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# Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Thomas the Lone Principled Federalist?

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**AGAINST FREEWHEELING,  
EXTRATEXTUAL OBSTACLE  
PREEMPTION:  
IS JUSTICE CLARENCE THOMAS THE LONE  
PRINCIPLED FEDERALIST?**

**Catherine M. Sharkey\***

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Federal preemption of state tort law unequivocally alters the allocation of authority between the states and the national government. The Supreme Court’s preemption jurisprudence creates a federalism puzzle: Justices who have been ardent defenders of state autonomy in Commerce Clause, Tenth Amendment, and Eleventh Amendment immunity cases are transformed into aggressive purveyors of preemption, trampling upon state regulatory autonomy.

Notwithstanding alternative explanations of the Court’s preemption jurisprudence,<sup>1</sup> the one with the greatest staying power is that which attributes everything to ideology and politics. Most prominently, Richard Fallon has argued that “[b]ecause federal preemption eliminates state regulatory burdens, preemption rulings have a tendency—

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<sup>1</sup> See, e.g., Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1365-98 (2006) (providing a functional account, based upon interests in promoting national uniformity and protecting against spillover effects, of states exporting costs onto other states); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449 (2008) (advancing an “agency reference model” whereby courts’ analytic framework for deciding preemption cases should take advantage of agencies’ comparative advantage in providing information regarding the clash between state standards and federal regulatory schemes) [hereinafter Sharkey, *Products Liability Preemption*]; Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125 (2009) (elaborating upon the “agency reference” model, whereby courts should subject the agency’s regulatory record to “hard look” review and should defer to the agency’s position only to the extent that it is persuasive in light of the evidence and only so long as the agency has vetted all of the relevant federalism concerns put to it by those representing state regulatory interests) [hereinafter Sharkey, *Federalism Accountability*]; see also Catherine M. Sharkey, *What Riegel Portends for FDA Preemption of State Law Products Liability Claims*, 103 NW. U. L. REV. 437 (2009) [hereinafter Sharkey, *What Riegel Portends*].

welcome to substantive conservatives—to minimize the regulatory requirements to which businesses are subject.”<sup>2</sup> The conservative Justices, in other words, permit their respective views of underlying substantive disputes to guide their respective conclusions about proper allocation of decisional authority. Edward Rubin and Malcolm Feeley—among others—have described this charge of opportunism by asserting that “claims of federalism are often nothing more than strategies to advance substantive positions.”<sup>3</sup> Or, as Jonathan Macey has cynically asserted, “[c]onservatives and liberals alike extol the virtues of state autonomy whenever deference to the states happens to serve their political needs at a particular moment.”<sup>4</sup>

Justice Clarence Thomas stands as a challenge to the legal realist view of preemption that equates substantive conservatism with a pro-preemption view. Careful study of his position, then, provides a window into thinking more broadly about what lies at the core of the Court’s preemption jurisprudence. When Thomas staked out a staunchly anti-preemption position in *Wyeth v. Levine*, upholding state tort law failure-to-warn claims notwithstanding FDA approval of the drug label—and, in the process, distancing himself from fellow (pro-preemption) conservatives Chief Justice John Roberts and Justices Antonin Scalia and Samuel Alito—the *Los Angeles Times*

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<sup>2</sup> Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 471 (2002); see also Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 368–69 (remarking upon the “contrast . . . between the approach taken by individual Justices in preemption cases and the approach that the same Justices take to issues of constitutional federalism”).

<sup>3</sup> Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 948 (1994).

<sup>4</sup> 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, 265 (1990). In a similar vein, Michael Dorf has written:

The most obvious explanation is that the Justices are simply “result-oriented”—that is, conservative Justices make arguments favoring state interests when that will lead to conservative results and they make arguments favoring federal interests when that will lead to conservative results, while meanwhile, liberals do the opposite in pursuit of their own preferred policy outcomes.

Michael C. Dorf, *Do the Supreme Court’s Current Justices Hold Sincere Views About States’ Rights? A Failure-to-Warn Case Reveals an Apparent Inconsistency*, FINDLAW, March 9, 2009, <http://writ.news.findlaw.com/dorf/20090309.html>.

provocatively asked: “Clarence Thomas, Supreme Court liberal?”<sup>5</sup> Indeed, in the wake of *Wyeth*, strange bedfellows emerged, with some legal progressives preferring the position staked out by Thomas’s concurrence over and above that of the liberal majority opinion written by Justice John Paul Stevens.<sup>6</sup>

In his concurring opinion, Justice Thomas goes further than the *Wyeth* majority by shutting the door altogether on the theory of “implied obstacle preemption,” an expansive route whereby state law tort claims are ousted not by express statutory text, but rather on account of their implied conflict with the purposes and objectives of the federal regulatory scheme. Not mincing words, Thomas proclaims: “This Court’s entire body of ‘purposes and objectives’ pre-emption jurisprudence is inherently flawed.”<sup>7</sup> Elaborating further, Thomas charges that “[t]he cases improperly rely on legislative history, broad atextual notions of congressional purpose, and even congressional inaction in order to pre-empt state law.”<sup>8</sup> Thus, Thomas refused to join the majority’s “endorsement of far-reaching implied pre-emption doctrines.”<sup>9</sup> He took a strong stand against “judicially manufactured policies” cobbled together from “freewheeling, extratextual, and broad evaluations of the ‘purposes and objectives’ embodied within federal law” and emerged as the seemingly lone principled federalist, defending state autonomy at the cost of a liberal pro-tort regulation outcome.<sup>10</sup>

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<sup>5</sup> David G. Savage, *Clarence Thomas, Supreme Court liberal?*, L.A. TIMES, Mar. 8, 2009, at A3, available at <http://articles.latimes.com/2009/mar/08/nation/nathomas8>.

<sup>6</sup> See, e.g., *id.* (“The Supreme Court opinion that drew the most praise last week from a proudly ‘progressive’ constitutional law group was written by perhaps the court’s staunchest conservative, Justice Clarence Thomas.”).

<sup>7</sup> *Wyeth v. Levine*, 129 S. Ct. 1187, 1211 (2009) (Thomas, J., concurring in judgment).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1205.

<sup>10</sup> *Id.* at 1217; see also Dorf, *supra* note 4 (“Justice Thomas, who has also staked out the Court’s most state-protective view in congressional powers cases, was pretty clearly voting based on his jurisprudential views, not his regulatory policy views, in *Wyeth*.”); Robert S. Smith, *Why I Admire Justice Thomas*, 4 N.Y.U. J.L. & LIBERTY 630, 633 (2010) (“Justice Thomas, as it happens, voted in [*Wyeth*] with the liberals, demonstrating, I think, that he saw more deeply into the issue than any of his colleagues. For him, whether the state rule of law in question was a good one or a bad one (and I

While his *Wyeth* concurrence took many by surprise, Justice Thomas has in fact provided a fairly consistent and independent voice in preemption controversies. Thomas is perhaps the Court's most vociferous champion of federalism-based structural limits on Congress's powers;<sup>11</sup> unlike his conservative brethren (particularly Chief Justice Roberts and Justices Scalia and Alito), his views carry over consistently into the realm of federalism-based limits on states' powers. This latter category of doctrines impacting the scope of states' regulatory authority—curiously underexamined in many discussions of constitutional federalism—include preemption and the dormant Commerce Clause. These so-called “union-preserving” doctrines trample on state regulatory authority<sup>12</sup> and, as such, have been equally resisted by Thomas. And, “in today's world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress' commerce power at its edges, . . . or to protect a State's treasury from a private damages action, . . . but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.”<sup>13</sup>

Preemption jurisprudence is notably variegated. One dimension of the analysis is akin to statutory interpretation—how best to read and interpret the precise words used or implied by Congress in the statutes it enacts. Another layer consists of federalism-based presumptions, driven by a vision of the appropriate constitutional balance of power and authority between the federal and state governments. Embedded within this doctrinal edifice is another valence

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have little doubt he thought it a bad one) was less important than respect for the sovereign power of states to make their own laws . . .”).

<sup>11</sup> Thomas's view harkens back to pre-New Deal conceptions of dual sovereignty—that is, exclusive spheres for state and federal power. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995) (Thomas, J., concurring) (railing against the Court's expansive interpretation of the Commerce Clause since the New Deal).

<sup>12</sup> *See, e.g.*, Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551, 1591 (2003) (“Dormant Commerce Clause review has the effect of foreclosing or undermining a wide range of important state policies, such as responsible attempts at waste disposal, state safety regulation, and efforts to encourage important state industries.”).

<sup>13</sup> *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 160–61 (2001) (Breyer, J., dissenting) (citations omitted).

of political or policy predilections including affinities for regulation writ large and preferences toward bureaucratic versus common law jury enforced norms. And finally, an oft-overlooked piece of the puzzle is the interpretive and regulatory role assumed by the underlying federal agency. From these various dimensions of preemption analysis one might construct a series of representative matrices of institutional actors along which one could classify judicial philosophies: Congress vs. courts; courts vs. agencies; courts vs. states; agencies vs. states. Something like a rotating tetrahedron might be necessary to capture variation along each of these dimensions simultaneously.

Understanding Justice Thomas's worldview of preemption along these dimensions provides a window into larger debates about how theories of statutory interpretation should intersect with and inform debates about preemption. It also leads to further probing of alliances that break down in the preemption context—such as that between Justices Scalia and Thomas, who otherwise share a similar statutory interpretation framework—and of seemingly uncanny alliances that emerge—such as that between Justices Stevens and Thomas, who typically offer diverging political views. Neither legal realism nor any more nuanced parsing of regulatory or policy preferences sheds much light here.

Careful analysis of Justice Thomas's opinions in the preemption and dormant Commerce Clause arenas reveals that his position rests far more on fidelity to statutory text and preference for Congress over courts and agencies as a constitutional and institutional matter than it does on principles of abstract federalism or states' rights. Thomas is guided by an overarching principle: a judge should refrain from acting unless constitutionally commanded to do something by Congress or an agency—in which case, text provides the roadmap for action.<sup>14</sup> In Thomas's own words:

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<sup>14</sup> Thomas's criminal law jurisprudence likewise insists upon constitutional commands and eschews sub-constitutional judge-made law. He rails against a longstanding tradition of judicially crafted defenses, whereby "[f]ederal decisions have long recognized common law defenses: the best known (but not the only) examples are self-defense and the insanity defense (which was a common law rule until Congress in 1984 supplanted the judge-made defense with a statutory version)." Meltzer, *supra* note 2, at 354; *see, e.g.*, Shannon v. United States, 512 U.S. 573 (1994) (criticizing federal decisions that recognize a judicially crafted insanity defense to federal prosecutions); *see also*

It is a bedrock principle of judicial restraint that a right be lodged firmly in the text or tradition of a specific constitutional provision before we will recognize it as fundamental. Strict adherence to this approach is essential if we are to fulfill our constitutionally assigned role of giving full effect to the mandate of the Framers without infusing the constitutional fabric with our own political views.<sup>15</sup>

According to Thomas, “matters of political theory are beyond the ordinary sphere of federal judges. And that is precisely the point.”<sup>16</sup> Thomas, moreover, is a champion of “bright-line” rules,<sup>17</sup> and his view that the entire jurisprudence of obstacle preemption and the dormant Commerce Clause should altogether vanish can be seen as an outgrowth of his desire for clear boundaries.<sup>18</sup>

Together, fidelity to statutory text and affinity for bright-line rules illuminate Justice Thomas’s jurisprudence. A core principle emerges: as between Congress, federal agencies, and courts, the decision rests with Congress. This proposition covers Thomas’s embrace of express preemption where Congress has definitively spoken and concomitant rejection of implied obstacle preemption and the dormant Commerce Clause, each of which involves judicial

United States v. Oakland Cannabis Buyers’ Co-op., 532 U.S. 483 (2001) (emphatically rejecting a judge-made necessity defense to a legislative act’s prohibition against manufacturing and distributing marijuana). In a similar vein, Thomas has also signed onto a joint project with Justice Scalia to limit judicially implied constitutional tort remedies against federal officials in *Bivens* and its progeny. See, e.g., *Wilkie v. Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., concurring) (“I would not extend *Bivens* even if its reasoning logically applied to this case. ‘*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action.’” (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (Scalia, J., joined by Thomas, J., concurring))).

<sup>15</sup> *Lewis v. Casey*, 518 U.S. 343, 367 (1996) (Thomas, J., concurring). Justice Thomas is, in this sense, more emphatic than Justice Scalia, who affords judges more leeway in doing the best they can do, absent clear guidance from text. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861, 864 (1989); see also *infra* note 169.

<sup>16</sup> *Holder v. Hall*, 512 U.S. 874, 901 (1994) (Thomas, J., concurring).

<sup>17</sup> Cf. Posting of Rick Pildes to Balkinization, <http://balkin.blogspot.com/2009/06/caperton-and-supreme-courts-boundary.html> (June 8, 2009, 12:05 EST) (“The difference between ‘boundary-enforcing’ Justices and ‘bright-line rule’ Justices is one of the keys to understanding the Court, yet it is one of the least appreciated elements of judicial ideology or approach.”).

