections of Ga Code (authorizing officers to investigate a suspect's immigration status if the officer has probable cause).

[247] 2010 Ariz Legis Serv Ch 113 (West).

[248] SB 1070 also creates certain related crimes under state law, most importantly, a crime for an unauthorized alien to solicit, apply for, or perform work.

[249] See Lyle Denniston, *Another Landmark Ruling in the Offing* (SCOTUSblog, Dec 12, 2011), online at http://www.scotusblog.com/2011/12/another-landmark-ruling-in-the-offing/.

[250] Ariz Rev Stat Ann §§ 23-211 et seq.

"allows Arizona courts to suspend or revoke the licenses necessary to do business in the State if an employer knowingly or intentionally employs an unauthorized alien."[251] The law requires that state officials determine an individual's status by seeking federal verification of citizenship or immigration status, pursuant to federal law, and forbids any independent determination of that status. Likewise, employees may establish an affirmative defense by showing good-faith compliance with federal procedures for verifying an individual's eligibility for employment. Finally, state law requires all employers to verify an employee's eligibility by using the "E-Verify" system, an internet-based federal database.[252]

The Chamber of Commerce of the United States, along with various business and civil rights organizations, challenged the LAWA on preemption grounds. They argued, in particular, that the Arizona law was expressly preempted by the federal Immigration Reform and Control Act (IRCA),[253] which established extensive federal regulation of the employment of unauthorized aliens. The IRCA expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[254] The primary question in *Whiting* was whether Arizona's law could escape express preemption by fitting into the category of "licensing and similar laws." The Chamber also argued that LAWA was impliedly preempted because it conflicted with IRCA's object and purpose, and in particular that federal law impliedly preempted Arizona's effort to mandate the use of the federal E-Verify program.

Writing for the Court,[255] Chief Justice Roberts began with the statutory text: "When a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which nec-

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[251] 131 S Ct at 1976.

[252] See id at 1976–77 (summarizing the LAWA's provisions).

[253] Pub L No 99-603, 100 Stat 3359 (1986), codified as amended in scattered sections of 8 USC.

[254] 8 USC § 1324a(h)(2).

[255] Justices Scalia, Kennedy, and Alito joined the Chief's opinion in full. Justice Thomas joined all but the portions dealing with obstacle preemption—presumably because he has questioned the very legitimacy of obstacle preemption and thus wished to address only arguments based on the statutory text. See Part III.B. Although the Reporter described the Chief Justice's opinion on the obstacle preemption issues as not being "of the Court," it is worth noting that he still spoke for a 4–3 majority on those points because Justice Kagan was recused.

essarily contains the best evidence of Congress' preemptive intent.'"[256] "[O]n its face," he noted, the Arizona law "purports to impose sanctions through licensing laws," and Arizona's broad definition of license was consistent with dictionary definitions of the term, similar definitions in federal law, and the Court's own prior decisions.[257] The Court thus concluded that "Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted."[258]

The Chief Justice then turned to the implied preemption arguments. "At its broadest level," he said, "the Chamber's argument is that Congress 'intended the federal system to be exclusive,' and that any state system therefore necessarily conflicts with federal law."[259] That argument, the majority found, was inconsistent with the IRCA's explicit language saving state licensing regimes.[260] Moreover, the Chief Justice emphasized that "here Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects."[261] The LAWA adopted the federal definition of unauthorized alien and required state investigators to verify the work authorization of allegedly unauthorized aliens with federal authorities; "[a]s a result, there can by definition be no conflict between state and federal law as to worker authorization, either at the investigatory or adjudicatory stage."[262] Likewise, the LAWA's prohibitions on employment of unauthorized aliens "trace the federal law" and provide employers "with the same affirmative defense for good-faith compliance with the I-9 process as does the federal law."[263]

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[256] 131 S Ct at 1977, quoting *CSX Transportation, Inc. v Easterwood*, 507 US 658, 664 (1993).

[257] 131 S Ct at 1977. The Chief Justice noted, moreover, that "even if a law regulating articles of incorporation, partnership certificates, and the like is not itself a 'licensing law,' it is at the very least 'similar' to a licensing law, and therefore comfortably within the savings clause." Id at 1978.

[258] Id at 1981.

[259] Id, quoting Brief for the Petitioners, *Chamber of Commerce v Candelaria*, No 09-115, *39 (US filed Sept 1, 2010).

[260] 131 S Ct at 1981.

[261] Id.

[262] Id, citing Ariz Rev Stat Ann §§ 23-212(B), (H).

[263] 131 S Ct at 1982, citing Ariz Rev Stat Ann §§ 23-211(8), 212(J). Similarly, both the state and federal law allowed employers "a rebuttable presumption of compliance" when they use the E-Verify system. See 131 S Ct at 1982, citing Ariz Rev Stat Ann § 232-212(I).

Critically, the Court rejected the notion that "the law is preempted because it upsets the balance that Congress sought to strike" between "deterring unauthorized alien employment, avoiding burdens on employers, protecting employee privacy, and guarding against employment discrimination."[264] Cases finding such disruption, the Chief Justice observed, "all involve uniquely federal areas of regulation"—such as foreign affairs, maritime law, or fraud on a federal agency—while "[r]egulating in-state businesses through licensing laws has never been considered such an area of dominant federal concern."[265] Likewise, "all [the cases relied on by the Chamber] concern state actions that directly interfered with the operation of the federal program."[266] The present case, by contrast, involved no such interference, since Congress had specifically carved out a state role and Arizona law reinforced, rather than undermined, the IRCA's prohibitions on discrimination.[267] The Chief Justice emphasized that "[i]mplied preemption analysis does not justify a 'free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives,'" and that "'a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.'"[268] "That threshold," the Court concluded, "is not met here."[269]

Justice Breyer (joined by Justice Ginsburg) and Justice Sotomayor both dissented. Breyer thought that while the Arizona law might fit dictionary definitions of a "licensing" scheme, it was inconsistent with the way that term was used in the IRCA: "ordinary corporate charters, certificates of partnership, and the like

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[264] Id at 1983.

[265] Id (discussing *American Insurance Association v Garamendi*, 539 US 396 (2003); *Crosby v National Foreign Trade Council*, 530 US 363 (2000); *United States v Locke*, 529 US 89 (2000); *Buckman v Plaintiff's Legal Committee*, 531 US 341 (2001); and *Bonito Boats, Inc. v Thunder Craft Boats, Inc.*, 489 US 141 (1989)).

[266] 131 S Ct at 1983.

[267] Id at 1983–84.

[268] Id at 1985, quoting *Gade v National Solid Wastes Management Assn.*, 505 US 88, 110, 111 (1992) (Kennedy, J, concurring in part and in judgment).

[269] Id. The Chief Justice also rejected a narrower implied preemption argument, based on the fact that Arizona law requires employers to use the E-Verify system while federal law makes that system voluntary. He noted that the statute establishing E-Verify "contains no language circumscribing state action," id, and that "the Federal Government has consistently expanded and encouraged the use of E-Verify." Id at 1986. The Court rejected concerns about state-imposed burdens on the system and about the system's accuracy, noting that the United States had assured the Court of the system's adequacy on both counts. See id.

do not fall within the scope of the word 'licensing' as used in this federal exception."[270] Moreover, Breyer argued that the LAWA disrupted the balance Congress struck between the competing goals of federal immigration law. This was so because the state law increased the penalties for hiring an unauthorized alien in such a way as to outstrip federal penalties for discrimination, so that employers would have incentives to err on the side of not hiring "foreign-looking" persons.[271] The LAWA likewise "subjects lawful employers to increased burdens and risks of erroneous prosecution," particularly because of inaccuracies in the E-Verify system.[272] Breyer would thus have read the IRCA's "licensing" language more narrowly, "as limited in scope to laws licensing businesses that recruit or refer workers for employment."[273]

Also dissenting, Justice Sotomayor read the IRCA's saving language even more narrowly, "to preserve States' authority to impose licensing sanctions after a final *federal* determination that a person has violated IRCA by knowingly employing an unauthorized alien."[274] In other words, states may act only after federal authorities have determined that an employer is in violation of federal law. Although she read the savings clause differently than Justice Breyer, Sotomayor largely echoed his concerns that Arizona's scheme would undermine uniform federal enforcement of the immigration laws.[275]

f. an incoherent doctrine?

At the end of his dissent in *Concepcion*, Justice Breyer harkened back to his admonition in *Egelhoff* that "the true test of federalist principle" occurs in preemption cases.[276] Implicitly invoking the conservative Justices' paeans to state sovereignty in cases like

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[270] Id at 1988 (Breyer, J, dissenting).

[271] Id at 1990.

[272] Id at 1990–91.

[273] Id at 1995. Justice Breyer would likewise have held that the state law's mandate to use E-Verify was impliedly preempted. See id at 1995–97.

[274] Id at 1998 (Sotomayor, J, dissenting) (emphasis added).

[275] See id at 1999–2005. Justice Sotomayor likewise agreed with Justice Breyer that Arizona could not mandate the use of E-Verify. Id at 2005–07.

[276] See text accompanying note 6.

United States v Lopez and *Alden v Maine*,[277] Breyer noted that "federalism is as much a question of deeds as words. It often takes the form of a concrete decision by this Court that respects the legitimacy of a State's action in an individual case."[278] The Court's deeds in the 2010 Term, however, do not lend themselves to easy summation. This is true for a variety of reasons, some intrinsic to the nature of preemption cases and others contingent on the division of opinion on the current Court.

As Justice Breyer suggested in *Egelhoff*, preemption analysis occurs "at retail . . . statute by statute, line by line."[279] Sometimes Congress really does intend to preempt state law, and sometimes it doesn't; in the cases that reach the Supreme Court, typically by generating a split among the lower courts, Congress's intent is ambiguous almost by definition. If the Court were to impose very strong default rules—a super-strong version of the *Rice* presumption against preemption, for example—then we might expect all these intermediate cases to go one way or the other. But the default rules have never been *that* strong, nor is it clear that they should be. In the absence of heavy-handed defaults, any court deciding a series of preemption cases arising under a variety of different statutes that say different things and invoke different purposes is going to find preemption in some cases and reject it in others.[280] The different outcomes in *Wyeth* and *PLIVA*, for instance, reflect that the regulatory regimes for brand-name and generic drugs are meaningfully different in respects relevant to the preemption question.[281]

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[277] See *United States v Lopez*, 514 US 549, 552 (1995) (citing as a constitutional "first principle[]" the need to maintain "a healthy balance of power between the States and the Federal Government"); *Alden v Maine*, 527 US 706, 713 (1999) (emphasizing "the vital role reserved to the States by the constitutional design").

[278] 131 S Ct at 1762 (Breyer, J, dissenting).

[279] 532 US at 160 (Breyer, J, dissenting).

[280] See Richard A. Epstein and Michael S. Greve, *Introduction: Preemption in Context* 1, 19, in Epstein and Greve, eds, *Federal Preemption* (cited in note 44), at 19 ("The congressional intent baseline raises the specter that preemption law can only be as coherent as the statutory universe on which it operates.").

[281] See, for example, *PLIVA*, 131 S Ct at 2582 ("It is beyond dispute that the federal statutes and regulations that apply to brand-name drug manufacturers are meaningfully different than those that apply to generic drug manufacturers."). Similarly, *Wyeth*'s decision that federal approval of a drug does not preempt state common law actions seems inconsistent with *Riegel v Medtronic*, 552 US 312 (2008), which held that federal approval of a medical *device* does preempt state tort suits. But as Justice Stevens explained in *Wyeth*, "when Congress enacted an express pre-emption provision for medical devices in 1976

The divergent outcomes in the Court's preemption cases last Term thus do not necessarily signify a jurisprudence that is incoherent, confused, or unprincipled.[282] To be sure, there are frustrating inconsistencies: In *Whiting*, for example, the politics of immigration may seem to have induced most of the Justices to reverse their usual stance on preemption matters. But politics does not tell the whole story.[283] Even where the divergent results cannot be traced, as in *PLIVA* and *Wyeth*, to the underlying statutes, it hardly follows that the Justices have thrown neutral principles out the window. Rather, multiple neutral principles—concerning both methodology and constitutional structure—may bear on preemption cases, and their relative importance plausibly may vary across cases. For the *Whiting* dissenters, for example, principles of avoiding discrimination based on ethnicity or preserving federal primacy in foreign affairs may have seemed more immediately at issue than principles of federalism. Each of these values is grounded in the Constitution, and each might plausibly be called upon to resolve a close case of statutory construction. To say that one could have weighed these principles differently—as the majority did in *Whiting*—is not to say that there was no principled basis for coming out where the dissenters did. And to say that we need a more foundational principle for choosing among competing values in such cases is simply to restate the fundamental problem of constitutional law.

As I have already discussed, the Justices find themselves divided on at least two sets of legal questions that arise in nearly all preemption cases: What counts as preemption? And who can preempt state law? Both sets of issues raise questions along three dimen-

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. . . it declined to enact such a provision for prescription drugs." 555 US at 567. These statutory differences turn out to matter a great deal.

[282] See, for example, Ashutosh Bhagwat, *Wyeth v. Levine and Agency Preemption: More Muddle, or Creeping to Clarity?* 45 Tulsa L Rev 197, 197 (2000) ("The law of preemption . . . is infamous for its vagueness and unpredictability."); Pursley, 71 Ohio St L J at 515 (cited in note 9) ("Judicial preemption doctrine is thin and confusing."). Law professors love to say that this or that area of law is "incoherent" or "confused." See Young, 83 Tex L Rev at 11 n 41 (cited in note 47) (collecting citations to academics concluding that this or that field is "incoherent"). The fact that we say it so often, and about so many different doctrinal areas, suggests that a certain amount of disorder is inherent in any complex human construct like the law. In any event, there is no reason to believe that the Court's preemption jurisprudence is more confused than, say, its privacy or equal protection jurisprudence.

[283] For one thing, it is far from obvious what we mean by "politics" when we talk about judicial decisions. See Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the "Federalist Revival" after Gonzales v Raich*, 2005 Supreme Court Review 1, 18–20.

sions. The first dimension concerns the proper interpretation of the Supremacy Clause—in particular, the sort of conflict between state and federal law required before preemption must occur, and whether the Supremacy Clause forecloses a presumption against preemption. A second dimension is more methodological in nature, implicating broader debates about the relative importance in statutory construction of statutory text, legislative history, interpretive canons, the views of federal administrative agencies, and straight-up policy arguments. And, finally, the third dimension raises basic questions of separation of powers—not just which federal entities have the power to preempt state laws, but also whose views count as to whether preemption has occurred. These dimensions obviously overlap; the question of interpretive methodology, for example, implicates fundamental separation-of-powers concerns about the relationship between courts and other governmental actors. But distinguishing the broader dimensions of the Court's preemption disputes should spotlight the connection between those disputes and broader debates in public law.

Each individual Justice confronts these central questions of preemption doctrine, but the difficulty of developing coherent answers is compounded by the multimember nature of the Court. Some of the Justices have staked out clear positions on some of these issues, but not others, and other Justices remain uncommitted on most of them. For example, Justice Thomas has developed in recent years a distinctive and principled approach to preemption that stakes out a position on almost all of the relevant questions. Justice Breyer has likewise articulated a largely coherent theoretical position that, although allowing judges considerably more flexibility than Thomas's view, nonetheless at least has something to say about each of the relevant doctrinal and methodological issues. Outcomes in individual cases, however, are largely a function of where the less committed Justices fall. And even when these Justices sign on to a more theoretically ambitious opinion, they seem to feel relatively unconstrained to follow that theory in future cases. That is why, at least for now, preemption doctrine remains somewhat in flux.

It is not obvious that there *should* be a coherent body of "preemption doctrine"—that is, doctrine that is not a function of the particular regulatory field at issue. William Eskridge, for example, has argued that "the larger project of preemption jurisprudence

is to develop area-specific precepts for calibrating the state-federal balance."[284] To some extent, area-specific doctrine is inevitable. Preemption stems from Congress's intent, which varies from statute to statute, and as the Court decides a series of cases under a particular statute, the Court will likely develop an area-specific picture of Congress's intent under that statute. The Court has thus interpreted the Federal Arbitration Act and the National Bank Act as broadly preempting state law,[285] while construing the regime governing new medical drugs as leaving an important role for state tort regulation.[286]

My own view, however, is that preemption questions are too critical to the overall balance of our federalism to leave them as matters of "ordinary" statutory construction, unconnected to the broader themes of national power and state autonomy. Our constitutional system has always left much, if not most, of the institutional architecture of federalism to be worked out through ordinary legislation; hence, federal statutes, administrative regulations, institutional practices, and judge-made doctrines play a greater role in defining the balance of state and federal power than do the entrenched provisions of the canonical constitution. As I have already discussed, the enumerated limits of Congress's powers now play an extremely limited role in preserving the federal balance, and preemption has become the central question of our federalism. It is critical to approach preemption questions in ways that cohere with the broader concerns of constitutional federalism doctrine.[287] The next part discusses the ways in which the Court has set about that task.

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[284] Eskridge, 83 Notre Dame L Rev at 1485 (cited in note 123). For examples, see Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in Epstein and Greve, eds, *Federal Preemption* at 166 (cited in note 44); Sharkey, 76 Geo Wash L Rev at 449 (cited in note 95).

[285] See *Moses H. Cone Memorial Hospital v Mercury Construction Corp.*, 460 US 1, 24–25 (1983) (stating that the FAA announces "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," and "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act"); *Barnett Bank of Marion County, N.A. v Nelson*, 517 US 25, 32 (1996) (observing that, in the banking area, the Court's "history is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law").

[286] See *Wyeth v Levine*, 555 US 555 (2009).

[287] See Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 Cal L Rev 1371 (2010) (arguing that because statutes flesh out the constitutional structure, constitutional values should inform statutory construction).

III. The Presumption Against Preemption

In theory, at least, the centerpiece of modern preemption doctrine remains the Court's statement in *Rice v Santa Fe Elevator Corp.*[288] that "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Just three years ago, in *Wyeth*, the Court described the *Rice* presumption as a "cornerstone[] of our pre-emption jurisprudence."[289] Notwithstanding this and similar endorsements, many scholars have noted the Court's failure to consistently employ the *Rice* canon.[290] The 2010 Term was no exception to this tendency: The Justices ignored *Rice* in *Williamson* and *Concepcion* and invoked it only in dissent in *PLIVA* and *Bruesewitz*.[291] In *Whiting*, the majority looked only to the "plain wording" of the express preemption clause, but imposed a "high threshold" for finding *conflict* preemption.[292]

The unreliability of this presumption is nothing new: In *Rice* itself, the Court first articulated its strong anti-preemption presumption, but then went on to find *field* preemption based on a relatively weak showing of Congress's intent.[293] The presumption against preemption has become particularly controversial in recent years. On the one hand, some scholars (this one included) have developed theoretical accounts situating the *Rice* presumption within federalism doctrine as well as within the broader context

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[288] 331 US 218, 230 (1947).

[289] 555 US at 565.

[290] See, for example, Merrill, 102 Nw U L Rev at 741 (cited in note 102) ("[T]he presumption against preemption is honored as much in the breach as in observance."); Rosen, 102 Nw U L Rev at 785 (cited in note 101) (observing that the presumption "is only inconsistently invoked and applied"). Some commentators go so far as to say that "the Supreme Court's recent preemption decisions . . . [have], in effect, created a presumption *in favor of* preemption." Davis, 53 SC L Rev at 971 (cited in note 78) (emphasis added).

[291] See *PLIVA*, 131 S Ct at 2586 (Sotomayor, J, dissenting); *Bruesewitz*, 131 S Ct at 1096 n 15 (Sotomayor, J, dissenting). *Williamson* is the most surprising, because the Court rejected preemption without invoking *Rice*. But the Court may have felt that the circumstances of the case were so close to *Geier* that the only issues concerned the differences between the regulations at issue in the two cases. It is plausible that general presumptions would have little impact on such a granular question.

[292] 131 S Ct at 1977, 1985.

[293] See 331 US at 232–36. Richard Epstein and Michael Greve are thus right to question whether *Rice* really did what it is generally cited for. See Epstein and Greve, *Conclusion* at 315 (cited in note 67). That hardly undermines the authority of subsequent decisions' application of a real presumption against preemption, however.

of statutory and constitutional interpretive methodology.[294] On the other hand, the presumption has also come under attack from litigants and academics. Parties and their amici before the Court have repeatedly called for the Court to abandon *Rice* explicitly, both in express and implied preemption cases,[295] and the Court's reaffirmation of *Rice* in *Altria* and *Wyeth* is unlikely to discourage further attacks for long.

One question that arises at the outset is what to make of the Court's failure to invoke *Rice* in many of the cases in which it might seem to apply. Dissenting Justices in *Altria* and *Wyeth* invoked these omissions to argue that *Rice* is no longer—if it ever was—good law.[296] To my mind, however, Justice Thomas himself provided the appropriate answer to this sort of argument in *Wyeth*, where he said that "[b]ecause it is evident from the text of the relevant federal statutes and regulations themselves that the state-law judgment below is not pre-empted, it is not necessary to decide whether, or to what extent, the presumption should apply in a case such as this one, where Congress has not enacted an express pre-emption clause."[297] In other words, when the Justices think that the preemption question is not a close one, they often choose not to invoke *Rice*'s tiebreaker rule. This is true both when the Court does and does not find preemption. The Court's approach

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[294] See, for example, Young, 83 Tex L Rev at 130–34 (cited in note 47); Gardbaum, 79 Cornell L Rev at 767 (cited in note 55).

[295] See note 111; see also Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Georgetown L J 2085, 2092 (2000) (attacking *Rice*); Untereiner, 84 Tulane L Rev 1265–68 (cited in note 11) (same).

[296] In *Altria*, for example, Justice Thomas cited the following express preemption cases that failed to refer to any presumption against preemption: *Sprietsma v Mercury Marine*, 537 US 51 (2002); *Rose v New Hampshire Motor Transport Association*, 552 US 364 (2008); *Engine Manufacturers Association v South Coast Air Quality Management Dist.*, 541 US 246 (2004); *Buckman Co. v Plaintiffs' Legal Commission*, 531 US 341 (2001); *United States v Locke*, 529 US 89 (2000); and *Geier v American Honda Motor Co.*, 529 US 861 (2000). He acknowledged that the Court had invoked it in *Medtronic, Inc. v Lohr*, 518 US 470 (1996); *Lorillard Tobacco Co. v Reilly*, 533 US 525 (2001); and *Bates v Dow Agrosciences LLC*, 544 US 431 (2005), but observed that *Lohr* was a "fractured decision," 555 US at 99, and asserted that *Lorillard* and *Bates* did not in fact rely on the presumption even though they found no preemption, id at 100–101. Most important, Thomas thought that *Riegel v Medtronic, Inc.*, 552 US 312 (2008), resolved any doubts: "[g]iven the [*Riegel*] dissent's clear call for the use of the presumption against pre-emption, the Court's decision not to invoke it was necessarily a rejection of any role for the presumption in construing the statute." 555 US at 102. See also *Wyeth*, 555 US at 623–24 (Alito, J, dissenting) (discussing *Geier* and *Buckman*).

[297] 555 US at 589 n 2 (Thomas, J, concurring in the judgment).

may well be a form of "incompletely theorized agreement"[298]—after all, why undermine consensus on a result by invoking a presently controversial argument when one can resolve the case without it?[299] Just as William Eskridge and Lauren Baer have shown that the Court frequently fails to invoke *Chevron* in cases in which it might apply,[300] so too the Court's avoidance of *Rice* may signify little about whether *Rice*'s interpretive presumption remains good law.

It is not clear that the Court's stance on *Rice* represents a stable equilibrium, however, and it is worth examining the arguments advanced against a presumption against preemption and the extent to which particular Justices have taken those arguments up. Much of the debate about *Rice* is really a skirmish in the broader war between reliance on the "plain meaning" of statutory text and recourse to extrinsic tools like the canons of construction. What Justice Scalia once said of *Chevron* is likely true of *Rice* as well: If one generally believes that texts are clear, then one has less occasion to rely on interpretive rules and presumptions that aid in construing ambiguous statutes.[301] One can read Scalia's unwillingness to invoke *Rice* in *Bruesewitz*, for example, as a rejection of extrinsic sources of statutory meaning in general, not simply as an attack on a particular rule of construction in preemption cases.[302]

The 2010 Term also featured two more specific debates about the standard for preemption, however. One concerned an academic argument advanced by Caleb Nelson about the original under-

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[298] See generally Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv L Rev 1733 (1995).

[299] See, for example, *Crosby v National Foreign Trade Council*, 530 US 363, 374 n 8 (2000) (declining to address the controversial question whether *Rice* should apply in foreign relations cases, stating that "[w]e leave for another day a consideration in this context of a presumption against preemption").

[300] See William N. Eskridge Jr. and Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 Georgetown L J 1083, 1090 (2008) (finding "that the Court usually does not apply *Chevron* to cases that are, according to *Mead* and other opinions, *Chevron*-eligible"). Few seem to infer from this that *Chevron* is no longer good law.

[301] See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L J 511, 521 ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.").