<sup>18</sup> Nor would *stare decisis* stand in Thomas’s way of abolishing these doctrines. See *infra* note 76.

assertion of a decision-making prerogative. But a second principle—a formalistic separation of the spheres of statutory interpretation and preemption—is key to reconciling Thomas’s views. This proposition makes sense of Thomas’s steadfast embrace of *Chevron* deference to agencies in statutory interpretation contexts that seem to be at odds with federalist principles, as well as his aversion to agency deference in preemption matters. The most significant strain in Thomas’s jurisprudence may be, above all, a principled aversion to courts and their “judicially manufactured policies.”<sup>19</sup> And federalism just fills in where expedient.

### I. THE MIXED-UP IDEOLOGY OF PREEMPTION AND DORMANT COMMERCE CLAUSE JURISPRUDENCE

Federal preemption and dormant Commerce Clause cases share a preoccupation with whether various state laws should be displaced by interests in national uniformity or efficiency, including reining in cost exportation from one state to another.<sup>20</sup> Both doctrines define

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<sup>19</sup> *Wyeth v. Levine*, 129 S. Ct. 1187, 1217 (2009) (Thomas, J., concurring in judgment).

<sup>20</sup> For an elaboration of this view of federal preemption, see Issacharoff & Sharkey, *supra* note 1, at 1382; see also Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 733 (2008) (positing that implied preemption “closely resembles, and effectively works in tandem with, the dormant Commerce Clause doctrine [as] . . . [b]oth doctrines work to preserve the United States as a single integrated commercial market in the face of state legislation that threatens to create multiple markets of suboptimal scale”).

For the national unity and cost-exportation view of the dormant Commerce Clause, see *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007) (“Our dormant Commerce Clause cases often find discrimination when a State shifts the costs of regulation to other States, because when ‘the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.’” (quoting *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767–68 n.2 (1945))); *Am. Trucking Ass’n v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 433 (2005) (“Our Constitution ‘was framed upon the theory that the peoples of the several states must sink or swim together.’”); *id.* (noting that the dormant Commerce Clause prevents states from “‘jeopardizing the welfare of the Nation as a whole,’ by ‘plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear’”) (internal citations omitted); see also Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court’s “Unsteady Path”: A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995); Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2110 (2000) (characterizing dormant

states' constitutional authority to regulate in areas of concurrent jurisdiction—those areas in which legislation is an option for both the federal government and states. The doctrines are plausibly viewed along a continuum.<sup>21</sup> In express preemption cases, Congress has articulated a clear intent to displace state tort law; in implied preemption cases, such intent is gleaned from a variety of statutory and regulatory sources; whereas the dormant Commerce Clause prohibits state laws that discriminate against, or impose an undue burden upon, interstate commerce absent any overt direction from Congress.

Substantive conservatism should favor both doctrines, as their effect is to cast away state regulations. Application of the dormant Commerce Clause can prohibit state regulation even where Congress has yet to regulate in the area. If the level of federal regulation in a particular area is lower than that of the states, then federal preemption would lower the overall amount of regulation. Principled federalists, on the other hand, should resist both doctrines as intrusions upon state regulatory autonomy.<sup>22</sup>

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Commerce Clause jurisprudence as resting upon the “uniquely federal interest in maintaining national unity and uniformity in interstate economic regulation”); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 795–96 (2001) (arguing that an economic perspective sheds light on the Court’s dormant Commerce Clause jurisprudence, differentiating “between state regulations that enhance overall economic welfare despite their extraterritorial effects and state regulations that lower overall economic welfare”); Saul Levmore, *Interstate Exploitation*, 69 VA. L. REV. 563, 571 (1983) (claiming that the Court, both descriptively and normatively, differentiates between permissible and impermissible state regulation under the dormant Commerce Clause by determining whether a state regulation merely interferes with or actually exploits free trade); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 17 (1975) (asserting that the failure to appreciate the nationalist impulse of the dormant Commerce Clause cases “is largely because the sanction of nullity for violation of the free-trade policy is the same as under a *Marbury*-like invalidation and does not ‘look like’ the affirmative creation of federal regulatory rules”).

<sup>21</sup> *Accord* Dinh, *supra* note 20, at 2097 (characterizing the dormant Commerce Clause as part of a “spectrum of interrelated mechanisms whereby federal law displaces state law”); Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 87 (2006) (describing the dormant Commerce Clause as “continuous” with implied preemption).

<sup>22</sup> *But see* Michael S. Greve, *Federalism’s Frontier*, 7 TEX. REV. L. & POL. 93, 95 (2002) (“The Rehnquist Court has waged its federalism campaign on behalf of ‘states’ rights’ against national impositions, but the rehabilitation of a plausible, constitutional federalism is a two-front war. Federalism surely must limit the national government’s powers over the states and protect intergovernmental immunities . . .

Joint consideration of these doctrines sets the stage for testing the prevailing political or ideological explanation of what motivates the Justices. Bradley Joondeph summarized the conventional story, arguing that the Supreme Court's decisions (at least during the Rehnquist era) reflect "the values of the modern Republican Party":

The modern GOP has generally endorsed the abstract principle of devolving greater power to state governments and particularly the judicial enforcement of the limits on Congress's enumerated powers. But when the principle of state policy-making autonomy has clashed with the goal of reducing economic regulation, Republicans have repeatedly opted to reduce regulation at the expense of state authority.<sup>23</sup>

Joondeph built upon earlier accounts by Richard Fallon and Daniel Meltzer.<sup>24</sup> Fallon explicated the "'conservative' paths of the Rehnquist Court's federalism decisions," bringing together various doctrines, including preemption and the dormant Commerce

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However, it must also protect states from aggression and exploitation *by other states*; moreover, it must protect the common economic market from regulatory balkanization." (emphasis in original); Issacharoff & Sharkey, *supra* note 1, at 1369 ("[W]e seek to explain the drive toward federalization in numerous areas of the law with reference to two animating principles: (1) National market exigencies demand uniformity of treatment across the United States in interpreting federal regulations; and (2) states can neither export costs onto their neighbors nor compromise the ability of other states to have a reasonable set of regulations.").

<sup>23</sup> Bradley W. Joondeph, *Federalism, the Rehnquist Court, and the Modern Republican Party*, 87 OR. L. REV. 117, 120 (2008); see also Jeffrey Rosen, Keynote Address at the Santa Clara Law Review Symposium: Big Business and the Roberts Court (Jan. 23, 2009), in 49 SANTA CLARA L. REV. 929, 929-30 (2009) (describing the Roberts Court as dominated by pro-business conservatives who are "willing to extend federal doctrines like preemption to protect the national uniformity that business interests prefer").

<sup>24</sup> See also Ernest A. Young, *Federal Preemption and State Autonomy*, in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 249, 263 (Richard A. Epstein & Michael S. Greve eds., 2007) (juxtaposing the voting patterns of "states' rights" Justices (Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas) in "classic" federalism cases invoking the Commerce Clause authority with voting patterns in preemption cases, in which the "liberals" favor state law while "conservatives" insist on national power).

Clause.<sup>25</sup> Of the 35 preemption cases decided after Justice Thomas joined the Court, the Rehnquist Court held in favor of federal preemption in almost two-thirds of them. Meltzer, dissecting the Court's voting alignments in a subset of those cases, found that in the eight nonunanimous preemption cases decided during the October 1999–2001 Terms, "Justice Scalia voted to preempt in all eight, the Chief Justice William Rehnquist and Justices Sandra Day O'Connor and Anthony Kennedy in seven each, and Justice Thomas in six, whereas . . . Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer each voted to preempt only twice and Justice Stevens never voted to preempt."<sup>26</sup>

With respect to the dormant Commerce Clause, Fallon documented how in recent years, "the Court has done more to tighten than to loosen the restrictions that the so-called dormant Commerce Clause imposes on state and local governments."<sup>27</sup> Although, as Fallon explained, "[i]t is easy to imagine that a Supreme Court committed to revitalizing constitutional federalism might adopt a revisionist stance toward dormant Commerce Clause doctrine,"<sup>28</sup> that was decidedly not the case.

On its face, then, substantive conservatism appears to trump principled federalism. In the aggregate, the picture that emerges is of a conservative Court that sacrifices its federalism principles on the altar of anti-regulation. But at the level of an individual Justice, it is not true that his or her views on preemption and dormant Commerce Clause doctrine rise or fall together.<sup>29</sup> Justice Stevens, for example, aggressively promotes the dormant Commerce Clause while staunchly resisting implied preemption by invoking federalism principles to defend state autonomy.<sup>30</sup> Justice Scalia is the mirror image:

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<sup>25</sup> Fallon, *supra* note 2, at 459–65.

<sup>26</sup> Meltzer, *supra* note 2, at 369–70. It is significant that each of the six cases in which Thomas voted in favor of preemption were *express* preemption cases. His votes in these cases in no way undercut his consistent opposition to implied preemption and dormant Commerce Clause. As is discussed below, Thomas draws a sharp line between cases in which Congress has spoken and those in which it has been silent. *See infra* Part II.

<sup>27</sup> Fallon, *supra* note 2, at 432.

<sup>28</sup> *Id.* at 460.

<sup>29</sup> Greve & Klick, *supra* note 21, at 66.

<sup>30</sup> *See* Greve, *supra* note 22, at 116 n.143 ("Justice Stevens turns aggressively preemptive when he himself, rather than some mere legislator or bureaucrat, does the

he has inveighed against the dormant Commerce Clause as unconstitutional, but habitually votes to uphold implied preemption.<sup>31</sup> Jeffrey Rosen has declared Justice Thomas the sole “states’ rights conservative” — as opposed to “business conservative” — on the Court.<sup>32</sup> It is true that Thomas equally — and consistently — resists implied preemption and the dormant Commerce Clause. What is less clear is the extent to which fidelity to abstract federalism values, such as states’ rights, is the animating principle of Thomas’s jurisprudence.

## II. CONSISTENCIES: FORMALISM AND TEXTUALISM

Justice Thomas’s jurisprudence in preemption and dormant Commerce Clause cases can be summed up succinctly in his own words: the judge’s role is “to interpret the language of the statute[s] enacted by Congress.”<sup>33</sup> So, where Congress has spoken (express preemption), he follows suit and ousts competing state law; but where Congress has only murmured (implied preemption) or has remained silent (dormant Commerce Clause doctrine), he resists any impulse to stray outside the text looking for reasons to displace state law.

A more sophisticated constitutional vision underlies this rather simplistic summary rendition. Justice Thomas’s conservative judicial philosophy embraces two key structural limitations in

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preempting. He is the Court’s most forceful advocate of constitutional preemption under the Due Process Clause and the dormant Commerce Clause.”); Greve & Klick, *supra* note 21, at 87 (noting that Justice Stevens “is the most aggressive advocate of the ‘dormant’ Commerce Clause”); Robert A. Schapiro, *Justice Stevens’s Theory of Interactive Federalism*, 74 *FORDHAM L. REV.* 2133, 2135–36 (2006) (setting out “to resolve some of the seeming tensions within [Justice Stevens’s] jurisprudence, such as his relatively permissive approach to state regulation in the area of federal preemption as compared to his relatively broad conception of the preemptive sweep of the dormant Commerce Clause”).

<sup>31</sup> See, e.g., Greve & Klick, *supra* note 21, at 88 (“Justice Stevens emerges as a defender of state prerogatives, and Justice Scalia often takes the opposite tack.”).

<sup>32</sup> Rosen, *supra* note 23, at 932 (“[T]hey [libertarians] have only a single possible vote on the [Roberts] Supreme Court today: Justice Clarence Thomas. (The other originalist on the Court, Antonin Scalia, is not a consistent supporter of states’ rights.)”); see also Greve & Klick, *supra* note 21, at 82 (showing Thomas to be the outlier of a trend in the direction of more conservative judges voting more often in favor of preemption).

<sup>33</sup> *Wyeth v. Levine*, 129 S. Ct. 1187, 1217 (2009) (Thomas, J., concurring in judgment) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002)).

the Constitution: limited federal regulatory power and the requirements of bicameralism and presentment to enact legislation. In pursuit of a government of limited federal power, Thomas has resisted the expansion of congressional power through interpretation of the commerce power of Congress. And—relevant to both preemption and the dormant Commerce Clause—he has insisted that “our federal system in general, and the Supremacy Clause in particular, accords preemptive effect to only those policies that are actually authorized by and effectuated through the statutory text.”<sup>34</sup> In other words, “[u]nder the Supremacy Clause, state law is pre-empted only by federal law ‘made in Pursuance’ of the Constitution, Art. VI, cl.2—not by extratextual considerations of the purposes underlying congressional [action or] inaction.”<sup>35</sup>

#### A. *Express Preemption*

Given Justice Thomas’s judicial philosophy and his formalist and textualist predilections, express preemption is not especially controversial, for Congress has spoken and the judge simply interprets the statutory language. Thomas adheres to two principles in express preemption cases: (1) express preemption provisions should be read according to their ordinary import; and (2) the “presumption against preemption” statutory default canon is entirely out of place.

In his forceful dissent in *Altria v. Good*, Justice Thomas makes the case that the presumption against preemption should have no place in the Court’s express preemption jurisprudence.<sup>36</sup> The *Altria* majority decided that fraudulent advertising claims brought under the Maine Unfair Trade Practices Act were neither expressly nor impliedly preempted by the Federal Cigarette Labeling and Advertising Act.<sup>37</sup> The Cigarette Labeling Act is emblematic of Congress speaking out of both sides of its mouth on the preemption issue. It

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<sup>34</sup> *Id.* at 1216.

<sup>35</sup> *Id.* at 1217.

<sup>36</sup> *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 555-59 (2008) (Thomas, J., dissenting).

<sup>37</sup> *Id.* at 541-42 (majority opinion).

contains both an express preemption provision<sup>38</sup> and an express savings clause.<sup>39</sup> The majority's interpretation of these provisions was guided by the presumption against preemption: "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'"<sup>40</sup> In his vociferous dissent, Thomas denounces the presumption against preemption as giving a "cramped and unnatural construction . . . that fail[s] to give effect to the statutory text."<sup>41</sup>

Justice Thomas's partial concurrence in *Bates v. Dow Agrosciences*<sup>42</sup> foreshadowed his *Altria* dissent.<sup>43</sup> While agreeing that the

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<sup>38</sup> The express preemption provision reads, "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b) (2009).

<sup>39</sup> The savings clause reads, "Nothing in this chapter (other than the requirements of section 1333 of this title) shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes." *Id.* at § 1336.

<sup>40</sup> *Altria*, 129 S. Ct. at 543 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

<sup>41</sup> *Id.* at 554 (Thomas, J., dissenting) (citing *Cipollone v. Liggett Group*, 505 U.S. 504, 544–48 (1992) (Scalia, J., concurring and dissenting in part)).

<sup>42</sup> 544 U.S. 431 (2005).

<sup>43</sup> *Id.* at 457 (Thomas, J., concurring in judgment in part and dissenting in part). Indeed, Thomas's latest denouncement in *Altria* has a trail leading all the way back to *Cipollone*, the 1992 progenitor of the Court's line of products liability preemption cases. Thomas joined Justice Scalia in dissent, resisting the plurality's invocation of the presumption to narrow its read of the express preemption provision of the Public Health Cigarette Smoking Act of 1969. Instead, the dissent would read express provisions in accordance with the ordinary meaning of statutory language. *Cipollone*, 505 U.S. at 548 (Scalia, J., concurring and dissenting in part) ("The proper rule of construction for express pre-emption provisions is, it seems to me, the one that is customary for statutory provisions in general: Their language should be given its ordinary meaning."). Any presumption "dissolves once there is conclusive evidence of intent to pre-empt in the express words of the statute itself." *Id.* at 545.

Justice Thomas also latched onto the partial dissent (authored by Justice O'Connor) in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), a case in which the majority construed statutory terms narrowly on account of the presumption against preemption. The dissent charged that the majority's constricted reading of "any requirement" in the preemption provision of the Medical Device Amendment to the Food Drug and Cosmetic Act so as not to foreclose all avenues of relief for an injured plaintiff made a mockery of congressional intent as the touchstone of preemption. *Lohr*, 518 U.S. at 512 (O'Connor, J., concurring and dissenting in part).

state tort claims in that case were not preempted by the Federal Insecticide Fungicide and Rodenticide Act, Thomas criticizes the majority's insistence upon finding a "clear and manifest" congressional intent to preempt.<sup>44</sup> Thomas agrees with Caleb Nelson's argument that "[i]f the Court's normal rules of statutory interpretation are designed to give effect to congressional intent, then the Court's insistence on giving express preemption clauses a narrower-than-usual interpretation will drive preemption decisions *away from* that intent."<sup>45</sup> Nelson has argued that the Court's narrow constructions of congressional language create an "*extrapolitical* safeguard—a safeguard that makes it difficult for Congress to preempt state law to the extent it wants."<sup>46</sup>

On top of his substantive views, Justice Thomas would also reject the presumption against preemption on precedential grounds. Thomas is dismayed at the Court's invocation of the presumption in *Altria* after it was seemingly put to rest during the previous Term in the Court's *Riegel v. Medtronic*<sup>47</sup> decision. In *Riegel*, the Court held (8 to 1) that the Medical Device Amendments to the Food Drug and Cosmetic Act preempted state law design-defect and failure-to-warn claims involving a medical device that had undergone rigorous Food and Drug Administration (FDA) pre-approval scrutiny.<sup>48</sup> As Thomas points out in his *Altria* dissent, "[t]he Court interpret[s] the statute without reference to the presumption or any perceived need to impose a narrow construction on the provision in order to protect the police power of the States."<sup>49</sup> The Court instead relies

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Justice Thomas's resolute refusal to take into account the "harsh result" of foreclosing relief to plaintiffs is reserved for express preemption cases. In *Buckman Co. v. Plaintiffs' Legal Comm.*, an implied preemption case, Thomas joined a concurrence (penned by Justice Stevens) that reined in the majority's broader pro-preemption holding, at least in part on account of the harsh effect it would have in terms of denying relief altogether to injured plaintiffs. See 531 U.S. 341, 355 (2001) (Stevens, J., concurring). Presumably, the calculus is different in implied preemption cases, where Congress has not spoken clearly on the preemption issue.

<sup>44</sup> *Bates*, 544 U.S. at 449 (Thomas, J., concurring in judgment in part and dissenting in part).

<sup>45</sup> *Id.* at 457 (citing Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 292 (2000)).

<sup>46</sup> Nelson, *supra* note 45, at 300–01.

<sup>47</sup> *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008).

<sup>48</sup> *Id.* at 1008.

<sup>49</sup> *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 557 (Thomas, J., dissenting).

solely upon “ordinary principles of statutory construction”<sup>50</sup> to interpret the actual language of the federal statute. The majority opinion—written by Justice Scalia—begins with statutory text and even veers into policy considerations and the role of the FDA,<sup>51</sup> but there is nary a word about the allegedly canonical presumption against preemption. Thomas argues that the Court’s silence—especially in light of Justice Ginsburg’s invocation of the presumption in her solo dissent—amounts to a wholesale rejection of the presumption as it applies to express preemption provisions.<sup>52</sup> Not only intellectually bankrupt, then, the presumption also lacks precedential authority.<sup>53</sup> According to Thomas, since the dawn of express preemption in *Cipollone v. Liggett Group*,<sup>54</sup> the Court “has altered its doctrinal approach to express pre-emption,”<sup>55</sup> so that precedent now aligns with his own substantive views—even if the majority fails to see it this way.

Indeed, the Court’s track record with respect to the presumption against preemption is murky. In some express preemption cases—as in *Cipollone*,<sup>56</sup> *Medtronic, Inc. v. Lohr*,<sup>57</sup> and *Bates*<sup>58</sup>—the majority (or plurality) embraces it enthusiastically as an opening salvo for the case, thus signaling (if not pre-ordaining) an anti-preemption conclusion. In others—as in *Riegel*<sup>59</sup>—the presumption is curiously absent. Moreover, it does seem peculiar that the presumption has been invoked so often in the *express* preemption context, where, almost by definition, it would seem extraneous, given Congress’s prescription of intent with actual words.<sup>60</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> See Sharkey, *What Riegel Portends*, *supra* note 1, at 440.

<sup>52</sup> *Altria*, 129 S. Ct. at 558 (Thomas, J., dissenting) (“Given the 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.”).

<sup>53</sup> *Id.*

<sup>54</sup> 505 U.S. 504 (1992).

<sup>55</sup> *Altria*, 129 S. Ct. at 555 (Thomas, J., dissenting).

<sup>56</sup> 505 U.S. 504.

<sup>57</sup> 518 U.S. 470 (1996).

<sup>58</sup> *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005).

<sup>59</sup> *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008).

<sup>60</sup> See Sharkey, *Products Liability Preemption*, *supra* note 1, at 458.

Justice Thomas presents a coherent and consistent position: follow the ordinary meaning of the statutory text enacted by Congress. Where there is such express text, there is no need for a presumption against preemption—in essence, a thumb on the scale against preemption regardless of the language enacted by Congress—to aid in the interpretive task. It is true that the net effect of express preemption will likely be no role (or no significant role) for states in regulatory enforcement or as providers of compensation for injuries. This might strike at the heart of a true federalist, but, for Thomas, fidelity to text trumps, at least where Congress has enacted legislation in accordance with constitutional principles.

*B. Dormant Commerce Clause*

If express preemption—where Congress has clearly spoken on the fate of state regulation—is taken to be one end of a continuum, the dormant Commerce Clause is situated at the opposite end. For the striking down of state regulation on the grounds of the dormant Commerce Clause is, for all intents and purposes, akin to preemption by Congressional silence.<sup>61</sup>

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<sup>61</sup> Justice Thomas has explicitly characterized invalidation under the dormant Commerce Clause as “preemption-by-silence.” *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 615 (1997) (Thomas, J., dissenting) (noting that the theory of “preemption-by-silence” has been rejected “in virtually every analogous area of the law.”).

Henry Monaghan quoted a provocative passage from Harvard Law School Professor Thomas Reed Powell, noting the irony of reliance upon judicial inferences from congressional silence:

Now congress has a wonderful power that only judges and lawyers know about. Congress has a power to keep silent. Congress can regulate interstate commerce just by not doing anything about it. Of course when congress keeps silent, it takes an expert to know what it means. But the judges are experts. They say that congress by keeping silent sometimes means that it is keeping silent and sometimes means that it is speaking. If congress keeps silent about the interstate commerce that is not national in character and that may just as well be regulated by the states, then congress is silently silent, and the states may regulate. But if congress keeps silent about the kind of commerce that is national in character and ought to be regulated only by congress, then congress is silently vocal and says that the commerce must be free from state regulation.

The Commerce Clause grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States.”<sup>62</sup> The Supreme Court has long held that the Commerce Clause contains an implicit “negative” aspect that restrains state power.<sup>63</sup> Pursuant to the dormant Commerce Clause, the Court sets a default rule against certain kinds of state regulations, namely those that impose unfair burdens on interstate commerce.<sup>64</sup> The Court has justified this rule as part of the Framers’ design in forging a new Union “to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”<sup>65</sup> Pursuant to its authority under the dormant Commerce Clause, the Court strikes down state regulations “even in the absence of a conflicting federal statute . . . .”<sup>66</sup>

What is significant is that the Court, not Congress, defines the conflict between state and federal policy. There has been “an often controversial evolution of rules to accommodate federal and state interests.”<sup>67</sup> The Court distinguishes between facially discriminatory state laws—i.e., “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the

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Monaghan, *supra* note 20, at 16 n.92 (quoting Thomas Reed Powell, *The Still Small Voice of the Commerce Clause*, in 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 931, 932 (1938)); *see also* *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 783–83 (1947) (“A shrewd critic has thus expressed the considerations that in the past have often lain below the surface of merely doctrinal applications: ‘Formally the enterprise is one of interpretation of the Act of Congress to discover its scope. Actually it is often the enterprise of reaching a judgment whether the situation is so adequately handled by national prescription that the impediment of further state requirements is to be deemed a bane rather than a blessing.’”) (quoting Thomas Reed Powell, *Current Conflicts Between the Commerce Clause and State Police Power*, 1922-1927, 12 MINN. L. REV. 607, 607 (1927-28)).

<sup>62</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>63</sup> *See* *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

<sup>64</sup> *See, e.g.,* *Dep’t of Revenue v. Davis*, 128 S. Ct. 1801, 1808 (2008) (noting that the dormant Commerce Clause “is driven by concern about ‘economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors’” (citation omitted)).

<sup>65</sup> *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979).

<sup>66</sup> *Id.* at 326.

<sup>67</sup> *Id.*

latter”<sup>68</sup>—and those that “regulate[] evenhandedly”<sup>69</sup> but impose incidental effects on interstate commerce. State laws that fall within the former category are “virtually *per se* invalid.”<sup>70</sup> By contrast, according to the *Pike* test, state laws that are not facially discriminatory are allowed to stand “unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”<sup>71</sup> The doctrine’s inherent flexibility has given the Court license to strike down state laws that seem inimical to the spirit of a national economy.<sup>72</sup> The Court has in fact celebrated this flexible mode of judicial decision-making, “eschew[ing] formalism for a sensitive, case-by-case analysis of purposes and effects.”<sup>73</sup>

Not surprisingly—given the absence of constitutional text supporting the doctrine, coupled with the unfettered license given to judges to divine irreconcilable conflict between state regulation and national policy—Justice Thomas is strident in his opposition to the dormant Commerce Clause. Thomas aligns with Justice Scalia, calling for the Court to abandon its enforcement of the Commerce Clause’s negative implications. Scalia decries the lack of “clear theoretical underpinning for judicial ‘enforcement’ of the Commerce Clause.”<sup>74</sup> With characteristic rhetorical flourish, he adds that the

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<sup>68</sup> *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 99 (1994).