[302] See also *Cipollone*, 505 US at 544 (Scalia, J, concurring in part and dissenting in part) ("Under the Supremacy Clause, our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning.").

standing of the Supremacy Clause,[303] which has important implications for both the *Rice* presumption and the proper approach to conflict preemption. This argument has particularly influenced Justice Thomas,[304] who has developed the most fully theorized approach to preemption among the current Justices, as well as prominent advocates of broad federal preemption.[305] The second debate concerns the extent to which the Court should analyze preemption differently in different regulatory fields—in particular, whether the *Rice* presumption should be confined to fields of traditional state primacy, while other rules should govern areas like immigration and foreign affairs where the national government has taken a leading role. Sections A and B of this part address the Nelson argument as it pertains to *Rice* and to conflict preemption, respectively. Section C considers the subject-matter scope of the presumption against preemption.

A. NON OBSTANTE, PART I—CHALLENGING RICE

In an important article published just over a decade ago,[306] Caleb Nelson challenged much of contemporary preemption doctrine as inconsistent with the original understanding of the Supremacy Clause. That Clause provides that the Constitution, treaties, and federal statutes "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."[307] Professor Nelson argues that the last phrase would have been understood by the Founding generation as a *non obstante* clause. These clauses were frequently employed to overcome the ordinary presumption against implied repeals of prior law.[308] He asserts that *Rice*'s presumption against preemption is inconsistent with this understanding: "A general rule that express preemption clauses should be read 'narrowly' . . . is hard to square with the

[303] Caleb Nelson, *Preemption*, 86 Va L Rev 225 (2000).

[304] See, for example, 131 S Ct at 2579 (plurality opinion) (endorsing Nelson's view on conflict preemption).

[305] See, for example, Untereiner, 84 Tulane L Rev at 1267–68 (cited in note 11) (endorsing Nelson's critique of *Rice*).

[306] See Nelson, 86 Va L Rev 225 (cited in note 303).

[307] US Const, Art VI, cl 2.

[308] Nelson, 86 Va L Rev at 237–44 (cited in note 303).

Supremacy Clause's non obstante provision."[309] Nelson's argument adds a valuable historical perspective to the preemption debate, and I embrace a number of his conclusions here. I do not believe, however, that he provides a persuasive argument for abandoning *Rice*.[310]

The Court did not confront Professor Nelson's argument against *Rice* directly in the 2010 Term. It did debate his claim that the Supremacy Clause must be read as a *non obstante* provision, but in the distinct context of *implied* preemption. And the Court's *express* preemption decision in *Bruesewitz* seemed to reflect some implicit skepticism about *Rice* by simply avoiding citing it. The remainder of this section addresses Nelson's argument against *Rice* on its merits, while Section B considers the likelihood that the Court will ultimately accept it.

1. *The strength and nature of the Rice presumption*. As an initial matter, it is not clear that Professor Nelson means to reject the presumption against preemption as the Court has actually applied it. He notes that "[o]ne should not take [his critique of *Rice*] too far,"[311] and he has no quarrel with the proposition that "judges should generally be 'reluctant to infer pre-emption.'"[312] Nelson's analysis thus provides no support for industry groups that have argued for "a presumption in favor of preemption."[313] It seems fair to read his argument as foreclosing only a strong clear statement requirement for preemption—a presumption that, as Judge Wald once put it, "Congress did not intend to interfere with the traditional power and authority of the states unless it signaled its intention in neon lights."[314]

Any such "neon lights" requirement would be far more rigid than the way the Court has traditionally applied *Rice*.[315] Professor

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[309] Id at 293.

[310] My argument in this section relies substantially on points made in an amicus brief that I filed on behalf of a group of constitutional and administrative law scholars in *Wyeth v Levine*. Brief of Amicus Curiae Constitutional and Administrative Law Scholars in Support of Respondent, *Wyeth v Levine*, No 06-1249, *9–14 (US Aug 14, 2008).

[311] Nelson, 86 Va L Rev at 294 (cited in note 303).

[312] Id at 293, quoting *Exxon Corp. v Governor of Maryland*, 437 US 117, 132 (1978).

[313] Brief of Amicus Curiae Product Liability Advisory Council, Inc., in Support of Petitioner at *15 (cited in note 111).

[314] Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L Rev 195, 209 (1983).

[315] See, for example, Karen Petroski, Comment, *Retheorizing the Presumption Against*

Nelson's point seems better read as a corrective to the danger, identified by Professor Shapiro, that any interpretive canon "will constitute both the starting and the ending point of analysis rather than serving as a helpful tool in resolving difficult cases."[316] But as long as courts do not apply *Rice* "in a way that subordinates other sources of information" about legislative intent—that is, so long as they do not transform it into a strong clear statement requirement—this danger does not arise.[317] None of last Term's preemption cases used *Rice* to exclude other sources of statutory meaning, and most of the cases ignored it entirely. The problem is that *Rice* is overlooked, not over-read.

At times, Professor Nelson seems to limit his anti-*Rice* argument to express preemption cases—that is, to cases in which Congress explicitly has dealt with the question of preemption.[318] It is fair to read his point as sweeping somewhat more broadly, however, to challenge any rule of construction that encourages courts to "strain the federal law's meaning in order to harmonize it with state law."[319] Nelson rejects the idea "that judges have a general

Implied Repeals, 92 Cal L Rev 487, 520 (2004) (noting that "the presumption against preemption does not enjoy the near-categorical status that the presumption against implied repeals currently does on the Supreme Court"). Professor Nelson also acknowledges that, given the placement of the semicolon in the Supremacy Clause, "the non obstante provision might have been directed especially at state judges," Nelson, 86 Va L Rev at 260 (cited in note 303)—not at the federal courts. But see id at 258–59 (arguing that the Framers played fast and loose with punctuation).

[316] Shapiro, 67 NYU L Rev at 956 (cited in note 52). Professor Nelson confirms this point when he acknowledges that "most of us view genuinely ambiguous statutory language as a delegation to the courts of authority to pick one interpretation from among the group of interpretations that are best," Nelson, 86 Va L Rev at 296 (cited in note 303), and that "[m]ost of the time, of course, Congress will leave courts free to take account of state interests when exercising their delegated authority," id at 298. He insists only that "courts [must] apply the presumption only *after* they have used whatever tools our theory of statutory interpretation permits," id at 296, and that "judges do not have complete discretion to base their selection [of an otherwise permissible interpretation] on whatever factors they like," id at 297. Nelson thus rejects only a categorical presumption that would "permit courts to base the decision *entirely* on [federalism] concerns," id at 298 (emphasis in original). I, for one, have never seen a Supreme Court decision that rested "entirely" on the *Rice* presumption.

[317] Shapiro, 67 NYU L Rev at 957–58 (cited in note 52); see also id at 958 (noting that strong "clear statement" rules "exclude the kind of purposive analysis that permits a court to find a result implicit in a statutory enactment"); see also Clark, *Process-Based Preemption*, in Buzbee, ed, *Preemption Choice* 208–09 (cited in note 8) (construing Professor Nelson's argument as objecting primarily to a strong clear statement approach to the presumption against preemption).

[318] See text accompanying note 309; see also Nelson, 86 Va L Rev at 292 (cited in note 303).

[319] Nelson, 86 Va L Rev at 255 (cited in note 303).

obligation to harmonize federal law with whatever state law happens to exist."[320] He targets cases like *Merrill Lynch, Pierce, Fenner & Smith v Ware*, which have stated that "the proper approach [in preemption cases] is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'"[321] In Nelson's view, "[u]nless there is some particular reason (over and above the general presumption against implied repeals) to believe that Congress meant to avoid such a contradiction, the Supremacy Clause indicates that the content of state law should not alter the meaning of federal law."[322]

This aspect of Professor Nelson's view seems to require little, if any, departure from current doctrine. In express preemption cases, preemption doctrine is, in Professor Rosen's terms, wholly "unilateralist"—courts construe what law Congress intended to preempt and do not place any countervailing value on state law.[323] And even in implied conflicts cases, where courts may deem some minor level of conflict tolerable for the sake of preserving state authority, courts do not generally "weigh" federal interests against state ones. Nor do they "harmonize" state and federal law in the sense of compromising each to attain some consensus norm.[324] The *Rice* presumption itself is a tool for discerning the content of *federal* law and whether that law conflicts with state regulation. As Louise Weinberg has said, we should not "suppos[e] that the presumption in favor of state law operates in cases of identified 'actual' federal-state conflict. Identification of a federal-state conflict-in-fact is, precisely, what overcomes the presumption."[325]

Congress's intent controls, however, as to the sorts of state regulation that conflict with the federal regulatory scheme. Many preemption decisions reflect the fact that Congress often intends for state and federal regulation to operate cooperatively within the same field—a possibility for which Nelson allows (as he must).

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[320] Id at 292.

[321] 414 US 117, 127 & n 8 (1973), quoting *Silver v New York Stock Exchange*, 373 US 341, 357 (1963).

[322] Nelson, 86 Va L Rev at 256 (cited in note 303).

[323] Rosen, 102 Nw U L Rev at 785 (cited in note 101).

[324] See sources cited in note 100.

[325] Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 Tex L Rev 1743, 1756 (1992).

The objectionable language in *Merrill Lynch*, for example, required the Court to "reconcile" state and federal law precisely because "Congress, in the securities field, has not adopted a regulation system wholly apart from and exclusive of state regulation. Instead, Congress intended to subject the exchanges to state regulation that is not inconsistent with the federal Act."[326]

One might go beyond *Merrill Lynch*'s specific-intent situation in two senses, however. The first would be to suggest that Congress should *always* be read as intending to preserve state regulatory authority, in the absence of some clear expression of intent to the contrary. Such a general presumption may be justifiable on purely descriptive grounds—that is, as the most likely description of Congress's *actual* intent.[327] Several commentators have observed that Congress's general tendency when it enters a regulatory field is to leave concurrent state regulatory authority in place.[328] Professor Nelson seems to accept this aspect of *Rice* when he allows that "judges should generally be 'reluctant to infer pre-emption.'"[329]

Justice Souter proposed a second and perhaps somewhat stronger version of *Rice* when he asserted that "[i]f the [federal] statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred."[330]

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[326] 414 US at 137. Specifically, the Court noted that "Section 6(c), 15 U. S. C. § 78f (c), explicitly subjects exchange rules to a requirement of consistency with the Act 'and the applicable laws of the State in which [the exchange] is located.'" See also id at 138 n 16 (noting that "[t]he Act contains other provisions indicating the intent of Congress that state law continues to apply where the Act itself does not").

[327] See, for example, Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?* 45 Vand L Rev 562, 563 (1991) ("Descriptive canons are principles that involve predictions as to what the legislature must have meant, or probably meant, by employing particular statutory language. . . . In contrast, normative canons are principles . . . that do not purport to describe accurately what Congress actually intended or what the words of a statute mean, but rather direct courts to construe any ambiguity in a particular way in order to further some policy objective." (footnotes omitted)).

[328] See Schapiro, *From Dualism to Polyphony* at 41 (cited in note 8) ("Since 1937, overlapping state and federal regulation has become the norm for many, if not most, subjects."); Robert R. M. Verchick and Nina Mendelson, *Preemption and Theories of Federalism*, in Buzbee, ed, *Preemption Choice* 13, 15 (cited in note 8) ("Congress regularly legislates to share power or to preserve state authority.").

[329] Nelson, 86 Va L Rev at 293 (cited in note 303), quoting *Exxon Corp. v Governor of Maryland*, 437 US 117, 132 (1978).

[330] *Gade v National Solid Wastes Management Assn.*, 505 US 88, 116–17 (1992) (Souter, J, dissenting).

This view, which has not (to my knowledge) been embraced in so many words by a majority of the Court, requires a court to choose the interpretation of ambiguous federal laws that best accommodates state regulatory efforts. This is probably where Professor Nelson would jump off the train, arguing that the meaning of a *non obstante* clause is to foreclose this sort of harmonization. It is not clear, however, that Justice Souter's formulation of *Rice* is really much of a step. As I discuss in the next section, any interpretive presumption that is not simply ornamental will have this sort of effect.

2. *The Supremacy Clause and canonical construction*. Even a soft presumption like *Rice* is not simply a tool for divining Congress's intent. What Justice Marshall said of "[c]lear-statement rules"—that they "operate less to reveal *actual* congressional intent than to shield important values from an *insufficiently* strong legislative intent to displace them"[331]—is also true of *Rice*. Some critics of the Supreme Court's clear statement rules have suggested that it is illegitimate for courts to apply "normative" canons protecting state autonomy.[332] Viet Dinh has extended this complaint to the presumption against preemption, arguing that it encourages judges to "rewrite the laws enacted by Congress."[333] For Professor Dinh, any interpretive rule not designed simply "to discern what Congress has legislated and whether such legislation displaces concurrent state law," risks "an illegitimate expansion of the judicial function."[334] At times, Professor Nelson appears to echo this criticism. That critique, however, runs counter to established traditions in our law of statutory construction.

All interpretive presumptions require, to varying degrees, that courts set aside the interpretation of a statute that would otherwise

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[331] *EEOC v Arabian American Oil Co.*, 499 US 244, 262 (1991) (Marshall, J, dissenting).

[332] See Eskridge and Frickey, 45 Vand L Rev at 593, 632–45 (cited in note 53) (arguing that "the Court . . . is creating a domain of 'quasi-constitutional law' in certain areas"); Manning, 110 Colum L Rev at 404 (cited in note 84) (arguing that the federalism canons depend on abstract values of federalism, but that "[v]alues such as federalism . . . do not exist in freestanding form" in the Constitution). Professor Manning's thoughtful critique of "freestanding federalism" is largely beyond the scope of this essay. I note only that it would call into question not only canons of statutory construction like the *Rice* presumption, but also other doctrines based on broad notions of federalism, such as the judicial abstention and anti-commandeering doctrines. It would also require rejecting many other principles predicated on freestanding structural values, such as federal sovereign immunity and functionalist doctrines of separation of powers.

[333] Dinh, 88 Georgetown L J at 2092 (cited in note 295).

[334] Id.

be most likely (in view of the other sources of statutory meaning) in favor of some less likely reading. Professor Nelson seems to suggest that *Rice* should control only where the court is in equipoise between two interpretations of a federal statute, only one of which would preempt state law.[335] But there are very few "ties" in statutory interpretation.[336] And assuming that the plausible interpretations are not actually *equal*, *Rice*'s presumption will matter only in those cases in which it prompts a court to choose the *less* likely reading; otherwise, the presumption does no independent work.[337] The function of an interpretive canon is thus to allow certain extrinsic elements—rules of linguistic usage, constitutional and subconstitutional values—to shape statutory construction. When Justice Souter says that *Rice* should counsel courts to choose nonpreemptive readings of federal statutes over preemptive ones, he is simply being specific about the traditional and utterly typical operation of interpretive presumptions.

The operation of such rules is foundational to the role of courts in statutory construction. Many commentators have pointed out that "[a]s applied to novel or unanticipated circumstances, all laws are more or less indeterminate," so that "courts necessarily engage in some degree of interstitial norm elaboration."[338] James Madison recognized as much in *The Federalist*:

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[335] Nelson, 86 Va L Rev at 265 (cited in note 303); see also John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum L Rev 1, 123 (2001) (criticizing clear statement rules to the extent that they "sometimes require judges to reject the most natural reading of a statute in favor of a plausible but less conventional interpretation").

[336] See, for example, Frederick Schauer, *Ashwander Revisited*, 1995 Supreme Court Review 71, 83 ("It is hard to imagine a case in which . . . there would be two identically plausible interpretations, such that . . . the rational judge would be reduced to something akin to tossing a coin."). Justice Scalia has said much the same thing about *Chevron*, observing that its interpretive rule "becomes virtually meaningless . . . if ambiguity exists only when the arguments for and against the various possible interpretations are in absolute equipoise. If nature knows of such equipoise in legal arguments, the courts at least do not." Scalia, 1989 Duke L J at 520 (cited in note 301). He concludes that "[i]f *Chevron* is to have any meaning, then, congressional intent must be regarded as 'ambiguous' not just when no interpretation is even marginally better than any other, but rather when two or more reasonable, though not necessarily equally valid, interpretations exist." Id.

[337] Justice Scalia and certain less august commentators have made a similar point about the constitutional avoidance canon. See *Almendarez-Torres v United States*, 523 US 224, 270 (1998) (Scalia, J, dissenting) (discussing the canon of constitutional avoidance); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex L Rev 1549, 1577–78 (2000) (same).

[338] Clark, *Process-Based Preemption* at 205 (cited in note 79); see also Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 Nw U L Rev 1389, 1404 (2005) ("No one can debate seriously the need for some default rules in statutory construction. Indeed, courts consistently are called upon to make sense of ambiguous statutory language and to plug

> All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.[339]

Eschewing the use of interpretive canons or presumptions in favor of relying on the "plain text"—as the majority purported to do last Term in *Bruesewitz*, for example[340]—thus risks submerging the courts' actual rationale for decision. If courts do not simply employ default rules without acknowledgment, they will need to recur either to increasingly attenuated sources of congressional intent or to their own policy judgments. Neither of those options is likely to appeal to textualists. The canons have at least the virtue of articulating the tiebreaker rules in play, so that they may be discussed and defended. As Amanda Tyler has recognized, "[t]he real question is what default rules we should have where the formal evidence of congressional purpose—i.e., statutory enactment—leaves us shorthanded."[341]

Professor Nelson concedes that the *non obstante* language in the Clause is directed only at the generic presumption against implied repeals. "While the *non obstante* provision tells courts not to apply the general presumption against implied repeals in preemption cases," he says, "it does not require them to discard their other tools of statutory interpretation."[342] Those tools include, as I have already suggested, an awareness that concurrent regulation—not wholesale ouster of the states—is the dominant pattern of contemporary national policy. They also include the basic proposition that "[n]ew statutes fit into the normal operation of the legal system unless the political branches provide otherwise"[343] and the concomitant role of the courts in harmonizing new enactments with preexisting law. David Shapiro has demonstrated that most of the canons serve "the essentially conservative role of the courts

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statutory gaps. Congress does not and cannot necessarily contemplate every future application of a statute at the time of its drafting.").

[339] Federalist 37 (Madison), in *The Federalist* at 236 (cited in note 20).

[340] See 131 S Ct at 1081.

[341] Tyler, 99 Nw U L Rev at 1404 (cited in note 338).

[342] Nelson, 86 Va L Rev at 294 (cited in note 303).

[343] Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 Harv L Rev 1913, 1914 (1999); see also Stephen E. Sachs, *Constitutional Backdrops*, at 25–26 (unpublished manuscript on file with author) (explaining that new statutes are ordinarily "defeasible" by background principles of law even if the text does not refer to those principles).

. . . in the more moderate sense of accommodating change to the larger, essentially stable context in which it occurs."[344] One can agree with Nelson that courts should not distort the meaning of federal statutes in order to avoid preemption without accepting that the Framers of the Supremacy Clause meant courts to abandon this basic function.

Most importantly, the "other tools of statutory interpretation" have traditionally included a broad imperative to construe statutes in light of constitutional values, including our constitutional commitment to federalism. I have argued elsewhere that constitutional principles are often implemented through statutes and other forms of "ordinary" law.[345] This is particularly true of federalism, which has from the beginning been implemented not simply through Article I's division of powers but also through statutes allocating the division of labor between, and law applied in, the state and federal courts,[346] structuring state political processes and regulating the behavior of state officials,[347] and—especially in the modern era—delegating significant responsibilities to state governments within federal programs.[348] When statutes implement constitutional principles, statutory construction becomes a critical part of the "reasoned elaboration" of constitutional values.[349] As Henry Hart and Al Sacks wrote over a half century ago,

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[344] Shapiro, 67 NYU L Rev at 925 (cited in note 52).

[345] See generally Young, 117 Yale L J at 408 (cited in note 13).

[346] See, for example, 28 USC §§ 1251, 1257 (giving the Supreme Court jurisdiction over "all controversies between two or more States" and "All controversies between the United States and a State," as well as the power to review the decisions of the states' highest courts); Anti-Injunction Act, 28 USC § 2283 (generally prohibiting federal courts from enjoining state-court proceedings); Rules of Decision Act, 28 USC § 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

[347] See, for example, Voting Rights Act of 1965, Pub L No 89-110, Title 1, § 5, 79 Stat 439 (1965), codified as amended at 42 USC § 1973c; 42 USC § 1983; Equal Employment Opportunity Act of 1972, Pub L No 92-261, 86 Stat 103 (1972), codified as amended at 42 USC § 2000e(a) (extending Title VII of the 1964 Civil Rights Act to cover state governments).

[348] See, for example, Clean Air Act, 42 USC § 7401 et seq (regulating air emissions by, in part, establishing "National Ambient Air Quality Standards" for every state and requiring participating states to develop and enforce state implementation plans to reach those standards); Patient Protection and Affordable Care Act, Pub L No 111-148, 124 Stat 119 (2010), to be codified in scattered sections of 26, 42 USC) (using federal and state regulators to address health care reform). On the critical importance of such delegations to federalism, see, for example, Bulman-Pozen and Gerken, 118 Yale L J 1256 (cited in note 35).

[349] See Young, 98 Cal L Rev at 1384–86 (cited in note 287).

> Not only does every particular legal arrangement have its own particular purpose but that purpose is always a subordinate one in aid of the more general and thus more nearly ultimate purposes of the law. Doubts about the purposes of particular statutes or decisional doctrines, it would seem to follow, must be resolved, if possible, so as to harmonize them with more general principles and policies.[350]

Canons of statutory construction play a pivotal role in this effort. The "rule of lenity" harmonizes criminal statutes with broader principles of due process,[351] for example, and the canon of constitutional avoidance is best understood as a tool for protecting a variety of constitutional principles.[352]

Normative canons can play this role even when the underlying constitutional value might otherwise be extremely difficult for courts to enforce. Clear statement rules disfavoring restrictions on the jurisdiction of the federal courts, for example, may be the *only* viable way, in many instances, of protecting values of judicial independence grounded in Article III.[353] This is especially true of federalism, which has been underenforced at least since 1937, and many of the Court's pro-federalism clear statement rules predate the Rehnquist Court's "federalist revival."[354] As I have already discussed, the *Rice* presumption is an important aspect of this phenomenon.

If Professor Nelson's argument forbids reliance on *Rice*'s presumption against preemption, it is equally hostile to the Court's other pro-federalism clear statement rules. These include rules disfavoring interpretations of federal statutes that would impose conditions on states' acceptance of federal funds,[355] subject the

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[350] Henry M. Hart Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 148 (William N. Eskridge Jr. & Philip P. Frickey, eds) (Foundation, 1994).

[351] See Cass R. Sunstein, *Nondelegation Canons*, 67 U Chi L Rev 315, 332 (2000) ("The rule of lenity is inspired by the due process constraint on conviction pursuant to open-ended or vague statutes.").

[352] See Young, 78 Tex L Rev at 1585 (cited in note 337); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 Cal L Rev 397 (2005).

[353] See Young, 78 Tex L Rev at 1587 (cited in note 337).

[354] See, for example, *United States v Bass*, 404 US 336 (1971); *Murdoch v Memphis* 87 US (20 Wall) 590 (1875) (refusing to find that Congress intended to extend U.S. Supreme Court review to questions of state law on appeal from the state courts absent a clear statement of Congress's intent to that effect).

[355] *Arlington Central School District Board of Education v Murphy*, 548 US 291 (2006); *South Dakota v Dole*, 483 US 203 (1987).

states to statutory liability under federal law,[356] abrogate the states' sovereign immunity,[357] regulate the traditional functions of state government,[358] intrude on traditional concerns of state criminal law,[359] or regulate at the outer limits of Congress's Commerce Clause authority.[360] Each of these rules potentially alters the construction of federal statutes based on concern for state governmental autonomy; each, therefore, would seem to run afoul of the argument that the Supremacy Clause permits no presumption against "implied repeals" of state prerogatives. The ubiquity of these rules, however, and the decades of precedent behind many of them, emphasizes the radical change that a broad reading of Nelson's argument would impose on the federal law of statutory construction. One might thus apply the canon of avoidance to Nelson's argument itself, preferring a more modest reading that would leave this pervasive and traditional judicial function intact.

3. *Rice and the contemporary structure of federalism doctrine*. The *Rice* presumption rests not on the implied repeals canon but rather on the evolving structure of our federalism. The presumption, along with the Court's other federalism-based "clear statement" rules, developed long after the period examined by Professor Nelson. They developed for a reason: The Founders' initial institutional strategy for limiting national power and preserving state autonomy had failed. That strategy relied on the specific enumeration of national powers in Article I of the Constitution and the Tenth Amendment's corresponding reservation of all other powers to the states. As I described in Part I, this dual federalist regime ultimately collapsed as a result of the Court's difficulty in drawing determinate boundaries to cabin terms like "commerce among the several states" and "necessary and proper," as well as due to increasing pressure for national regulation in response to industrialization and economic crisis. Notwithstanding the Rehnquist Court's effort to retain *some* limits on the Commerce

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[356] *Will v Michigan Dept. of State Police*, 491 US 58 (1989).

[357] *Atascadero State Hospital v Scanlon*, 473 US 234 (1985); see also *Chisholm v Georgia*, 2 US (2 Dall) 419, 429 (1793) (Iredell, J, dissenting).

[358] *Gregory v Ashcroft*, 501 US 452 (1991).

[359] *United States v Bass*, 404 US 336 (1971).

[360] *Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers*, 531 US 159 (2001); *United States v Jones*, 529 US 848 (2000).