<sup>69</sup> *Id.* (quoting *Hughes*, 441 U.S. at 336).

<sup>70</sup> *Id.* A facially discriminatory law can survive only if it “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Dep’t of Revenue v. Davis*, 128 S. Ct. 1801, 1808 (2008) (quoting *Or. Waste Sys.*, 511 U.S. at 101). The Court examines the offered local justifications with the strictest of scrutiny—a burden so heavy that “facial discrimination by itself may be a fatal defect.” *Or. Waste Sys.*, 511 U.S. at 101 (quoting *Hughes*, 441 U.S. at 337).

<sup>71</sup> *Davis*, 128 S. Ct. at 1808 (alteration in original) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

<sup>72</sup> At the extreme, “every state law which obstructs a national market violates the Commerce Clause.” *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 207 (1994) (Scalia, J., concurring).

<sup>73</sup> *Id.* at 201 (majority opinion). Note again the distinction between this flexible, case-by-case approach and a “bright-line” rule approach. Justice Scalia, hewing to the latter approach (along with Justice Thomas) admonishes the Court to “produce a clear rule” in this area. *Id.* at 210 (Scalia, J., concurring); see also Pildes, *supra* note 17.

<sup>74</sup> *Tyler Pipe Indus. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 260 (1987) (Scalia, J., concurring and dissenting in part).

Court's "applications of the doctrine have, not to put too fine a point on the matter, made no sense."<sup>75</sup>

But whereas Justice Scalia would apply the doctrine in limited realms on *stare decisis* grounds, Justice Thomas's opposition is more absolute.<sup>76</sup> In his dissent in *Camps Newfound/Owatonna*, Thomas emphatically rejects the doctrine in all its guises.<sup>77</sup> Thomas takes aim at the nature of the Court's jurisprudence as overbroad, unnecessary, and entirely unhinged from any textual justification: "The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application."<sup>78</sup> He concedes that some dormant Commerce Clause cases have arrived at "what intuitively seemed to be a desirable result," but such pragmatic policy considerations "remain[] unsettling

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<sup>75</sup> *Id.*

<sup>76</sup> Thomas's position here has evolved. He showed an earlier willingness to strike down facially discriminatory laws. See, e.g., *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994) (striking down a facially discriminatory flow control ordinance); *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of Or.*, 511 U.S. 93, 96 (1994) (finding Oregon trash surcharge for out-of-state trash that was nearly three times greater than the in-state service fee invalid under the dormant Commerce Clause as a facially discriminatory regulation). He aligned himself with Justice Scalia in *West Lynn Creamery v. Healy*—a case in which the Court likened a milk pricing policy to a protective tariff, whereby a state taxes goods imported from out-of-state but not similar in-state products. 512 U.S. at 193. Scalia's concurrence stakes out a pragmatic scheme to limit future invalidations under the dormant Commerce Clause, but grudgingly accepts some invalidations on *stare decisis* grounds. *Id.* at 210 (Scalia, J., concurring).

Justice Thomas's dissent in *Camps Newfound/Owatonna, Inc. v. Town of Harrison* marks the adoption of his more rigid opposition to the doctrine in all of its forms. 520 U.S. 564 (1997) (Thomas, J., dissenting). In *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, Thomas reiterates his diatribe against the dormant Commerce Clause and specifically disavows the majority position he joined in *C & A Carbone*. 550 U.S. at 349 (Thomas, J., concurring). See also KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS*, 281-82 (2004) ("[Justice Thomas] does not believe in *stare decisis*, period.").

<sup>77</sup> *Camps Newfound/Owatonna*, 520 U.S. at 610 (Thomas, J., dissenting). Thomas proposes a radical solution: the Court should eliminate the dormant Commerce Clause altogether; in its stead, the Court should enforce the Import-Export Clause to invalidate the more egregious state taxes and tariffs. See U.S. CONST. art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . .").

<sup>78</sup> *Camps Newfound/Owatonna*, 520 U.S. at 610 (Thomas, J., dissenting).

because of that rationale's lack of a textual basis."<sup>79</sup> Thomas laments that the Court "ha[s] used the Clause to make policy-laden judgments that we are ill equipped and arguably unauthorized to make."<sup>80</sup> In the end, according to Thomas, "the underlying justifications for [the Court's] involvement in the negative aspects of the Commerce Clause . . . are illusory."<sup>81</sup> Moreover, the Court's jurisprudence in the area has "undermine[d] the delicate balance in what we have termed 'Our Federalism.'"<sup>82</sup>

But, even more than any federalism concerns, the true source of Justice Thomas's angst over the dormant Commerce Clause lies in the fact that it "surely invites us, if not compels us, to function more as legislators than as judges."<sup>83</sup> He would "leave[] to Congress the policy choices necessary for any further regulation of interstate commerce."<sup>84</sup> He has repeated this mantra against "application of the negative Commerce Clause [which] turns solely on policy considerations, not on the Constitution."<sup>85</sup> Thomas rails against such judicial policymaking in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*:

Many of the [Court's dormant Commerce Clause cases] rest on the erroneous assumption that the Court must choose between economic protectionism and the free market. But

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<sup>79</sup> *Id.* at 618.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 612.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 619. Thomas writes more specifically of the *Pike* balancing test:

Any test that requires us to assess (1) whether a particular statute serves a "legitimate" local public interest; (2) whether the effects of the statute on interstate commerce are merely "incidental" or "clearly excessive in relation to the putative benefits"; (3) the "nature" of the local interest; and (4) whether there are alternative means of furthering the local interest that have a "lesser impact" on interstate commerce, and even then makes the question "one of degree," surely invites us, if not compels us, to function more as legislators than as judges.

*Id.*

<sup>84</sup> *Id.* at 620.

<sup>85</sup> *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 349 (2007) (Thomas, J., concurring).

the Constitution vests that fundamentally legislative choice in Congress. To the extent that Congress does not exercise its authority to make that choice, the Constitution does not limit the States' power to regulate commerce. In the face of congressional silence, the States are free to set the balance between protectionism and the free market. Instead of accepting this constitutional reality, the Court's negative Commerce Clause jurisprudence gives nine Justices of this Court the power to decide the appropriate balance.<sup>86</sup>

And, to add insult to injury, not only is the Court's enterprise illegitimate, but even worse, it is destabilizing as the Court shifts its policy predilections over time.<sup>87</sup>

### C. *Implied Preemption*

If express preemption and dormant Commerce Clause doctrine lie at the poles, then we have arrived at the messy, murky middle: implied preemption. Clear statutory text—the domain of express preemption—by definition does not govern. Nor is there silence, for Congress has enacted a regulatory structure, with varying degrees of comprehensiveness. Implied field preemption arises where Congress has enacted such a comprehensive, detailed regulatory scheme in an area that competing state law regulation is altogether foreclosed.<sup>88</sup> It is rare, and basically nonexistent in the products liability realm that has been my main focus.<sup>89</sup> Implied conflict preemption arises where there is a clash between a federal regulatory scheme and operation of some state law claims.<sup>90</sup> Implied conflict preemption comes in two varieties: impossibility and obstacle. Impossibility, as the name implies, arises where the demands of the state and federal regulatory commands are irreconcilable.<sup>91</sup> Obstacle preemption covers a wider

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<sup>86</sup> *Id.* at 352.

<sup>87</sup> *Id.* at 351.

<sup>88</sup> See Sharkey, *Products Liability Preemption*, *supra* note 1, at 455–58.

<sup>89</sup> Which is not to say that serious scholars do not continue to clamor for its application. See, e.g., Richard A. Epstein, *The Case for Field Preemption of State Laws in Drug Cases*, 103 NW. U. L. REV. 463 (2009).

<sup>90</sup> See Sharkey, *Products Liability Preemption*, *supra* note 1, at 504.

<sup>91</sup> See *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

band of cases where the state law interferes with, or obstructs, the purpose or aim of the federal regulatory scheme.<sup>92</sup>

Implied preemption derives its constitutional authority from the Supremacy Clause.<sup>93</sup> The doctrine has perplexed courts and scholars alike. In practice, state and federal courts hew to different analytic frameworks for deciding preemption cases—with state courts, on balance, more hostile to expansionist forms of preemption, and with federal courts, on balance, more accepting and prone to defer to the views of the underlying federal regulator.<sup>94</sup>

Justice Thomas uses the *Wyeth v. Levine*<sup>95</sup> implied preemption case as a platform for staking out his position, which had crystallized after witnessing the Court's confusion in this area over the course of a decade and a half. He agrees with the majority that failure-to-warn claims under state law are not impliedly preempted by the FDA's pre-market approval of the label on a drug whose injection led to the plaintiff's injuries.<sup>96</sup> But he writes separately—in an opinion with no co-signatories—to urge a doctrinal shift.<sup>97</sup> First, he questions, or at least leaves open for resolution another day, whether the presumption against preemption—which he abhors in the express preemption context—should apply in implied preemption cases.<sup>98</sup> But his main

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<sup>92</sup> See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (holding that federal law preempts state law when “[state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

<sup>93</sup> U.S. CONST. art. VI, cl. 2.

<sup>94</sup> See Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Court*, 15 J.L. & POL'Y 1013 (2007).

<sup>95</sup> 129 S. Ct. 1187 (2009).

<sup>96</sup> *Id.* at 1204 (Thomas, J., concurring in judgment).

<sup>97</sup> *Id.* at 1205.

<sup>98</sup> In a footnote he writes:

Because it is evident from the text of the relevant federal statutes and regulations themselves that the state-law judgment below is not preempted, 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.

*Id.* at 1208 n.2. Justice Thomas has previously endorsed the presumption against preemption or its rough equivalent in the implied preemption context. In *Geier*, Thomas joined Justice Stevens's dissent, which sounded a strong laudatory note for the presumption against preemption. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 910 (2000) (Stevens, J., dissenting).

focus is on the greater evil: obstacle preemption.<sup>99</sup> For completeness's sake, I begin with a short summary of his take on impossibility preemption, before turning to the main object of his derision.

#### 1. IMPOSSIBILITY PREEMPTION

As an initial matter, Justice Thomas acknowledges the constitutional authority for implied preemption. He argues that the Court's current, narrow "physical impossibility" test for conflict preemption is flawed because physical impossibility is not a good proxy for a determination of whether state and federal law directly conflict under the Supremacy Clause.<sup>100</sup> He embraces instead the "logical contradiction" test, derived from the work of Caleb Nelson: courts should "ignore state law if (but only if) state law contradicts a valid rule established by federal law, so that applying the state law would entail disregarding the valid federal rule."<sup>101</sup> Thomas borrows an example from Nelson to clarify the distinction between impossibility and logical contradiction: "[I]f federal law gives an individual the right to engage in certain behavior that state law prohibits, the laws would give contradictory commands notwithstanding the fact that an individual could comply with both by electing to refrain from the covered behavior."<sup>102</sup>

All of this is mere tinkering, however, compared to the bomb Justice Thomas drops on obstacle preemption, a doctrine that, in his view, the Court should abandon altogether.

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<sup>99</sup> Moreover, the presumption against preemption—though unprincipled—might be accepted as a "necessary evil" given the Court's expansive tendencies in the implied preemption realm. *Accord* Nelson, *supra* note 45, at 292 (conceding that the presumption, while in tension with the Supremacy Clause, would nonetheless "help counterbalance the excesses of the Court's other [implied preemption] doctrines"). So, by focusing on the "greater evil" of implied obstacle preemption, the "lesser evil" of the presumption would fall by the wayside.

<sup>100</sup> *Wyeth*, 129 S. Ct. at 1209 (Thomas, J., concurring in judgment).

<sup>101</sup> Nelson, *supra* note 45, at 234.

<sup>102</sup> *Wyeth*, 129 S. Ct. at 1209 (Thomas, J., concurring in judgment).

## 2. OBSTACLE PREEMPTION

Justice Thomas is ready to discard the doctrine of obstacle preemption: “This Court’s entire body of ‘purposes and objectives’ preemption jurisprudence is inherently flawed.”<sup>103</sup>

According to Justice Thomas, as a constitutional doctrine, obstacle preemption is a relative youngster.<sup>104</sup> It dates to the 1941 case *Hines v. Davidowitz*.<sup>105</sup> In *Hines*, the Court held that the national government’s alien registration scheme preempted Pennsylvania’s attempt to administer its own, more stringent registration system.<sup>106</sup> The Pennsylvania Alien Registration Act required aliens to register annually, as opposed to the one-time registration required by the Federal Alien Registration Act.<sup>107</sup> The state regulation, moreover, required aliens to carry an identification card at all times, which was not mandated by the federal act.<sup>108</sup> The majority began with the premise that the federal government is constitutionally entrusted with control over foreign affairs.<sup>109</sup> Registration of aliens was a key part of foreign relations because “experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another’s subjects inflicted, or permitted, by a government.”<sup>110</sup> Moreover, allowing states to interfere in foreign relations would potentially inflict harm upon other states.<sup>111</sup>

Against this backdrop, the Court embraced a protean conception of implied preemption. It eschewed any bright-line rule. The Court canvassed myriad expressions of preemption: “conflicting;

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<sup>103</sup> *Id.* at 1211.