Power,[361] the principle of enumerated powers now offers relatively little constraint on national action.[362]

The expanding scope of potential federal regulatory authority in the mid-twentieth century transformed our federalism from a regime of separate spheres to one of concurrent powers. With few constitutional constraints on what Congress *can* do, the action shifts to what Congress *has* done. To the extent that the Court fashions doctrines to protect federalism in a concurrent regime, then, those doctrines must take a different form. As Louise Weinberg has observed, "the very absence of formal impediments to the erosion of dual federalism has elicited from the Supreme Court a variety of prudential means of shoring up state power."[363] These include judge-made abstention doctrines,[364] narrowing constructions of critical federal statutes,[365] and a variety of state-protective "clear statement" rules.[366] As the cases just cited demonstrate, this process of subconstitutional protection for federalism has been going on for a very long time. The *Rice* presumption is less mandatory than these other doctrines—it influences close cases of statutory construction, rather than requiring a particular result in all cases within its scope—but it is otherwise in the same vein.

Rice also responds to the parallel shift from relatively vigorous

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[361] See *United States v Lopez*, 514 US 549 (1995) (holding that Congress did not have authority under the Commerce Clause to regulate guns in schools); *United States v Morrison*, 529 US 598 (2000) (holding that certain provisions of the Violence Against Women Act exceeded federal power).

[362] See, for example, *Gonzales v Raich*, 545 US 1 (2005) (holding that the Commerce Clause gives Congress authority to prohibit production and use of medical marijuana); Young, *Popular Constitutionalism* (cited in note 127) (arguing that enumerated limits on Congress's powers are "underenforced").

[363] Weinberg, 70 Tex L Rev at 1749 (cited in note 325).

[364] See, for example, *Younger v Harris*, 401 US 37 (1971) (requiring federal courts to abstain from enjoining pending state criminal proceedings); *Railroad Commission v Pullman Co.*, 312 US 496 (1941) (requiring federal courts to abstain in order to allow state courts to decide unresolved questions of state law that might permit federal court to avoid a federal constitutional question).

[365] See, for example, *Murdoch v City of Memphis*, 87 US 590 (1875) (construing the Judiciary Act to foreclose U.S. Supreme Court review of state court decisions on state law issues); *Wainwright v Sykes*, 433 US 72 (1977) (construing the *habeas* statute to disallow federal court review of federal claims not presented to the state courts unless the petitioner can show cause and prejudice for the default).

[366] See, for example, *Gregory v Ashcroft*, 501 US 452 (1991) (holding that Congress must clearly state its intent to regulate the traditional functions of state government); *Will v Michigan Dept. of State Police*, 491 US 58 (1989) (Congress must speak clearly in order to subject states to federal liability); *United States v Bass*, 404 US 336, 349 (1971) (Congress must speak clearly in order to intrude on state criminal jurisdiction).

judicial enforcement of constitutional boundaries to a primary reliance on political and procedural checks on national authority. Given that current federalism doctrine emphasizes the states' representation in Congress as the primary protection for federalism, "a presumption against preemption promotes legislative deliberation" about the implications of federal legislation for state autonomy.[367] Likewise, *Rice*'s presumption "may be used to implement constitutionally prescribed lawmaking procedures by ensuring that Congress and the president—rather than judges—make the crucial decision to override state law"; this is especially important because those procedures are "cumbersome and exclusive" by design.[368] As Justice O'Connor wrote in *Gregory*, "'to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'"[369] The *Rice* presumption is thus consistent with contemporary federalism doctrine's emphasis on the political and procedural safeguards of federalism.

Professor Nelson asserts that "even though the political safeguards of federalism may affect Congress's policy choices, they do not compel any particular rules for construing the resulting statutes"; moreover, "[f]or courts always to adopt narrowing constructions of *the language that Congress enacts* would be to give the political safeguards of federalism a kind of double weight."[370] But even the *Garcia* Court did not say that the "political safeguards of federalism" (not to mention the *procedural* ones, which Nelson does not address) were never to be enforced by courts. The Court simply said that "the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result," and it suggested that any judicial doctrine limiting national power "must

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[367] Verchick and Mendelson, *Preemption and Theories of Federalism* at 23 (cited in note 328).

[368] Clark, *Process-Based Preemption* at 213 (cited in note 79).

[369] *Gregory*, 501 US at 464, quoting Tribe, *American Constitutional Law* at § 6-25 (cited in note 30); see also Tribe, 1 *American Constitutional Law* at § 5-11 (cited in note 30) (explaining that *Gregory*'s clear statement rule "ensures the efficacy of the procedural political safeguards that were *Garcia*'s focus"). To say this is not necessarily to demand that Congress's preemptive intent must be explicit in the statutory text, as a clear statement rule would require. Rather, it is simply to ask that Congress's intent be clear based on the traditional sources by which courts generally determine that intent, including statutory structure, legislative history, and the like.

[370] Nelson, 86 Va L Rev at 299–300, 301 (cited in note 303) (emphasis in original).

find its justification in the procedural nature of this basic limitation."[371] Process-oriented judicial review, of course, can nonetheless be quite robust, as John Hart Ely's "representation reinforcement" approach to individual rights has famously demonstrated.[372] I have argued elsewhere that *Garcia* in fact supports a "Democracy and Distrust" approach to federalism, where the Court would emphasize process-oriented doctrines that would ensure that the political and procedural safeguards of federalism are respected and, where possible, enhance the operation of those safeguards.[373] Certainly the *Rice* presumption—which implements and enhances political and procedural checks on federal power but which imposes no substantive limits on congressional action—fits *Garcia*'s mandate that judicial review "must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'"[374]

Viewed in context, the *non obstante* aspect of the Supremacy Clause responded to a particular institutional relationship between state and federal law. In the early Republic, the new national government struggled to stake out a role in a political environment dominated by preexisting state governments.[375] In that circumstance, it made some sense to construe federal enactments broadly and subordinate concerns about preempting too much of the preexisting state legal background. But the world is very different now. As the current editors of the *Hart & Wechsler* casebook have pointed out, in the twentieth century "the expansion of federal legislation and administrative regulation . . . has accelerated. . . . [A]t present federal law appears to be more primary than interstitial in numerous areas."[376] And the norm in this denser regulatory environment is for state and federal legislation to coexist.[377] Indeed, the contemporary danger to our federal balance comes from the overexpansion of federal authority at the expense of state autonomy.[378]

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[371] 469 US at 554.

[372] See Ely, *Democracy and Distrust* (cited in note 48).

[373] See sources cited in note 47.

[374] 469 US at 554, quoting *EEOC v Wyoming*, 460 US 226, 236 (1983).

[375] See generally Young, 46 Wm & Mary L Rev at 1751–52, 1775–76 (cited in note 20).

[376] *Hart & Wechsler* at 459 (cited in note 90).

[377] See sources cited in note 328.

[378] See Young, 46 Wm & Mary L Rev at 1806–09 (cited in note 20).

Under present circumstances, abandoning the *Rice* presumption would undermine an already weak set of constitutional safeguards for state autonomy. I have defended the presumption against preemption elsewhere as a necessary "compensating adjustment" to preserve the Constitution's commitment to federalism in an era when the courts no longer enforce strong substantive limits on Congress's enumerated powers and rely instead on political and procedural checks on federal legislative action.[379] To the extent that the Framers did intend a strong *non obstante* reading of the Supremacy Clause, they assumed it would operate in an institutional context defined by strong enumerated powers constraints on federal action, separation-of-powers constraints sharply limiting the production of federal law, and vigorous judicial enforcement of all those constraints. These assumptions no longer hold.[380] It makes little sense to apply a contemporary sense of the scope of Congress's regulatory authority and the role of judicial review in constitutional federalism cases but insist on a circa-1789 set of preemption rules.

One need not go so far, however, because courts can give effect to the Framers' original understanding of the Supremacy Clause as a *non obstante* provision without rejecting *Rice*. As I have already discussed, Professor Nelson's reading of the Clause may foreclose only weighing state interests against federal ones in preemption cases, "harmonizing" federal law with state law in ways that subvert the clear intent of Congress, or converting *Rice* into a strong clear statement rule that would disallow recourse to the traditional tools of statutory construction. The Supreme Court has applied *Rice*, however, as a "plus factor" for resolving close cases under ambiguous statutes. As the cases in the 2010 Term demonstrate, the problem with *Rice*'s presumption against preemption is not that it is inconsistent with the Supremacy Clause, but rather that it is too frequently ignored.

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[379] See id at 1848–50. On compensating adjustments, see generally id at 1748–62; Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U Chi L Rev 421, 426 (2003). This approach is controversial. See, for example, John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 Harv L Rev 2003 (2009); Michael J. Klarman, *Antifidelity*, 70 S Cal L Rev 381 (1997). That debate, which I have addressed in the earlier work cited above, is beyond the scope of the present essay.

[380] See, for example, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv L Rev 1231 (1994).

B. NON OBSTANTE, PART 2—IMPLIED PREEMPTION

Professor Nelson's originalist reading of the Supremacy Clause has quite different implications for cases of *implied* preemption. Nelson argues that the Framers' understanding of the Supremacy Clause, within the context of a broader doctrine of repeals, compels a particular test for conflict preemption: state law is preempted only if there is a "logical contradiction" between state and federal law.[381] Under this approach, implied conflict preemption would generally be much narrower than the doctrine applied in many recent cases. Justice Thomas, for whom Nelson clerked in the 1994 Term, has adopted this argument in a series of separate opinions, and this body of opinions represents the most sustained effort by any Justice to develop a full-blown theory of preemption. Last Term, in *PLIVA*, he persuaded three other Justices—Roberts, Scalia, and Alito—to join that theory.[382] This section considers Professor Nelson's arguments about implied preemption, their contribution to Justice Thomas's emerging theory, and the implications of these arguments for future doctrine.

According to Professor Nelson, "the Supremacy Clause puts the doctrine of preemption within the same general framework as the traditional doctrine of repeals," which held that a later law superseded an earlier one only where the two provisions were "repugnant" to one another.[383] The Supremacy Clause established a rule of federal priority rather than a temporal one, but "the Supremacy Clause's rule of priority matters only when state law is 'repugnant to' valid federal law; the rule of priority comes into play only when courts cannot apply *both* state law *and* federal law, but instead must choose between them."[384] Under this "logical-contradiction test," broad notions of obstacle preemption are unconstitutional.[385] Nelson concludes that, under this view, "courts could no longer find preemption simply because they think that

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[381] Nelson, 86 Va L Rev at 260 (cited in note 303).

[382] 131 S Ct at 2579–80 (plurality opinion). Justice Kennedy, who provided the fifth vote for the remainder of Thomas's *PLIVA* opinion, did not join the *non obstante* section.

[383] Nelson, 86 Va L Rev at 236, 245–46 (cited in note 303), quoting William Blackstone, 1 *Commentaries* 59 (1765).

[384] Nelson, 86 Va L Rev at 251 (cited in note 303).

[385] Id at 260, 265–90.

state law hinders accomplishment of the 'full purposes and objectives' behind a federal statute."[386]

Justice Thomas adopted some of this reasoning three Terms ago, in his separate concurrence in *Wyeth*. There, Thomas announced that "I have become increasingly skeptical of this Court's 'purposes and objectives' pre-emption jurisprudence," which "routinely invalidates state laws based 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."[387] These "implied pre-emption doctrines that wander far from the statutory text," he concluded, "are inconsistent with the Constitution."[388] Thomas's argument in *Wyeth* rested primarily on two grounds: First, he read the Supremacy Clause to require "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."[389] This "structural limitation" preludes implied preemption "based on [the Court's] interpretation of broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law."[390] Second, Thomas emphasized the incompatibility of obstacle preemption with judicial restraint. "[T]his brand of the Court's preemption jurisprudence," he said, "facilitates freewheeling, extratextual, and broad evaluations of the 'purposes and objectives' embodied within federal law," leading to "decisions giving improperly broad pre-emptive effect to judicially manufactured policies, rather than to the statutory text enacted by Congress."[391] *Wyeth* cited Professor Nelson's work and suggested that Nelson's "logical contradiction" test might provide a superior approach to conflict preemption questions.[392]

Justice Thomas's opinion last Term in *PLIVA* went further, explicitly adopting Professor Nelson's reading that "[t]he phrase 'any

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[386] Id at 304.

[387] 555 US at 583 (Thomas, J, concurring in the judgment).

[388] Id.

[389] Id at 586.

[390] Id at 586, 587.

[391] 555 US at 604.

[392] Id at 590.