<sup>104</sup> I suspect that the historical roots of obstacle preemption can be traced even further back, but for purposes of this Article, I am content to track Thomas’s elaboration, with the caveat that it not be taken as a definitive history of obstacle preemption.

<sup>105</sup> 312 U.S. 52 (1941).

<sup>106</sup> *Id.* at 74.

<sup>107</sup> *Id.* at 59–60.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 63–64.

<sup>110</sup> *Id.* at 64.

<sup>111</sup> *Id.* at 63–64 (“As Mr. Justice Miller well observed of a California statute burdening immigration: ‘If [the United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?’” (quoting *Lung v. Freeman*, 92 U.S. 275, 279 (1875))).

contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference.<sup>112</sup> But, according to the Court, “none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.”<sup>113</sup>

The Court instead opted, to borrow Rick Pildes’s phrase, to play a “boundary-enforcing role”:<sup>114</sup> “Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania’s law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>115</sup> And, in this case, given that Congress had enacted a “broad and comprehensible plan”<sup>116</sup> for alien registration and the fact that Congress and the public had repeatedly rejected overly intrusive provisions as antithetical to a free government and society,<sup>117</sup> the majority readily found that Pennsylvania’s stricter mandates stood in the way of federal objectives.

With the *Hines*’s majority’s formulation of state law standing as “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” the doctrine of implied conflict preemption took flight.<sup>118</sup> In the nearly seven decades that have followed, the Court has invoked *Hines* to forge the boundary between acceptable and offending state legislation and regulation.<sup>119</sup>

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<sup>112</sup> *Id.* at 67 (citation omitted).

<sup>113</sup> *Id.*

<sup>114</sup> Pildes, *supra* note 17.

<sup>115</sup> *Hines*, 312 U.S. at 67 (citation omitted).

<sup>116</sup> *Id.* at 69. The federal government had established laws governing the admittance of aliens, how aliens may become citizens, and the deportation of aliens. *Id.* The chairman of the Senate subcommittee responsible for the bill noted that the purpose of the Act was to weave the new provisions into existing federal law so as to “make a harmonious whole.” *Id.* at 72 (quoting Cong. Rec., June 15, 1940, p.12620).

<sup>117</sup> *Id.* at 70, 72.

<sup>118</sup> It is of no moment to my analysis here that one might better characterize the *Hines* case itself as one of implied field preemption.

<sup>119</sup> See, e.g., *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009) (“[Agencies] have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an ‘obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” (quoting *Hines*, 312 U.S. at 67)); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2001) (“This Court, when describing conflict pre-emption, has spoken of pre-empting state

It is against the current of nearly seven decades of application, then, that Justice Thomas swims. In *Wyeth*, his skepticism reached a boiling point: he will no longer countenance what amounts to “judicially manufactured policies” cobbled together from “freewheeling, extratextual, and broad evaluations of the ‘purposes and objectives’ embodied within federal law.”<sup>120</sup> For Thomas, getting to this point of seemingly drastic departure has been an evolutionary process, as he has grown “increasingly skeptical of [the] Court’s ‘purposes and objectives’ pre-emption jurisprudence.”<sup>121</sup> Thomas joined the dissent (penned by Justice Stevens) in *Geier*, which proposed a “special burden” test for any party seeking preemption in the face of a statutory “savings” clause.<sup>122</sup> Statutory interpretation in that case was not clear-cut, given that the Motor Vehicle Safety Act contained *both* an express preemption clause and an express savings clause.<sup>123</sup> But according to the dissent, the express language of the savings clause “unquestionably limits, and possibly forecloses” the preemptive effect of federal safety standards on state common law remedies.<sup>124</sup> Any party seeking to overcome the force of the savings clause on implied preemption grounds therefore faces a “special burden” in demonstrating that valid federal purposes would be frustrated if that state law were not preempted.<sup>125</sup>

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law that ‘under the circumstances of th[e] particular case . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’—whether that ‘obstacle’ goes by the name of ‘conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency; violation; curtailment; . . . interference,’ or the like.” (quoting *Hines*, 312 U.S. at 67)).

<sup>120</sup> Thomas has a special affinity for the turn of phrase, “freewheeling judicial inquiry,” which he has employed before. See *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 459 (2005) (Thomas, J., concurring in judgment in part and dissenting in part). The phrase is borrowed from Justice Kennedy. See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (criticizing the majority for engaging in “freewheeling judicial inquiry into whether a state statute is in tension with federal objectives” that turns focus away from Congress and toward courts).

<sup>121</sup> *Wyeth*, 129 S. Ct. at 1205 (Thomas, J., concurring in judgment); *id.* at 1207 (“I have become ‘increasing[ly] reluctan[t] to expand federal statutes beyond their terms through doctrines of implied preemption.’” (quoting *Bates*, 544 U.S. at 459)).

<sup>122</sup> *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 900 n.16 (2000) (Stevens, J., dissenting).

<sup>123</sup> *Id.* at 867–68 (majority opinion).

<sup>124</sup> *Id.* at 900 n.16 (Stevens, J., dissenting).

<sup>125</sup> *Id.*

Under this heightened test, a manufacturer must demonstrate that allowing the common law claims would “impose an obligation on manufacturers that directly and irreconcilably contradicts any primary objective that the Secretary [or federal administrator] set forth with clarity in [the federal regulation].”<sup>126</sup>

*Geier* was likely a turning point in Justice Thomas’s thinking. It was a high water mark for an expansive version of implied preemption. As Ken Starr has noted, *Geier* “powerfully illustrates the Court’s eager acceptance of the *Hines* methodology.”<sup>127</sup> The majority specifically rejected the “complex new doctrine” of special burdens proposed by the dissent and committed itself to following *Hines*’s broad test.<sup>128</sup> Thomas seized an opportunity to press his contrarian view in *Bates*.<sup>129</sup> Recall that the majority in *Bates* held that the state law claims were neither expressly nor impliedly preempted by the Federal Insecticide Fungicide and Rodenticide Act.<sup>130</sup> Thomas, concurring separately, takes the view that implied preemption cannot be found in the face of an express savings clause<sup>131</sup>—in effect substituting a “bright-line” rule for the more compromising “special burden” standard of the *Geier* dissent. Thomas takes a further step, moreover, when he seeks to undermine the majority’s implied preemption holding: “Because we need only determine the ordinary meaning of § 136v(b) [the statute’s savings clause], the majority rightly declines to address respondent’s argument that petitioners’ claims are subject to other types of pre-emption.”<sup>132</sup> But the majority did address whether state law claims would “seem to aid, rather

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<sup>126</sup> *Id.* at 906. The threshold is made all the higher by the presumption against preemption, which the dissent endorses. *Id.*

<sup>127</sup> Kenneth W. Starr, *Reflections on Hines v. Davidowitz: The Future of Obstacle Preemption*, 33 PEPP. L. REV. 1, 6 (2005).

<sup>128</sup> *Geier*, 529 U.S. at 874.

<sup>129</sup> *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 457–59 (2005) (Thomas, J., concurring in judgment in part and dissenting in part).

<sup>130</sup> *Id.* at 452–54 (majority opinion).

<sup>131</sup> *Id.* at 457–58 (Thomas, J., concurring in judgment in part and dissenting in part).

<sup>132</sup> *Id.* at 458 (“Nor does the majority ask whether enforcement of state-law labeling claims would ‘stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’ in enacting FIFRA.” (quoting *Hines*, 312 U.S. at 67)).

than hinder” the federal regulatory scheme.<sup>133</sup> Thomas thus presents a recharacterization of the majority to comport with his worldview: “Today’s decision thus comports with this Court’s increasing reluctance to expand federal statutes beyond their terms through doctrines of implied pre-emption.”<sup>134</sup>

Justice Thomas’s arrival point in *Wyeth* was not only foreshadowed by his earlier opinions, but it is also entirely consistent when viewed alongside his express preemption and dormant Commerce Clause jurisprudence: namely, Thomas takes a bright-line rule approach and resists doctrines that “wander far from the statutory text.”<sup>135</sup> Thomas has several bones of contention with freewheeling implied preemption doctrine. First, he is wary of the kind of evidence courts employ to discern congressional intent. Thomas associates himself with Justice Harlan Fiske Stone’s dissent in *Hines*.<sup>136</sup> In Stone’s view, Pennsylvania’s alien registration act did not directly conflict with the federal act; the federal act in no way provided that additional state requirements would be preempted.<sup>137</sup> Stone castigated the majority’s use of “vague inferences as to what

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<sup>133</sup> *Id.* at 451 (majority opinion) (“Private remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA.”); *see also id.* at 451–52 (finding no evidence showing that state tort suits lead to a “crazy-quilt” of FIFRA standards and thus no showing that common-law suits are disruptive).

<sup>134</sup> *Id.* at 459 (Thomas, J., concurring in judgment in part and dissenting in part) (citing *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting)).

<sup>135</sup> *Wyeth v. Levine*, 129 S. Ct. 1187, 1205 (2009) (Thomas, J., concurring in judgment).

<sup>136</sup> *Id.* at 1212–13 n.4.

<sup>137</sup> *Hines v. Davidowitz*, 312 U.S. 52, 78–81 (1941) (Stone, J., dissenting). More broadly, in terms of his aversion to judicial policymaking, Thomas stands on the intellectual shoulders of Chief Justice Stone. *See, e.g., United States v. Pink*, 315 U.S. 203, 256 (1942) (Stone, C.J., dissenting) (“It is not for this Court to adopt policy, the making of which has been by the Constitution committed to other branches of the government. It is not its function to supply a policy where none has been declared or defined and none can be inferred.”); *see also* Stephen Gardbaum, *The Breadth vs. the Depth of Congress’s Commerce Power: The Curious History of Preemption during the Lochner Era* 48, 69–70, in *FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS* (Richard A. Epstein & Michael S. Greve, eds. 2007) (“Stone . . . argued that the necessary manifestation of congressional intent to preempt should *never* be implied by the courts: express preemption or an actual conflict between state and federal law are the only methods of displacing concurrent state authority.”).

Congress might have intended if it had considered the matter” to build its case that Congress had crafted a comprehensive alien registration scheme that was meant to preclude additional state inter-meddling.<sup>138</sup>

Second, and more fundamentally, Justice Thomas bristles at the notion that courts can appropriately, let alone effectively, tease out single purposes or aims of federal legislation and regulations. His stance in *Pharmaceutical Research and Manufacturers of America v. Walsh* (*PhRMA v. Walsh*) is illustrative.<sup>139</sup> The district court in *PhRMA* enjoined a Maine prescription drug program (Maine Rx), finding that the state law requirements conflicted with the objective of Medicaid and were thus preempted by the federal statute.<sup>140</sup> In overturning the district court’s decision, the Supreme Court majority identifies several ways in which the Maine prescription drug program did in fact further the purposes and objectives of Medicaid.<sup>141</sup> Thomas agrees with the majority’s result—that the state program was not preempted by the federal statute—but prides himself on reaching his conclusion “without speculation about whether Maine Rx advances ‘Medicaid-related goals’ or how much it does so.”<sup>142</sup> To Thomas’s mind, such engagement is futile: most federal statutes—and certainly the Medicaid Act—are products of compromise, a delicate balance between competing and conflicting interests and goals.<sup>143</sup> Given the “impossibility of defining ‘purposes’ in complex statutes at such a high level of abstraction,” Thomas warns of the “concomitant danger of invoking obstacle preemption based on the arbitrary selection of one purpose to the exclusion of others.”<sup>144</sup>

Third, and relatedly, as Justice Thomas stresses in his *Wyeth* concurrence, the Court’s purpose-based approach to implied preemption “encourages an overly expansive reading of statutory

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<sup>138</sup> *Hines*, 312 U.S. at 75 (Stone, J., dissenting).

<sup>139</sup> *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 675 (2003) (Thomas, J., concurring).

<sup>140</sup> *Id.* at 662 (majority opinion).

<sup>141</sup> *Id.* at 663–664.

<sup>142</sup> *Id.* at 682 (Thomas, J., concurring).

<sup>143</sup> *Id.* at 678.

<sup>144</sup> *Id.*

text.”<sup>145</sup> This occurs because “[t]he Court’s desire to divine the broader purposes of the statute before it inevitably leads it to assume that Congress wanted to pursue those policies ‘at all costs’—even when the text reflects a different balance.”<sup>146</sup>

Finally, the fractured nature of the Court’s implied preemption decisions—with majorities and dissents staking out polar opposite positions—illustrates how a “freewheeling judicial inquiry into whether a state statute is in tension with federal objectives . . . undercut[s] the principle that it is *Congress* rather than the *courts* that pre-empts state law.”<sup>147</sup>

In the end, Justice Thomas’s position rests far more on fidelity to statutory text and preference for Congress over courts as a constitutional and as an institutional matter than it does on principles of federalism *vel non*.

### III. FEDERALISM PARADOXES

Justice Thomas’s position against freewheeling, extratextual obstacle preemption, which has evolved over the years and crystallized in *Wyeth*, has roots in a formalist approach to law, with heavy reliance upon statutory text, a fierce distrust of judicial policymaking, and concomitant faith in Congress. But, to what extent does Thomas’s staunch anti-obstacle-preemption position situate him as a principled federalist? Certainly, ruling out obstacle preemption would widen the berth of state regulatory autonomy; no longer could courts find—absent direction from Congress—that state law claims impede federal purposes and deem them void on that basis.

But note how much turns, then, on whether a case is one of express or implied preemption. In actual practice, the distinction is

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<sup>145</sup> *Wyeth v. Levine*, 129 S. Ct. 1187, 1215 (2009) (Thomas, J., concurring in judgment).

<sup>146</sup> *Id.* (citing Nelson, *supra* note 45, at 279–80). Nelson points out that members of Congress have a keen interest in protecting the interests of their home states and will therefore not pursue federal objectives at any cost. Nelson, *supra* note 45, at 280–81.

<sup>147</sup> *Pharm. Research*, 538 U.S. at 682 (Thomas, J., concurring) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment)) (emphases added).

often blurred.<sup>148</sup> As Caleb Nelson has pointed out, express preemption analysis requires reading an entire statute in context, which often merges into something akin to the more protean implied preemption analysis.<sup>149</sup> Consider *Bates* in this regard. Recall that Justice Thomas went to some lengths to insist that the case was an express preemption case but went no further, even in the face of the majority's implied preemption analysis.<sup>150</sup>

Looked at from the standpoint of state regulatory autonomy, express preemption cases pose as much, if not more, of a threat. One tension in Justice Thomas's jurisprudence thus emerges when one considers that, in the express preemption realm, he has tended to support very expansive interpretations of preemptive language, often justified by an appeal to national uniformity.

A second tension emerges with respect to his treatment of federal agencies' participation in preemption and statutory interpretation. In his *Wyeth* concurrence, Justice Thomas repeatedly refers dismissively to the agency's position on preemption as "musings."<sup>151</sup> And "agency musings," Thomas retorts, "do not pre-empt state law under the Supremacy Clause,"<sup>152</sup> as "no agency . . . can pre-empt a State's judgment by merely musing about goals or intentions not found within or authorized by the statutory text."<sup>153</sup> Thomas's skepticism regarding the role of federal agencies in preemption decisions is a longstanding view; moreover, at least at first glance, it is entirely consistent not only with his formalist, textualist predilections, but also with the classic federalist suspicion of agency assertions of preemptive authority.<sup>154</sup>

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<sup>148</sup> See, e.g., *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990) (acknowledging that the categories of express and implied preemption are not "rigidly distinct").

<sup>149</sup> See Nelson, *supra* note 45, at 264.

<sup>150</sup> See *supra* text accompanying notes 129–134.

<sup>151</sup> *Wyeth v. Levine*, 129 S. Ct. 1187, 1207, 1215 (2009) (Thomas, J., concurring in judgment).

<sup>152</sup> *Id.* at 1207.

<sup>153</sup> *Id.* at 1215.

<sup>154</sup> See, e.g., Merrill, *supra* note 20, at 756 ("In terms of balance, transferring preemption authority to agencies would increase the capacity of the legal system to displace state law, which would probably result in a further shift in the direction of more federal authority."); Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2136 (2008)

But upon closer inspection, the ostensible consistency faces some challenge. In a line of cases, Justice Thomas enthusiastically applies *Chevron*<sup>155</sup> deference to agency interpretations of statutes that undeniably resolve the preemption question. Thomas protests that these are questions of statutory interpretation, not preemption cases. But, to an objective observer, it certainly looks like preemption by another name. Moreover, it is another case—like that of the express versus implied preemption dichotomy—in which the significance of abstract federalism values rises or falls based upon formal doctrinal categorization.

#### A. *National Uniformity and the Express Preemption Facade*

Justice Thomas consistently maintains that he is “reluctant to expand federal statutes beyond their terms through doctrines of implied pre-emption.”<sup>156</sup> Given his inclination to limit federal power, one might expect him to read express preemption provisions narrowly, at least when there is room, given the ordinary meaning of language. But his jurisprudence in *Employee Retirement Income Security Act of 1974 (ERISA)*<sup>157</sup> and cigarette labeling cases shows otherwise.<sup>158</sup>

ERISA’s preemption provision reads: the Act “shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan” covered by ERISA.<sup>159</sup> Justice Thomas

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(“[W]e reject the notion that administrative federalism should focus on the agencies rather than Congress.”).

<sup>155</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>156</sup> *Wyeth*, 129 S. Ct. at 1207 (Thomas, J., concurring in judgment) (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 459 (2005) (Thomas, J., concurring in judgment in part and dissenting in part)).

<sup>157</sup> 29 U.S.C. §§ 1001–1461 (2009).

<sup>158</sup> It bears mentioning that ERISA may present a special case, given the complete preemption effectuated by its statutory terms. *See, e.g.*, Gil Seinfeld, *The Puzzle of Complete Preemption*, 155 U. PA. L. REV. 537, 550–51 (2007). One might even claim that, similar to preemption in the intellectual property realm, ERISA preemption is more like implied field preemption, given the overriding goal of national uniformity. But even accepting all of this as true, Thomas’s views on national uniformity are not limited to the ERISA context, as the inclusion of *Altria*, a cigarette labeling case, makes clear.

<sup>159</sup> 29 U.S.C. § 1144(a) (2000) (emphasis added).

follows the Court's established ERISA jurisprudence, which requires that "[the Court] simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive."<sup>160</sup> An initial paradox emerges here: faced with an opaque express preemption clause with "antithetical" preemption and savings clauses, Thomas embraces the very same "purposes and objectives" inquiry that he emphatically rejects for implied obstacle preemption.<sup>161</sup>

A second paradox follows, for Justice Thomas gives ERISA's "relates to" language an expansive interpretation, relying not only on the ordinary meaning of the statutory text, but also on the fact that ERISA was intended to create national uniformity among insurance and pension plans. In case after case, he presses this view. *Egelhoff v. Egelhoff*,<sup>162</sup> which he authored, is a prime example. David Egelhoff, who was divorced, died without a will.<sup>163</sup> By the time of his death, he had not changed the named beneficiary of his pension, his ex-wife.<sup>164</sup> State law provided a different background rule for disposition of his pension funds: under Washington state law, insurance policy and pension benefits were automatically revoked upon divorce;<sup>165</sup> under ERISA, proceeds from plans are paid to the plan's named beneficiary.<sup>166</sup> Egelhoff's children sued his divorcee to recover money paid to her as named beneficiary.<sup>167</sup>

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<sup>160</sup> N.Y. Conference of Blue Cross & Blue Shield Plans v. Travelers Ins., 514 U.S. 645, 656 (1995).

<sup>161</sup> See, e.g., *Rush Prudential HMO, Inc. v. Moran* 536 U.S. 355, 392-93 (2002) (Thomas, J., dissenting) ("[P]re-emption and saving clauses are almost antithetically broad and are not a model of legislative drafting. But because there is no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional pre-emption analysis, the Court has concluded that federal pre-emption occurs where state law governing insurance stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.") (citations and internal quotations omitted).

<sup>162</sup> *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001).

<sup>163</sup> *Id.* at 144.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 147-48.

<sup>167</sup> *Id.* at 144-45.

Justice Thomas, writing for the majority, rules that ERISA preempts the state statute.<sup>168</sup> Given the potential breadth of the phrase “relates to,” as a way to cabin its trouncing on state law, Thomas suggests looking to “the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.”<sup>169</sup> Engaging in this searching probe of purposes, Thomas finds that beneficiary designations are an area of “core ERISA concern.”<sup>170</sup> Moreover, permitting the Washington statute to have effect would interfere with national uniformity among ERISA plans, which was one of the primary goals of ERISA.<sup>171</sup> In other words, if the Court allowed different states to set different legal obligations, federal uniformity would be destroyed.<sup>172</sup> Thomas adds a caveat: “We recognize that all state laws create some potential for a lack of uniformity. But differing state regulations affecting an ERISA plan’s ‘system for processing claims and paying benefits’ impose ‘precisely the burden that ERISA pre-emption was intended to avoid.’”<sup>173</sup>

Justice Thomas’s pattern of invoking the goal of national uniformity to argue that state laws at variance with ERISA present an obstacle to the accomplishment of federal initiatives is difficult to square with his professed aversion to purpose-based inquiries in

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<sup>168</sup> *Id.* at 150.

<sup>169</sup> *Id.* at 147. Thomas is at pains to demonstrate attempted fidelity to text. *See id.* at 146 (explaining that “relates to” must mean “has a connection with,” and that the statutory language is “broadly worded” and “clearly expansive”). Moreover, the judicial investigation of congressional intent does not rest easily with Thomas; seemingly bent on avoiding obstacle preemption language, Thomas instead links the congressional purpose inquiry back to the plain meaning of “relates to” and finds that the Washington statute has a “prohibited connection” with federal regulation. *Id.* at 148.

Here, again, the contrast with Justice Scalia is instructive. Scalia eschews the Court’s tenuous textual approach to ERISA analysis in favor of a clearer field and conflict preemption analysis. *See, e.g.,* Cal. Div. of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc., 519 U.S. 316, 336 (1997) (Scalia, J., concurring) (“[W]e apply ordinary field pre-emption, and, of course, ordinary conflict pre-emption.”); *see also* *Egelhoff*, 532 U.S. at 152-53 (Scalia, J., concurring).

<sup>170</sup> *Egelhoff*, 532 U.S. at 147.

<sup>171</sup> *Id.* at 148.

<sup>172</sup> *Id.* Allowing different state laws would also create an additional administrative burden because plan administrators would need to check state law obligations instead of simply making payments to the plan’s designee. *Id.* at 149-50.

<sup>173</sup> *Id.* at 150 (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10 (1987)).

implied preemption.<sup>174</sup> Moreover, ERISA preemption has notoriously trampled on state regulatory autonomy.<sup>175</sup> *Rush Prudential HMO, Inc. v. Moran*<sup>176</sup> provides another striking example. The majority upholds an Illinois statute that provides for an arbitration-like proceeding for disputes between the patient and the health maintenance organization (HMO) over the “medical necessity” of a covered service proposed by a primary care physician.<sup>177</sup> Despite the fact that the statute indisputably “relates to” ERISA plans, according to the majority, it was spared preemption because it falls within the savings clause for laws that “regulate insurance.”<sup>178</sup> But Thomas resists this move. He argues in dissent that, “despite ERISA’s saving clause,” ERISA preempts so long as the state insurance law “supplements the remedies provided by ERISA.”<sup>179</sup> Thomas resists the majority’s attempt to “short circuit ERISA’s remedial scheme” and to “eviscerate[] the uniformity of ERISA remedies Congress deemed integral to the careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans.”<sup>180</sup> Thomas’s approach here – insisting on preemption in the face of a savings clause and venturing enthusiastically down the “purposes and objectives” path, all in service of upholding interests in national uniformity –

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<sup>174</sup> Indeed, he takes this ERISA claim quite far. *See, e.g., Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) (arguing that ERISA’s “integrated enforcement mechanism” is intended to provide an exclusive remedy to plaintiffs); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 388 (2002) (Thomas, J., dissenting) (arguing that ERISA should preempt the Illinois HMO Act because the exclusivity of remedies under ERISA is necessary to further the federal objective of national uniformity of employee benefits).

<sup>175</sup> *See* Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 39–53 (2007).

<sup>176</sup> 536 U.S. 355 (2002).

<sup>177</sup> *Id.* at 359.

<sup>178</sup> *Id.* at 381. Moreover, the majority finds that the effects of the state statute on ERISA goals are too attenuated to warrant preemption. *Id.* at 381 n.11 (“We do not believe that the mere fact that state independent review laws are likely to entail different procedures will impose burdens on plan administration that would threaten the object of [ERISA] . . . . And although the added compliance cost to the HMO may ultimately be passed on to the ERISA plan, we have said that such ‘indirect economic effects’ are not enough to preempt state regulation even outside of the insurance context.”) (citation omitted).

<sup>179</sup> *Id.* at 388 (Thomas, J., dissenting).