[state law] to the Contrary notwithstanding' [in the Supremacy Clause] is a non obstante provision."[393] This aspect of the Clause "therefore suggests that federal law should be understood to impliedly repeal conflicting state law"; moreover, it also "suggests that courts should not strain to find ways to reconcile federal law with seemingly conflicting state law."[394] Justice Kennedy declined to join this section of the opinion, and Justice Sotomayor's dissent criticized the plurality for "adopt[ing] the novel theory that the Framers intended for the Supremacy Clause to operate as a so-called non obstante provision."[395] According to Sotomayor, "[t]he plurality's new theory of the Supremacy Clause is a direct assault" on *Rice* and many other precedents "presum[ing] that federal law does not pre-empt, or repeal, state law."[396]

It is easy to see the reasons for Justice Sotomayor's concern. As she noted, "whereas [the Court has] long required evidence of a 'clear and manifest' purpose to pre-empt, the plurality now instructs courts to 'look no further than the ordinary meaning of federal law' before concluding that Congress must have intended to cast aside state law."[397] The implications of Justice Thomas's approach are complex, however. As Sotomayor acknowledged, "[t]he plurality . . . carefully avoid[ed] discussing the ramifications of its new theory for the longstanding presumption against pre-emption";[398] instead, Justice Thomas invoked the *non obstante* argument as part of the Court's most sophisticated discussion to date of *impossibility* preemption. The upshot of *PLIVA* was to make impossibility preemption somewhat easier to establish. The Court held that manufacturers of generic drugs had made out a case of impossibility preemption because the manufacturers could not comply with state-law labeling requirements without seeking prior federal approval—even though that approval might well have been forthcoming if they had sought it.[399]

It is critical to remember, however, that for *PLIVA*'s author,

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[393] 131 S Ct at 2579 (plurality opinion), citing Nelson, 86 Va L Rev at 238–40 (cited in note 303).

[394] 131 S Ct at 2580.

[395] Id at 2590 (Sotomayor, J, dissenting).

[396] Id at 2591.

[397] Id (citation omitted).

[398] Id at 2591 n 14.

[399] See Part II.B (discussing *PLIVA*, 131 S Ct 2567 (2010)).

impossibility is the *only* kind of conflict preemption; in *Wyeth*, after all, Thomas rejected "obstacle" preemption as unconstitutional. Taking the two positions together—a loosening of impossibility preemption in *PLIVA*, and a rejection of obstacle preemption in *Wyeth*—the result is surely a net gain for preemption opponents. *PLIVA*'s significance is limited to contexts in which the source of impossibility is a need for government approval to take an action required by state law, and it is also cabined by *Wyeth* itself, which held that a regulated entity can *not* establish impossibility simply by showing that a step required by state law would ultimately be subject to a federal regulatory veto.[400] On the other hand, there are hordes of obstacle preemption claims out there, and eliminating this whole category of preemption would significantly limit the preemptive impact of federal law.

There is, of course, one rather large fly in this ointment. Justice Thomas's expansion of impossibility preemption was for a majority of the Court (even if he did not get five for the *non obstante* aspect of his argument), while his rejection of obstacle preemption remains a dissenting position. Worse, he has not thus far been able to persuade *any* other Justices to join him in rejecting "purposes and objectives" preemption. If the Court lowers the bar to impossibility preemption while maintaining a broad view of obstacle preemption, that would hardly be good for state autonomy.

Last Term's cases did, however, provide some evidence that the Court is raising the overall bar for conflict preemption. The Court rejected a strong obstacle preemption argument in *Whiting*, and while the majority did not invoke *Rice* per se, Chief Justice Roberts's opinion did insist that "[o]ur precedents 'establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act.'"[401] The Chief echoed Justice Thomas's call for judicial restraint in *Wyeth* when he said that "[i]mplied preemption analysis does not justify a 'free-wheeling judicial inquiry into whether a state statute is in tension

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[400] See Part II.C. But see James M. Beck, *Top Ten Best Prescription Drug/Medical Device Decisions of 2011*, Drug and Device Law (Dec 30, 2011), online at http://druganddevicelaw.blogspot.com/2011/12/top-ten-best-prescription-drugmedical.html (predicting that *PLIVA*'s holding is "usable elsewhere . . . [considering] how that test might play in the context of, say, black box warnings, design defect claims (both drugs and non-PMA devices), Dear Doctor letters, and any other situation where our clients are required to get the FDA's (or some other federal agency's) sign off before doing this or that").

[401] 131 S Ct at 1985, quoting *Gade*, 505 US at 110 (Kennedy, J, concurring in part and in the judgment).

with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'"[402]

Perhaps equally significant, a unanimous Court in *Williamson* made a critical point about the preemptive effects of federal cost/benefit analyses. Although the federal agency had determined that requiring lap-and-shoulder belts in rear interior seats would not be cost effective, the Court rejected the notion that a contrary judgment under state law would pose an obstacle to federal policy. Justice Breyer explained:

> [M]any, perhaps most, federal safety regulations embody some kind of cost-effectiveness judgment. . . . [T]o infer from the mere existence of such a cost-effectiveness judgment that the federal agency intends to bar States from imposing stricter standards would treat all such federal standards as if they were *maximum* standards, eliminating the possibility that the federal agency seeks only to set forth a *minimum* standard potentially supplemented through state tort law. We cannot reconcile this consequence with a statutory saving clause that foresees the likelihood of a continued meaningful role for state tort law.[403]

Given *Geier*'s holding that the mere existence of such a savings clause does not foreclose obstacle preemption arguments,[404] *Williamson*'s statement seems generalizable to most obstacle preemption contexts: A federal agency's decision not to impose a regulatory requirement based on a cost/benefit calculus will not, without more, necessarily preempt a state-law judgment that such a requirement *is* cost effective. Many preemption arguments take just this form, and *Williamson* should make that sort of argument much harder to win.

Finally, even *Bruesewitz* may contain some good news for opponents of obstacle preemption. *Bruesewitz* was an express preemption case, and it ruled in favor of preemption. But the opinions featured a key methodological disagreement between Justice Scalia's majority opinion, with its somewhat remarkable unwillingness to consider arguments outside the text of the statute, and the concurrence and dissent, respectively, of Justices Breyer and Sotomayor. Although they disagreed as to outcome, both Breyer

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[402] 131 S Ct at 1985, quoting *Gade*, 505 US at 111 (Kennedy, J, concurring in part and in the judgment).

[403] 131 S Ct at 1139.

[404] See 529 US at 869 ("We now conclude that the saving clause . . . does *not* bar the ordinary working of conflict pre-emption principles.").

and Sotomayor were willing to consider a much broader universe of agency positions and policy arguments to resolve what otherwise seemed a close case on the text alone.[405] Obstacle preemption arguments, of course, tend to rely heavily on precisely these sorts of arguments, and the determination of a majority of the Court to stick close to the text—if it holds in other contexts—may well cut against obstacle preemption more often than not. However, *Bruesewitz* also highlights one of the obstacles, if you will, to adoption of Thomas's position by a majority of the Court. At least some of the Court's liberal wing, who generally tend to vote against preemption, are methodologically attached either to policy arguments generally (Sotomayor) or to both policy arguments and agency views (Breyer).[406] Breyer, after all, was the author of *Geier*, which found obstacle preemption in the teeth of an express savings clause for state common law claims.[407] Those methodological commitments will make it difficult for the liberals to abandon obstacle preemption altogether, although they may take a narrower view of it than some of their more conservative colleagues.

It thus seems possible that Justice Thomas will influence some of his conservative colleagues to take a narrower view of obstacle preemption, but consensus on that point seems likely to remain elusive. The other obvious question concerns the implications of these arguments about implied preemption for the *Rice* presumption. After all, Professor Nelson framed his attack on broad notions of implied preemption and his critique of the *Rice* presumption as two sides of the same coin. One observer has noted that "*Mensing* . . . reveals a Court that is about as evenly split as it is possible to be on the presumption against preemption, with four Justices saying no, four saying yes, and Justice Kennedy (who else on this Court?) supporting preemption without feeling the need to address that issue."[408] And Justice Stevens—the author of both *Altria* and *Wyeth* and the Court's most consistently anti-preemption Jus-

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[405] See notes 221–26 and accompanying text.

[406] See generally Stephen G. Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Vintage, 2005).

[407] 529 US at 869–74. Justice Thomas wrote separately in *Williamson* primarily to express his continuing dissent from that approach. See 131 S Ct at 1141–42 (Thomas, J, concurring in the judgment).

[408] Beck, *Top Ten Best Decisions* (cited in note 400).

tice during his long tenure[409]—is no longer on the Court.

The Court's failure to invoke *Rice* as part of a majority holding in any of the five cases last Term may provide some evidence that the presumption against preemption is in trouble, notwithstanding the reasons already given not to take that failure too seriously. And Justice Thomas (joined by the Chief and Justices Scalia and Alito) signaled his opposition to applying *Rice* to express preemption in his *Altria* dissent three years ago.[410] It is not clear, however, that Thomas's emerging position ought to foreclose a presumption against preemption. First, the Nelson/Thomas position on conflict preemption, functionally speaking, *is* a form of *Rice*. By ruling out obstacle preemption and requiring a "direct" conflict or "logical contradiction" between federal and state law, Thomas would raise the bar—quite substantially—for conflict preemption. That result would strengthen *Rice*'s presumption against preemption in conflict cases.

Nor is it clear that Justice Thomas's rejection of *Rice* for *express* preemption in his *Altria* dissent follows from the other positions he has taken. In particular, Thomas's separate opinion in *Wyeth* emphasized the procedural safeguards of federalism: obstacle preemption based on extratextual evidence of Congress's broad purpose, he argued, contravened the Supremacy Clause's command that only textual mandates that have run Article I's legislative gauntlet can supersede state law.[411] The *Rice* presumption in express cases rests on similar arguments. I have argued that the presumption against preemption 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.[412] And as Brad Clark has suggested, inferring preemption from ambiguous language "risk[s] circumventing the political and procedural safeguards of federalism built into the Supremacy Clause."[413] There is no obvious reason, in other words, why Justice Thomas's reasoning in *Wyeth* should not have applied in *Altria* as well.

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[409] See Young, 46 Vill L Rev at 1380–95 (cited in note 39) (discussing Justice Stevens's leadership on preemption issues).

[410] See text accompanying notes 108–10.

[411] See 555 US at 586–88 (Thomas, J, concurring in the judgment).

[412] See notes 121–27 and accompanying text.

[413] Clark, *Process-Based Preemption* at 209 (cited in note 79).

Finally, Professor Nelson has acknowledged that it makes no sense to reject *Rice* in express preemption cases unless one also adopts his position barring obstacle preemption:

> To be sure, [the *Rice*] presumption makes some sense within the Framework that the Supreme Court has developed for preemption cases. . . . By telling judges to approach federal statutes with "the starting presumption that Congress does not intend to supplant state law," the Supreme Court offsets its own expansive formulations of "implied" preemption. The presumption thus operates as an artificial way to bring the courts' results closer to Congress's probable "pre-emptive intent."[414]

To be sure, Nelson views *Rice* as "a second-best alternative to a broader overhaul of the Court's doctrine."[415] But until Justice Thomas succeeds in persuading his colleagues to undertake a "broader overhaul" of conflict preemption,[416] he and others sympathetic to Nelson's argument should hesitate to reconsider *Rice*. Nelson's historical research provides no support for doing the latter without the former.

C. TRADITIONAL SPHERES AND THE VESTIGES OF DUAL FEDERALISM

The other salient question concerning *Rice*'s presumption against preemption concerns its subject-matter scope. Although the presumption is sometimes framed as a general one,[417] courts frequently purport to limit it to fields of traditional state authority. The latter approach, however, reintroduces the same confusion that led to the demise of dual federalism in the first place.

The most prominent recent example of the bounded approach to *Rice* is the Court's 2000 decision in *United States v Locke*.[418] That decision held that federal laws regulating the safety of oil tankers preempted measures enacted by the state of Washington, in the wake of the *Exxon Valdez* oil spill, imposing more rigorous pre-

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[414] Nelson, 86 Va L Rev at 290–91 (cited in note 303).

[415] Id at 291.

[416] For a skeptical view, see Michael C. Dorf, *The Most Confusing Branch*, 45 Tulsa L Rev 191, 193 (2009) (suggesting that "given Justice Thomas's willingness to express idiosyncratic views on a range of issues—including federalism—one cannot be very optimistic about the prospect of his inspiring a wholesale doctrinal reformulation in this area").

[417] See, for example, *Building & Construction Trades Council v Associated Builders & Contractors*, 507 US 218, 224 (1993) ("We are reluctant to infer pre-emption."); *Maryland v Louisiana*, 451 US 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.").

[418] 529 US 89 (2000).

cautions on tankers operating in state waters. Prior precedent on this question had applied *Rice*'s presumption against preemption,[419] but the Court rejected that approach in *Locke*. Emphasizing *Rice*'s observation that "Congress legislated here in a field which the States have traditionally occupied,"[420] Justice Kennedy's opinion for the Court in *Locke* reasoned that "an 'assumption' of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence."[421] Observing that "[t]he state laws now in question bear upon national and international maritime commerce"—a field in which "Congress has legislated . . . from the earliest days of the Republic"—Kennedy concluded that "in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers."[422]

This rejection of *Rice*'s interpretive presumption mattered in *Locke*. Not only did the Court not resolve doubts about the federal regulatory measures at issue against preemption, it also narrowly construed express savings clauses in the federal Oil Pollution Act that preserved state authority to regulate risks relating to oil spills.[423] "Limiting the saving clauses as we have determined," Justice Kennedy said, "respects the established federal-state balance in matters of maritime commerce between the subjects as to which the States retain concurrent powers and those over which the federal authority displaces state control."[424] More fundamentally, the statutory construction issues in *Locke* were quite close, as illustrated both by the Court's contrary conclusions about the interaction of similar statutory schemes in *Ray* twelve years earlier[425] and the *Locke* Court's decision to remand several of the preemption issues to the lower courts for further consideration.[426]

Although the Court was unanimous in *Locke*, subsequent decisions have not consistently adhered to its restriction of *Rice* to

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[419] See *Ray v Atlantic Richfield Co.*, 435 US 151, 157 (1978), quoting *Rice*, 331 US at 230.

[420] 331 US at 230.

[421] 529 US at 108.

[422] Id.

[423] 33 USC §§ 2718(a), (c).

[424] 529 US at 106.

[425] *Ray*, 435 US at 157.

[426] 529 US at 116–17.

certain subject-matter spheres. Just as *Locke* ignored the Court's statement four years earlier that *Rice* applies "[i]n all cases,"[427] subsequent cases have occasionally ignored *Locke* and reaffirmed *Rice*'s general applicability.[428] This sort of flip-flopping may illustrate a broader phenomenon. The Justices evidently consider themselves bound to prior results and specific statutory interpretations arrived at in preemption opinions they have joined, but they often seem to treat discussions of interpretive methodology in those prior cases as something like dictum. A Justice may not feel the need to refuse to join, much less dissent from, a statement applying or refusing to apply an interpretive presumption, so long as she thinks the ultimate interpretation of the statute is correct. This phenomenon may simply reflect the necessities of peaceful coexistence on a multimember court,[429] and as such it is not necessarily a bad thing. On the other hand, it is not exactly conducive to clarity in the Court's preemption jurisprudence.

There is another ambiguity in the Court's approach in *Locke* and similar decisions. In *Rice*, the presumption against preemption was triggered by a history of *state* regulation in the relevant field—as Justice Douglas put it, the fact that "Congress legislated here in a field which the States have traditionally occupied."[430] Most of the other cases that tie *Rice* to specific regulatory fields use similar language.[431] Justice Kennedy's opinion in *Locke*, however, switched the relevant actors, inquiring whether "the *State* regulates in an area where there has been a history of significant *federal* presence."[432] This bit of slippage matters, because the truth is that most regulatory fields have a history of concurrent federal and state presence. That is especially true from the New Deal onward, but there are many significant examples dating to the dawn of the

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[427] *Medtronic, Inc. v Lohr*, 518 US 470, 485 (1996).

[428] See, for example, *Wyeth*, 555 US at 565.

[429] See note 298 and accompanying text (suggesting that such practices are a form of "incompletely theorized agreement").

[430] 331 US at 230.

[431] See, for example, *Jones v Rath Packing Co.*, 430 US 519, 525 (1977) (applying *Rice* "[w]here, as here, the field which Congress is said to have pre-empted has been traditionally occupied by the States"); *Hillsborough County v Automated Medical Laboratories, Inc.*, 471 US 707, 715 (1985) (same); *Medtronic*, 518 US at 485 (stating that *Rice* applies "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,'" quoting *Rice*). This remains true after *Locke*. See, for example, *Wyeth*, 555 US at 565, quoting the language from *Medtronic* above.

[432] 529 US at 108 (emphasis added).

Republic. Consider, for example, the field at issue in *Locke*—maritime commerce and safety. Federal law and (more importantly) federal *courts* have long had a significant role in maritime matters, but the First Judiciary Act's "Savings to Suitors" Clause guaranteed state courts and state law a role in maritime disputes,[433] and Chief Justice Marshall acknowledged in *Gibbons v Ogden*[434] that state governments have legitimate police power grounds to regulate commerce on navigable waters.[435] In other words, Justice Kennedy is plainly correct to say that maritime commerce has "a history of significant federal presence," but he would also be correct to say maritime commerce has a history of significant *state* presence. The answer to *Rice*'s applicability, in other words, will frequently depend on which way one asks the question.

The more fundamental problem, however, is the indeterminacy of any approach that tries to divide up the world into spheres of state and federal primacy.[436] One might avoid the *Locke* problem simply by asking whether state or federal law *predominates* in a given area—a question that *Locke* arguably got right with respect to maritime commerce.[437] But in most areas where preemption litigation arises, this predominance problem will be considerably less clear. Consider last Term's drug safety decisions in *Bruesewitz* and *PLIVA*, or the auto safety decision in *Williamson*. Each area is marked by a mix of state and federal regulation. Federal law tends to set standards for and approve products on the front end, before they are marketed to consumers; state products liability law, on the other hand, provides incentives to identify and correct unforeseen dangers in approved products and compensates victims when products do harm. Both forms of regulation have been

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[433] Judiciary Act of 1789, ch 20, 9(a), 1 Stat 77. The current version is 28 USC § 1333.

[434] 22 US (9 Wheat) 1, 21–22 (1824). See also *Cooley v Board of Wardens of Port of Philadelphia*, 53 US (12 How) 299 (1852) (upholding state regulation of maritime commerce where it was necessarily adapted to local conditions).

[435] See generally David W. Robertson, *Admiralty and Federalism: History and Analysis of Problems of Federal-State Relations in the Maritime Law of the United States* (Foundation, 1970) (surveying the complicated interplay of federal and state law in maritime matters); Ernest A. Young, *Preemption at Sea*, 67 Geo Wash L Rev 273 (1999) (sailing in Professor Robertson's wake).

[436] See *Garcia*, 469 US at 546 (rejecting "as unsound in principle and workable in practice, a rule of state immunity . . . that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'").

[437] Some difficult people might quibble even here, arguing that for most of our history, maritime law was considered neither state nor federal in character. See Young, 67 Geo Wash L Rev at 293 (cited in note 435).

around for a relatively long time, and both are plainly important. But it is hard to know how one would go about determining which level of regulation "predominates." Would one measure the number of government officials at each level involved in regulation? Assess the relative costs imposed by each? Count the number of government enforcement actions? The more specific one gets about methods of measurement, the more nonsensical the enterprise seems. But as things stand, it is hard not to conclude that courts are simply making off-the-cuff intuitive judgments.

A related difficulty compounds the problem: In most cases, the relevant "field" can be characterized in multiple ways.[438] Fields can, for instance, be characterized at different levels of generality. Was *Bruesewitz* a case about vaccines—a matter on which federal law has taken the lead? Was it a case about medical safety—which features divided responsibility between federal premarket approval of drugs and devices and state postmarket regulation through the tort system? Or was it, even more broadly, simply a products liability case—a field of traditional state regulation? There is also a problem of overlap. *Concepcion*, for instance, was an arbitration case, and federal law has traditionally dominated that field. But it was also an important case about consumer protection, a traditional state field. Similarly, *Whiting* could easily be characterized as an immigration case, and therefore a state intrusion into a field that many view as *exclusively* federal. But Chief Justice Roberts dismissed this argument by pointing out that "[r]egulating in-state businesses through licensing laws has never been considered such an area of dominant federal concern."[439]

These characterization games are great fun for law professors but not necessarily good for the law. They are reminiscent of the difficulties that plagued and ultimately hastened the end of the Court's "dual federalism" regime—in particular, the Court's inability to draw determinate lines.[440] To be sure, the stakes are lower in the current context, because the Court is not assessing whether Congress or a state government has the power to legislate *at all*, but rather which interpretive rules to apply in construing Con-

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[438] See Daryl J. Levinson, *Framing Transactions in Constitutional law*, 111 Yale L J 1311 (2002) (noting the indeterminacy problems that arise from different ways of framing the same transaction).

[439] 131 S Ct at 1983.

[440] See Part I.A.

gress's intent. Nonetheless, as Trevor Morrison has pointed out, the "problem with both the presumption against preemption and federalism-enforcing clear statement rules, at least as they are currently formulated," is that "[t]hey are all structured around substantive triggers that require courts to identify and attach great consequence to the 'historic' functions of the states."[441] Similarly, Robert Schapiro has noted that "current federal preemption doctrine at times manifests a . . . dualist spirit."[442]

To some extent, some differentiation of preemption doctrine by subject matter may be inevitable. Congress's purpose remains the "ultimate touchstone" in preemption cases,[443] and that intent varies by regulatory field. Over time, the Court develops an interpretive tradition, if you will, in particular regulatory areas. In the banking field, for instance, the Court's "history is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law."[444] This history does not mean that preemption claims always win in banking cases,[445] but it does mean that the Court employs a somewhat different set of interpretive assumptions in that area. Problems may arise when regulatory schemes intersect; *Barnett Bank*, for example, could have been characterized as an insurance case—and therefore part of a regulatory tradition considerably more favorable to state law—rather than a banking case.[446] But while such cases may raise difficult questions of statutory construction, they are hardly intractable and stem directly from the Court's obligation to determine Congress's will.

It may also be possible to characterize the contexts in which

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[441] Trevor W. Morrison, *The State Attorney General and Preemption*, in Buzbee, ed, *Preemption Choice* at 81, 91 (cited in note 8). See also Pursley, 71 Ohio St L J at 515 n 5 (cited in note 9) (noting that even if one reads recent decisions as clarifying that *Rice* applies in all cases, "the Court has retained the most confusing element of the doctrine—the need to identify areas of 'traditional' state authority—by suggesting gradations in the 'force' of the presumption based on whether the potentially preempted state law occupies such an area," citing *Altria*, 555 US at 77).

[442] Schapiro, *From Dualism to Polyphony* at 48 (cited in note 8).

[443] *Medtronic*, 518 US at 486.

[444] *Barnett Bank of Marion County, N.A. v Nelson*, 517 US 25, 32 (1996).

[445] See *Cuomo v Clearing House Association, LLC*, 129 S Ct 2710 (2009) (holding that federal banking laws did not preempt the states' authority to enforce state banking laws against national banks).

[446] See 517 US at 37–41.

the Court views preemption more favorably in a nonarbitrary way. Rick Hills has suggested that the Court finds preemption more readily in "commercial" cases involving laws "defining the rules for bargaining and remedies for breach of bargains," than in "regulatory" cases "involv[ing] state and federal laws defining the baseline entitlements over which the parties bargain."[447] For Professor Hills, this explains the Court's willingness to construe the Federal Arbitration Act broadly in *Concepcion*, while approaching preemption more cautiously in an auto-safety case like *Williamson*. The availability of arbitration, after all, is part of the remedies for breach of bargains, while products liability cases like *Williamson* involve substantive safety requirements.[448]

However useful Professor Hills's distinction between commercial and regulatory cases is as a descriptive matter, I doubt that it provides a useful principle to *guide* the Court in deciding hard cases going forward.[449] One problem is that the distinction is hardly crisp. As Hills acknowledges,[450] questions of remedy are not unrelated to regulatory matters—the availability of class actions, for instance, significantly increases the deterrent effect of state consumer protection rules.[451] And it is possible to frame the issues in some of the "regulatory" drug cases as "commercial" questions about the forum for and nature of available remedies. *Bruesewitz*, for example, concerned whether persons injured by federally approved vaccines could seek compensation through the state tort system or must rely on a federal procedure through the Court of Claims.[452] Moreover, converting the commercial/regulatory distinction into a normative principle would require some argument for grounding it in the Constitution, rather than in a policy argument about what state and national decision makers do

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[447] Roderick M. Hills Jr., *Preemption Doctrine in the Roberts Court: Constitutional Dual Federalism by Another Name?* (unpublished manuscript at 1) (Oct 12, 2011) (on file with author). Professor Hills explains that "[t]he 'mailbox rule' defining when a contract is accepted is an example of a 'commercial' law, while a prohibition on filling a wetlands or building a cement plant in a residential zone are examples of 'regulatory' laws." Id.

[448] See Id. To be sure, *Bruesewitz* and *PLIVA*—also "regulatory" cases—nonetheless found preemption. But it does seem fair to say that the Court's overall record in arbitration cases is more strongly preemptive than in its drug and medical device safety cases.

[449] Professor Hills makes clear that his argument is meant to be primarily descriptive. See Hills, *Preemption Doctrine in the Roberts Court* (cited in note 447).

[450] Id.

[451] See *Concepcion*, 131 S Ct at 1752.