<sup>180</sup> *Id.* at 389 (citation and internal quotations omitted).

seems oddly consonant with the position embraced by the *Geier* majority, setting forth the broadest endorsement to date of implied obstacle preemption.<sup>181</sup>

Nor is Justice Thomas's affinity for the national uniformity justification limited to ERISA cases.<sup>182</sup> In his *Altria* dissent, Thomas bolsters his expansive interpretation of the preemptive language in the Public Health Cigarette Smoking Act of 1969<sup>183</sup> with a nod to national uniformity.<sup>184</sup> Absent preemption, Thomas warns that "[t]he question whether marketing a light cigarette is 'misrepresentative' in light of compensatory behavior 'would almost certainly be answered differently from State to State.'"<sup>185</sup> And, the proliferation of state law fraud claims would undermine the stated congressional policy of avoiding nonuniform state standards.<sup>186</sup>

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<sup>181</sup> *But see* *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 900 n.16 (2000) (Stevens, J., dissenting). Recall that in *Geier*, the majority claimed that a tort suit would present an "obstacle to the variety and mix of devices that the federal regulation sought." *Id.* at 18–19 (majority opinion). The dissent, joined by Thomas, can perhaps be distinguished from *Rush Prudential* on the grounds that in the latter case, it is the congressional deal that purportedly requires a particular set of claims settlement procedures. *See Rush Prudential HMO, Inc.*, 536 U.S. at 389 (Thomas, J., dissenting). In contrast, the mix-of-devices justification in *Geier* was an *ex post* litigation position adopted by the underlying agency and rejected by the dissent. *See Geier*, 529 U.S. at 911–12 (Stevens, J., dissenting). But the fact remains that Thomas reads the opaque congressional language much more broadly than the majority and does so in the face of a saving clause.

<sup>182</sup> The Airline Deregulation Act contains a preemption clause similar in breadth to that in ERISA, preempting states from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law *related to* a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1) (1995) (emphasis added). Thomas has likewise been partial to expansive readings of this express preemption provision, in furtherance of national uniformity interests. He joined a dissent in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), which claimed that the breadth of the statutory language effectuates nearly complete preemption of all state contract claims. *Id.* at 250 (O'Connor, J., dissenting). The majority, by contrast embraced a narrower reading—one consistent, moreover, with that embraced by the underlying federal regulator, the Department of Transportation. *Id.* at 222–23 (majority opinion) (limiting preemption to state regulation that imposes "substantive standards with respect to rates, routes, or services, but not . . . claims . . . that an airline dishonored a term the airline itself stipulated").

<sup>183</sup> 15 U.S.C. § 1331 et seq. (2009).

<sup>184</sup> *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 551 (2008) (Thomas, J., dissenting).

<sup>185</sup> *Id.* at 561 (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 553 (1992)).

<sup>186</sup> *Id.* at 551 ("It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising

Justice Thomas's verve for national uniformity is by no means unqualified.<sup>187</sup> He accommodates the inexorable pressure towards national uniformity in the express preemption contexts involving regulation of pension benefit plans and cigarette labels, but squelches it entirely in the implied preemption context, regardless of regulatory context. Take *Gade v. National Solid Wastes Management Association*, a case in which the majority holds (5 to 4) that state requirements for hazardous waste worker training are preempted by federal law.<sup>188</sup> The federal law allows state requirements to persist in areas of worker health and safety already addressed by the Environmental Protection Administration, contingent upon the state submitting a plan for regulatory standards to the Secretary of Labor.<sup>189</sup> The Court decides that Illinois's failure to exercise this option was dispositive; it rejects a contrary interpretation that such approval was only relevant when states sought to out the federal standard altogether, as opposed to adding requirements on top of it.<sup>190</sup> The plurality analyzes the structure of the Occupational Safety Hazard Act which "evidences Congress' intent to avoid subjecting workers and employers to duplicative regulation."<sup>191</sup> The government established a uniform system of standards, with a safety valve for states that wanted to develop their own, federally approved systems.<sup>192</sup> Thomas joins Justice Souter's dissent, which not only rejects the plurality's finding of obstacle preemption but also leads with a paean to the presumption against preemption: "If the statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and

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with respect to any relationship between smoking and health, whereby . . . commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." (citing 15 U.S.C. § 1331(2)).

<sup>187</sup> Even within his ERISA jurisprudence, there are aberrations. See, e.g., *Cal. Div. of Labor Standards of Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 333 n.10 (1997) (rejecting the national uniformity preemption rationale in a case involving California prevailing wage requirement for public works contractors on the grounds that "California's standards do not result in disuniformities different in kind from those that would exist without them").

<sup>188</sup> 505 U.S. 88, 97-98 (1992).

<sup>189</sup> *Id.* at 96-97.

<sup>190</sup> *Id.* at 104-05.

<sup>191</sup> *Id.* at 100.

<sup>192</sup> *Id.* at 102.

no pre-emption may be inferred.”<sup>193</sup> Because the preemption provisions are susceptible to two opposing readings, the statute lacks a “clear expression” of congressional intent to preempt state law.

The dichotomy between express and implied preemption takes on enormous significance. This is to be expected, given the importance Justice Thomas places on textualist interpretation. Words matter and so do their absence. But the express language cannot bear the full weight given by Thomas. Express preemption provisions at times seem to provide little more than a hook, upon which broader visions of national uniformity can be hung. In these cases, Thomas seizes the opportunity and votes to preempt. His stated aversion to the judicial expansion of federal statutes using purpose-based analysis is held at bay. And his allegiance to federalism principles seems to fall by the wayside.

#### B. *When Congress Equivocates: The Role of Federal Agencies*

Where text is supreme, it follows that the position espoused, or the actions taken, by the federal regulator should have no bearing on the preemption inquiry. Justice Thomas is second only to Justice Stevens in his antagonism toward agency views.<sup>194</sup> Thomas’s position here is crystal clear, at least with respect to cases he formally

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<sup>193</sup> *Gade v. National Solid Wastes Ass’n*, 505 U.S. 88, 115–16 (1992). In his *Wyeth* concurrence, Thomas indicates that he may have rethought the appropriateness of the presumption against preemption even in implied preemption cases. See *Wyeth v. Levine*, 129 S. Ct. 1187, 1204 (2009) (Thomas, J., concurring in judgment). See also *supra* n. 98 (discussing the evolution of Thomas’s views on presumption against preemption in implied preemption cases).

<sup>194</sup> In a comprehensive study of agency statutory interpretation cases, including 1,014 U.S. Supreme Court cases from *Chevron* to *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), Thomas agreed with the agency’s position 63.1% of the time, as compared with the mean of 67%. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L. J. 1083, 1089–90 (2008). Of the sitting Court, only Stevens agreed with the underlying agency less often (60.9% of the time). *Id.* at 1153–54. Thomas agreed with conservative agency views in agency interpretation cases 75.8% of the time and liberal views only 46.8% of the time—the second-biggest disparity on the Court, again after Stevens (who agreed with liberal views 79.2% of the time and conservative views 49.6% of the time). See *id.* at 1095, 1154. The methodology to determine “conservative” and “liberal” did not involve a pigeonholing of federalism concerns into either camp. Instead, “conservative” implies support of business interests and other traditional policy backers. *Id.* at 1153, n.191.

categorizes as preemption cases. His aversion to federal agency participation is grounded in federalist principles.<sup>195</sup> But a paradox emerges once one brings into focus a line of cases in which Thomas would give *Chevron*<sup>196</sup> deference to agency interpretations of statutory language whose effect is either to oust or to preserve state law.

#### 1. NO ROLE FOR FEDERAL AGENCIES IN DECIDING PREEMPTION

For Justice Thomas, consideration of an agency's preemption position is totally out of bounds in express preemption cases. In his *Altria* dissent, he criticizes the majority for allowing its perception of the jurisdiction and capabilities of the Federal Trade Commission to cloud the plain meaning of the Act's express preemption provision and the congressionally delegated authority to the FTC.<sup>197</sup> The Labeling Act delegated authority to the FTC as the regulatory body in charge of policing deceptive advertising.<sup>198</sup> The plain language and delegated authority settle the matter for Thomas. The majority, by contrast, contends that the FTC depends upon state cooperation given that the FTC is a small administrative agency that is charged with overseeing a huge body of activity.<sup>199</sup> The FTC, moreover, specifically weighed in against preemption—at least with respect to implied preemption—to confirm that, given its wide regulatory jurisdiction, it relies significantly on state tort law enforcement to fill in the gaps.<sup>200</sup> Such ruminations on the

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<sup>195</sup> As Thomas observes, the Court is more likely to side with an agency when the agency takes the position that state law should *not* be preempted. See *Pharm. Research & Mfrs. v. Walsh*, 538 U.S. 644, 675–84 (2003) (Thomas, J., concurring) (emphasis added); see also William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 4, 1478 (2008) (“In the 39 cases where the agency argued against any preemption [out of a total 130 U.S. Supreme Court agency preemption cases] . . . the Court agreed a whopping 84.6% of the time (33/39 cases); in the 87 cases where the agency argued for preemption . . . the Court agreed 64.4% (56/87) of the time, a significantly lower win rate for the agency.”).

<sup>196</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>197</sup> *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 551–52 (2008) (Thomas, J., dissenting).

<sup>198</sup> *Id.* at 561.

<sup>199</sup> *Id.* at 545 n.6 (majority opinion) (noting that the FTC “has long depended on cooperative state regulation to achieve its mission because, although one of the smallest administrative agencies, it is charged with policing an enormous amount of activity”).

<sup>200</sup> Brief for the United States As Amicus Curiae Supporting Respondents at \*3, *Altria*, 129 S. Ct. 538 (No. 07-562), 2008 WL 24722389.

part of the majority—even if confirmed by the agency itself—ring hollow to Thomas in light of the clear statutory text.

*Bates*<sup>201</sup> provides another apt example. In *Bates*, the majority relies in large part on the clear statutory “savings clause” to find against preemption.<sup>202</sup> The Environmental Protection Agency supported preemption and argued that allowing state law to proceed would result in a “crazy-quilt of anti-misbranding requirements different from the one defined by FIFRA itself and intended by Congress to be interpreted authoritatively by EPA.”<sup>203</sup> Notwithstanding the clear text of the statute, the majority engages with the EPA. The majority rejects the EPA’s pro-preemption position because it defies the regulatory record and amounts to a 180-degree position shift, without any compelling justification.<sup>204</sup> Justice Thomas, however, does not give the agency’s position any thought.<sup>205</sup> Thomas’s steadfast position is that the Court should analyze the text of the preemption provision and go no further.<sup>206</sup> He therefore

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<sup>201</sup> *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005).

<sup>202</sup> *Id.* at 447–48.

<sup>203</sup> *Id.* at 448.

<sup>204</sup> *Id.* at 451–52. The majority elaborates:

Dow [the manufacturer] and the United States exaggerate the disruptive effects of using common-law suits to enforce the prohibition on misbranding. FIFRA has prohibited inaccurate representations and inadequate warnings since its enactment in 1947, while tort suits alleging failure-to-warn claims were common well before that date and continued beyond the 1972 amendments. We have been pointed to no evidence that such tort suits led to a “crazy quilt” of FIFRA standards or otherwise created any real hardship for manufacturers or for the EPA. Indeed, for much of this period EPA appears to have welcomed these tort suits.

*Id.*

<sup>205</sup> Thomas is not oblivious, however, to the concern regarding agency change of position. Thomas joins Justice Stevens’s concurrence in *Buckman*. *Buckman Co. v. Plaintiff’s Legal Comm.*, 531 U.S. 341, 353 (2001) (Stevens, J., concurring). There, the government argued in favor of very widespread preemption, covering the situation even when the FDA had previously found fraud-on-the-FDA. *Id.* at 347–51. Stevens’s concurrence tries to rein in this expansive implied preemption holding, by suggesting that state law claims could proceed where the FDA has made a specific finding of fraud-on-the-FDA. *Id.* at 354. The concurring justices make note of the fact that the FDA had not been consistent with its position on preemption. *Id.* at 354 n.2.

<sup>206</sup> *Bates*, 544 U.S. at 457 (Thomas, J., concurring in judgment in part and dissenting in part).

objects not only to the majority's reliance upon the presumption against preemption,<sup>207</sup> but also to its discussion of the history of tort litigation and (implicitly) to its consideration of the EPA's views (even where it ultimately does not defer to them).<sup>208</sup> The majority's additional arguments are "designed to tip the scales in favor of the States and against the Federal Government,"<sup>209</sup> which accords with Thomas's federalism predilections, but Thomas is not willing to bend to these in the face of clear statutory text.

Justice Thomas similarly goes out of his way to denigrate agency-centric preemption analysis in his dissent in *CSX Transportation, Inc. v. Easterwood*.<sup>210</sup> The majority holds that a state negligence claim based upon excessive train speed was preempted by federal law.<sup>211</sup> According to the majority, the federal speed regulations (which were not exceeded in this case) established a regulatory ceiling and ousted conflicting state regulation.<sup>212</sup> Although the regulations specified maximum speeds for trains contingent upon the nature of the track on which they operate, the majority reasons that "[u]nderstood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation."<sup>213</sup> Thomas criticizes the majority's reliance on a "broad regulatory 'background'" in favor of an approach hewing to the "most natural reading of the Secretary's regulation," which would not preempt state law.<sup>214</sup> Invoking high federalism rhetoric, Thomas claims that "[r]espect for the presumptive sanctity of state law should be no less when federal pre-emption occurs by administrative fiat rather than by congressional edict."<sup>215</sup>

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<sup>207</sup> *Id.*

<sup>208</sup> *See id.* at 457-58 ("The history of tort litigation against manufacturers is also irrelevant. We cannot know, without looking to the text of § 136v(b), whether FIFRA preserved that tradition or displaced it.").