[452] See Part II.C.

best.[453] For that reason, it compares unfavorably with process federalism rules like the presumption against preemption, which can be grounded in the political and procedural checks built into the constitutional structure of federal lawmaking.[454]

Controversy over the scope of *Rice* seems likely to increase in the 2011 Term, when the Court will hear *Arizona v United States*.[455] That case is the Justice Department's challenge to Arizona's SB 1070, which provides for broad state enforcement of federal immigration laws and extends beyond the employment context considered in *Whiting*. As Rick Hills has noted, "[t]he surprising aspect of *Whiting* . . . is that the Roberts Court's analysis of preemption was so conventional"; the Court "brushed aside the idea that Arizona encroached on a forbidden federal field of foreign relations law."[456] That argument will return with a vengeance in *Arizona*, as it formed a critical theme in the Ninth Circuit's decision striking down SB 1070. Judge Paez's opinion for the court of appeals held that "[t]he states have not traditionally occupied the field of identifying immigration violations so we apply no presumption against preemption."[457] As the Court did in *Locke*, the Ninth Circuit read a savings clause in the federal immigration statutes narrowly, and it gave effect not only to the preemptive choices of Congress but also to the enforcement discretion of the national Executive.[458] Finally, the Court of Appeals gave independent preemptive force to its judgment that the Arizona law intruded on the national government's power over foreign relations,[459] a theme that Judge Noonan posted in neon lights in his separate concurrence.[460]

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[453] See Hills, *Preemption Doctrine in the Roberts Court* (cited in note 447) (approving the distinction primarily on policy grounds).

[454] See text accompanying notes 44–54.

[455] 132 S Ct 845 (2011).

[456] Hills, *Preemption Doctrine in the Roberts Court* (cited in note 447).

[457] *United States v Arizona*, 641 F3d 349, 348 (9th Cir 2011).

[458] See id at 349, 351–52.

[459] Id at 352–53 & n 12 (observing that "[t]he Court's decision in [*Hines v Davidowitz*, 312 US 52 (1941)] demonstrates that the Court has long been wary of state statutes which may interfere with foreign relations").

[460] See *Arizona*, 641 F3d at 368 (Noonan concurring) ("The foreign policy of the United States preempts the field entered by Arizona. Foreign policy is not and cannot be determined by the several states. Foreign policy is determined by the nation as the nation interacts with other nations. Whatever in any substantial degree attempts to express a policy by a single state or by several states toward other nations enters an exclusively federal field.").

I have argued elsewhere that foreign relations law is the last bastion of the dual federalism that the Court generally abandoned in 1937.[461] At the height of the Cold War, the Court purported to set foreign relations aside as an exclusively federal sphere, so that state action touching that field would be preempted even in the absence of action by Congress.[462] That doctrine largely withered on the vine, however, because a virtually infinite variety of actions by state governments in fact affect foreign relations. The Court has repeatedly refused to interfere with the power of state governments to execute foreign nationals for murders committed within the state, notwithstanding vociferous protests by the relevant foreign governments and, in some cases, attempts by the national executive to intervene.[463] The truth is that, in our constitutional system of both horizontal and vertical separation of powers, it is virtually impossible for the United States actually to speak "with one voice"—in foreign relations or otherwise.[464]

Arizona v United States thus provides the Court with an opportunity to state more explicitly what it implicitly established in *Whiting*: That dual federalism is dead, and that concurrent regulation is the norm even in fields like immigration that impact foreign relations. After all, if foreign affairs cannot be cordoned off as a separate sphere of federal primacy, then it is hard to think of any other fields that can be. Adopting one set of interpretive rules that applies to all preemption cases regardless of the underlying substance of the case would go a long way toward rationalizing the Court's preemption jurisprudence.

IV. The Politics of Preemption Doctrine in the Roberts Court

One observer recently asserted that "Chief Justice John

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[461] Young, 69 Geo Wash L Rev at 177–80 (cited in note 28).

[462] *Zschernig v Miller*, 389 US 429 (1968).

[463] See, for example, *Medellin v Texas*, 552 US 491 (2008) (holding that neither the President nor the International Court of Justice had the power to prevent Texas from executing a Mexican national, notwithstanding Texas's alleged violation of the Vienna Convention on Consular Relations); *Breard v Greene*, 523 US 371 (1998) (rejecting suit by Paraguay seeking to stop Virginia's execution of a Paraguayan national, allegedly in violation of the Vienna Convention on Consular Relations).

[464] See, for example, Sarah H. Cleveland, *Crosby and the "One Voice" Myth in U.S. Foreign Relations*, 46 Vill L Rev 975 (2001) (arguing that neither the Constitution nor U.S. history supports the claim that the President speaks for the nation with one voice).

Roberts has an opportunity to add his name to the . . . exclusive list of those—like John Marshall, Roger Taney and Earl Warren—whose leadership of the Court has marked a shift in Court history and a new era of constitutional doctrine."[465] All three of the potential blockbuster cases cited in support of this prediction—the Arizona immigration case, the Texas redistricting case, and the challenge to the national healthcare law—raise significant issues of federalism.[466] And while only one of them—the Arizona case—is explicitly framed as a preemption issue, the other two have significant preemption implications.[467] It is too early, in my view, to say that this Court will usher in "a new era of constitutional doctrine." The Roberts Court's record to date does strongly suggest, however, that preemption will be an important part of its doctrinal legacy.

One might think that the Supreme Court's conservative wing—which has generally pushed for broader constitutional limits on federal power, albeit with only limited success—would be enthusiastic about limiting the scope of federal preemption. The actual pattern, however, has been considerably more complex. While some of the conservative Justices, especially Justice Thomas, have been willing to restrict preemption, most of them have tended to favor broad preemption of state law. The Court's more liberal wing, by contrast, has tended to limit preemption notwithstanding those Justices' aversion to constitutional limits on federal authority.[468] Prior to his retirement, John Paul Stevens was the Court's

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[465] Todd Brewster, *Will the Supreme Court Take a Historic Turn in 2012?* Constitution Daily (Dec 19, 2011), online at http://blog.constitutioncenter.org/will-the-supreme-court-take-a-historic-turn-in-2012/. On the other hand, Chief Justice Roberts turned fifty-seven this year, and by all indications he will be Chief Justice for a long time to come. It is worth remembering, then, that the Roberts Court's legacy may well be defined by issues that are not even on the radar screen at this early date in the Chief's tenure.

[466] See Lyle Denniston, *Political Trouble Ahead for the Supreme Court*, Constitution Daily (Dec 13, 2011), online at http://blog.constitutioncenter.org/political-trouble-ahead-for-the-supreme-court/) (agreeing that these are the 2011 Term's blockbusters, and observing that "[w]hat those three controversies have most in common is this: every one of them involves the fundamental constitutional question of how governmental power is to be divided up between Washington and the states"); *Arizona, Texas and Healthcare Reform* (UPI.com, Dec 18, 2011), online at http://www.upi.com/Top_News/US/2011/12/18/Under-the-US-Supreme-Court-Arizona-Texas-and-healthcare-reform/UPI-80901324197000/.

[467] The Voting Rights Act, after all, preempts state authority to draw congressional districts in certain circumstances. And although the national healthcare law permits certain waivers in order to allow state policy experimentation, it also supplants state regulatory authority in innumerable ways.

[468] See generally Young, 83 Tex L Rev 1 (cited in note 47) (documenting and discussing

most consistently anti-preemption Justice, notwithstanding his consistent dissents in the Rehnquist Court's landmark cases expanding constitutional protections for state sovereignty.[469]

This pattern arises because preemption cases implicate a number of cross-cutting ideological and methodological conflicts on the Court. Federal preemption is generally deregulatory—that is, preemption cases typically arise only where a state government has regulated more strictly than has the national government. In *Wyeth v Levine*,[470] for example, the Court considered whether state tort law could impose liability for failure to warn even where a drug's warning label had been approved by federal regulators. Preemption cases thus pit the deregulatory impulses of conservative Justices against their sympathy for the states; likewise, liberals find themselves torn between their nationalism and their pro-regulatory views.[471] Put another way, preemption calls into conflict a *libertarian* form of federalism that sees federalism as a way of limiting national regulatory power and promoting competition among the states, with a *checks-and-balances* view that emphasizes the role of states in diffusing power.[472] The latter view is largely indifferent to how states actually use their autonomy—that is, whether they choose to regulate or deregulate.

Libertarian federalism has an honorable pedigree. It finds its roots in Madison's desire for a federal "negative" on unwise state laws—a veto that, in the hands of Federalists like Madison, would have been used to undo excessive state intervention such as the debtor relief legislation adopted by the populist Pennsylvania legislature.[473] Its modern advocates stress the market-based benefits

this pattern); Richard H. Fallon Jr., *The Conservative Paths of the Rehnquist Court's Federalism Decisions*, 69 U Chi L Rev 429 (2002); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 Supreme Court Review 343.

[469] See, for example, *Lorillard Tobacco Co. v Reilly*, 533 US 525, 598 n 8 (Stevens, J, concurring in part and dissenting in part) (pointing out the irony that the five conservative Justices who formed the majority in *United States v Lopez* were willing to hold that federal law preempted state authority to regulate tobacco advertising within 1,000 feet of a school).

[470] 555 US 555 (2009).

[471] See, for example, Gregory M. Dickinson, *An Empirical Study of Obstacle Preemption in the Supreme Court*, 89 Neb L Rev 682, 682 (2011) ("Preemption defies traditional conservative-liberal alignment, as conservatives are torn between support of federalism and capitalist efficiency, and liberals are torn between support of strong national governance and multiplicity of legal remedies.").

[472] *See* Young, *Federal Preemption and State Autonomy* at 255–57 (cited in note 44) (describing and critiquing the libertarian model).

[473] See, for example, Epstein and Greve, *Introduction* 6–8 (cited in note 280) (discussing Madison's negative).

of competition among states to develop the most attractive policies, benefits to business of avoiding excessive or conflicting regulation, as well as the more fundamental benefit of limiting national power to intrude on the lives of individuals.[474] For libertarian federalists, however, state autonomy has no inherent value apart from these benefits, and that autonomy can be readily sacrificed in circumstances where national regulation is less intrusive on economic liberty than is state policy.[475]

My own view is that the Court should resist allowing a preference for deregulatory results to influence its resolution of preemption disputes. Our Constitution created an institutional structure of checks and balances; with certain relatively narrow exceptions, it did not incorporate an inherent preference for deregulation.[476] Moreover, it is not at all clear that courts are institutionally suited to administer a preemption doctrine predicated on a self-conscious effort to promote economic efficiency.[477] Such judgments are likely to seem—and have seemed—to outside observers as though the Justices are simply enforcing their own policy preferences. In *Whiting*, for example, it was hardly edifying to see the conservative Justices who so frequently vote for preemption switching places with the nationalists who most often oppose it, to all appearances simply because both sides have more specific preferences about immigration policy.

More fundamentally, even libertarian federalism ultimately presupposes strong, vital state governments. Competition cannot exist without competitors, and enfeebled states with few significant responsibilities are unlikely to produce the sorts of innovative choices for businesses and individuals that libertarian federalists seek. Nor are weak states likely to check efforts to expand the reach of federal regulation that intrudes on the autonomy of individuals, as several states have sought to do in the current healthcare litigation.[478] Some attention must be paid, in other words, to the institutional health of the states as states. And post-New Deal

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[474] See, for example, Untereiner, 84 Tulane L Rev at 1261–63 (cited in note 11).

[475] For an incisive statement of this view, see Michael S. Greve, *The Upside-Down Constitution* 7–8 (Harvard, 2012).

[476] Consider *Lochner v New York*, 198 US 45, 75 (1905) (Holmes, J, dissenting).

[477] See Young, *Federal Preemption and State Autonomy* at 255–56 (cited in note 44).

[478] See Young, *Popular Constitutionalism* (cited in note 127) (discussing how federalism-based limits on Congress's power provide breathing space for more expansive views of economic liberty that current federal constitutional doctrine may not support).

constitutional doctrine is quickly running out of options for protecting federalism. The Commerce Clause is largely dead, the Spending Clause is practically nonjusticiable, the Eleventh Amendment is generally unhelpful to state autonomy, and the anti-commandeering doctrine is very narrow and subject to ready circumvention under the Spending Clause. In other words, the presumption against preemption may be the last best hope for preserving a meaningful measure of state autonomy in our constitutional system.

The preemption cases of the 2010 Term reveal a Court that has still not made up its mind about preemption but perhaps one that is asking increasingly basic questions about preemption and its relation to other constitutional issues. The more that the Justices see preemption cases as not simply disputes about the scope of federal and state regulation under specific regulatory statutes, but rather as raising fundamental questions of federalism, the more likely they are to transcend the current divide between proponents and opponents of regulation. Their ability to do so will be, in Justice Breyer's phrase, "the true test of federalist principle."[479]

[479] *Egelhoff v Egelhoff*, 532 US 141, 160–61 (2001).