<sup>209</sup> *Id.* at 457.

<sup>210</sup> 507 U.S. 658, 676 (1993) (Thomas, J., concurring in part and dissenting in part).

<sup>211</sup> *Id.* (majority opinion).

<sup>212</sup> *Id.* at 674.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 678 (Thomas, J., concurring in part and dissenting in part).

<sup>215</sup> *Id.* at 679.

Agencies appear to get an equal lashing in implied preemption cases—including most recently in Justice Thomas’s *Wyeth* concurrence. Perhaps the most forceful anti-agency statement comes from the vigorous dissent of Justice Stevens in *Geier*, which Thomas joins.<sup>216</sup> The dissent chastises the plurality for its reliance upon the actions and litigation position of the federal regulator (the National Highway Transportation and Safety Administration).<sup>217</sup> To the plurality, the Secretary of the Department of Transportation’s “consistent litigating position . . . the history of airbag regulation, and the commentary accompanying the final version of Standard 208 reveal purposes and objectives of the Secretary that would be frustrated by [state law] no-airbag suits.”<sup>218</sup> The dissent lodges several critiques. First, the agency’s ex post litigation position does not afford the states any notice of preemptive intent.<sup>219</sup> Second, the history of airbag regulation and the Court’s own interpretation of the regulation (Standard 208) are “even more malleable than legislative history.”<sup>220</sup> Finally—and perhaps most fundamentally—reliance upon the agency runs roughshod over state interests.<sup>221</sup> Not mincing words, the dissent proclaims: “Unlike Congress, administrative agencies are clearly not designed to represent the interests of States . . . .”<sup>222</sup> Given the “relative ease [with which agencies] can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law,” agency involvement in preemption decisions raises “heightened federalism . . . concerns . . . .”<sup>223</sup>

## 2. CHEVRON DEFERENCE AND PREEMPTION BY ANOTHER NAME

The potential clash between preemption analysis (and specifically the presumption against preemption) and *Chevron*<sup>224</sup> deference to agency interpretations of preemptive authority is a

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<sup>216</sup> *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2001) (Stevens, J., dissenting).

<sup>217</sup> *Id.* at 910.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 910–11.

<sup>221</sup> *Id.* at 908.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

jurisprudential grey zone at the Supreme Court. The Court grants certiorari in *Wachovia Bank, N.A. v. Watters* on the question whether the interpretation of the Office of the Comptroller of the Currency (OCC) that its regulation preempted state laws regulating mortgage lending as applied to operating subsidiaries of national banks was entitled to *Chevron* deference.<sup>225</sup> The Court dodges the issue, holding that state laws were preempted by the National Banking Act (NBA), independent of the OCC's regulation,<sup>226</sup> prompting a vigorous dissent from Justice Stevens (joined by Chief Justice Roberts and Justice Scalia) that "[w]hatever the Court says, this is a case about an administrative agency's power to preempt state laws."<sup>227</sup> And so, the contentious *Chevron* deference issue was put off for another day. Along came *Cuomo v. Clearing House Association* last Term, which holds that the National Banking Act does not preempt a state attorney general's action to enforce state fair lending laws against a national bank.<sup>228</sup> The precise legal issue raised is whether the OCC's regulation purporting to preempt state law enforcement was a reasonable interpretation of the National Banking Act, which shields national banks from states' exercise of "visitorial powers."<sup>229</sup> Scalia, writing for the majority, contends that the plain terms of the National Bank Act, which would permit state enforcement of non-preempted state law,

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<sup>225</sup> *Watters v. Wachovia*, 550 U.S. 1 (2007). The lower court concluded that the OCC's position on preemption was entitled to *Chevron* deference. *Wachovia Bank v. Watters*, 431 F.3d 556 (6th Cir. 2005). Moreover, this position was widely embraced by the federal courts of appeals. See, e.g., *Nat'l City Bank of Indiana v. Turnbaugh*, 463 F.3d 325, 330 (4th Cir. 2006); *Wells Fargo Bank v. Boutris*, 419 F.3d 949, 957-67 (9th Cir. 2005); *Wachovia Bank v. Burke*, 414 F.3d 305, 309, 318-21 (2d Cir. 2005).

<sup>226</sup> *Watters*, 550 U.S. at 20 (opining that the deference issue was "beside the point, for under our interpretation of the statute, the level of deference owed to the regulation is an academic question"). Justice Thomas did not take part in the case.

<sup>227</sup> *Id.* at 43 (Stevens, J., dissenting); see also *id.* at 41 ("No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal-state balance.").

<sup>228</sup> *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009).

<sup>229</sup> The National Banking Act provides: "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts . . . , or . . . directed by Congress." 12 U.S.C. § 484(a).

believes the reasonableness of the OCC's interpretation to the contrary.<sup>230</sup>

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<sup>230</sup> *Cuomo*, 129 S. Ct. at 2715 (“[T]he presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation of the National Bank Act. We can discern the outer limits of the term ‘visitorial powers’ even through the clouded lens of history. They do not include, as the Comptroller’s expansive regulation would provide, ordinary enforcement of the law”). Scalia’s reasoning is cryptic here: Do the plain terms of the NBA incorporate “outer [definitional] limits,” such that *Chevron* Step One governs? Or, does the concession of “some uncertainty” provide sufficient ambiguity to move the Court to Step Two, at which point the (un)reasonableness of the Comptroller’s interpretation comes into play? The former interpretation is more consistent with Scalia’s hesitancy in finding ambiguity at Step One, as well as his propensity to apply broad *Chevron* deference thereafter. See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989) (“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.”). The distinction, moreover, matters given that “a court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *National Cable & Tele. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967, 982 (2005) (Thomas, J.).

Although Justice Thomas is often aligned with Justice Scalia in *Chevron* deference cases, *Cuomo* (and perhaps *Brand X*, in which Scalia dissented) might signal a divergence with Scalia with respect to a willingness to move beyond Step One. This divergence, moreover, may be explained (at least in part) by Scalia’s insistence that, beyond Step One, *Chevron* deference applies full stop to all authoritative agency statements, regardless of their formality. See *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) (“[P]reviously a reasonable agency application of an ambiguous statutory provision had to be sustained so long as it represented the agency’s authoritative interpretation . . .”). But at the same time, Scalia is particularly reluctant to accord *Chevron* deference to agency positions on preemption. See *supra* note 227 and accompanying text; see also *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996) (“This argument confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive. We may assume (without deciding) that the latter question must always be decided *de novo* by courts.”); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 512 (1996) (O’Connor, J., dissenting, joined by Chief Justice Rehnquist and Justices Scalia and Thomas) (“[I]t is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference.”). Seen in this light, in *Cuomo*, Scalia blurs Step One and Step Two in order to avoid giving preemptive effect to the OCC’s regulation; moreover, he criticizes Thomas for, *de facto*, giving deference to agency preemption determinations.

Even though Justice Thomas expresses even greater hostility to overt agency preemption determinations, his willingness to characterize cases (such as *Cuomo*) as statutory interpretation (and not preemption) cases might be influenced (at least in

Justice Thomas trumpets a pro-preemption view. He relies not on a view of national uniformity in the banking context, but instead upon *Chevron* deference to an agency's reasonable interpretation of the ambiguous term, "visitorial powers."<sup>231</sup> In this case, the OCC was charged with administering the National Banking Act, and the agency promulgated its regulation through notice-and-comment rulemaking procedures.<sup>232</sup> Though the effect would be to hold federal law supreme over state law with respect to national banks, Thomas insists that federalism principles are not implicated and offers several reasons for this conclusion. First, "[n]ational banks are created by federal statute and therefore are subject to full congressional control," and in this case, Congress delegated full authority to OCC.<sup>233</sup> Second, given that the case is governed by express statutory language, the presumption against preemption should have no place.<sup>234</sup> Third, Thomas resists the notion that he has employed *Chevron* deference to a regulation that declares the preemptive scope of the federal statute.<sup>235</sup> Instead, Thomas maintains, OCC simply "interpreted the term 'visitorial powers'" and "[t]he preemption of state enforcement authority to which petitioner objects thus follows from the statute itself—not agency action."<sup>236</sup> For

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part) by his endorsement of the more malleable *Skidmore* deference standard employed by the Court when reviewing agency interpretations outside of the notice-and-comment framework. Compare, e.g., *Christensen v. Harris County*, 529 U.S. 576, 578 (2000) (Thomas, J.) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."), with, e.g., *id.* at 589–91 (Scalia, J., concurring) ("*Skidmore* deference to authoritative agency views is an anachronism, dating from an era in which we declined to give agency interpretations (including interpretive regulations, as opposed to 'legislative rules') authoritative effect."). Thomas, in other words, has greater license to analyze preemption issues instead as "purely" questions of statutory interpretation, without being committed to giving *Chevron* deference to any position taken by the regulating agency.

<sup>231</sup> *Cuomo*, 129 S. Ct. at 2723 (Thomas, J., dissenting) ("The statutory term 'visitorial powers' is susceptible to more than one meaning, and the agency's construction is reasonable.").

<sup>232</sup> *Id.* at 2715 (majority opinion).

<sup>233</sup> *Id.* at 2731 (Thomas, J., dissenting).

<sup>234</sup> *Id.* at 2732.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

Thomas, it is critically important that Congress—not the federal agency—made the decision to enact express preemption statutory language.<sup>237</sup> Such a formalistic separation of the spheres of statutory interpretation and preemption is a hallmark of Thomas’s jurisprudence.<sup>238</sup>

But, as the majority points out, the regulation is contained in a subpart entitled “Preemption.”<sup>239</sup> Moreover, “any interpretation of ‘visitorial powers’ necessarily ‘declares the preemptive scope of the NBA.’”<sup>240</sup> And, according to the majority, “[w]hat is clear from logic is also clear in application: The regulation declares that ‘[s]tate officials may not . . . prosecut[e] enforcement actions.’ . . . If that is not preemption, nothing is.”<sup>241</sup> Justice Scalia thus accuses Justice Thomas of an

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<sup>237</sup> Thomas elaborates: “[A] federal agency’s construction of an ambiguous statutory term may clarify the pre-emptive scope of enacted federal law, but that fact alone does not mean that it is the agency, rather than Congress, that has effected the pre-emption.” *Id.* at 2733.

<sup>238</sup> The dichotomy rears its head in Thomas’s dissenting opinion in *Gonzales v. Oregon*, a case in which the majority holds that the Controlled Substances Act [CSA] did not preempt Oregon’s Death with Dignity Act. 546 U.S. 243, 299–303 (2006) (Thomas, J., dissenting). The majority refuses to grant *Chevron* deference to the Attorney General’s interpretation of the CSA to prohibit physician-assisted suicide. *See id.* at 245 (majority opinion) (“*Chevron* deference is not accorded merely because the statute is ambiguous and an administrative official is involved.”). Thomas instead insists that the case hinges on statutory interpretation, not principles of federalism or preemption:

I agree with limiting the applications of the CSA in a manner consistent with the principles of federalism and our constitutional structure. But that is now water over the dam . . . . Such considerations have little, if any, relevance where, as here, we are merely presented with a question of statutory interpretation, and not the extent of constitutionally permissible federal power. This is particularly true where, as here, we are interpreting broad, straightforward language within a statutory framework that a majority of this Court has concluded is so comprehensive that it necessarily nullifies the States’ “traditional . . . powers . . . to protect the health, safety, and welfare of their citizens.”

*Id.* at 301–02 (2006) (Thomas, J., dissenting) (citations omitted).

<sup>239</sup> *Cuomo*, 129 S. Ct. at 2721.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* (quoting 12 CFR § 7.4000(a)).

artful—but ultimately failed—attempt to minimize “the incursion that the Comptroller’s regulation makes upon traditional state powers.”<sup>242</sup>

Justice Thomas had tipped his hand on the interplay between preemption, *Chevron* deference, and federalism principles in a 2003 case, *Pharmaceutical Research & Manufacturers of America v. Walsh*.<sup>243</sup> Recall that *PhRMA* is a case in which Thomas concurs with the majority’s holding that the state drug prescription program was not preempted by Medicaid, but he writes separately to insist that his conclusion was not tethered to any judicial judgment that the state’s program facilitated the federal act’s purposes or objectives.<sup>244</sup> A curious feature of Thomas’s concurrence is the deference Thomas accords to the Department of Health and Human Services. Specifically, he states that “proper consideration of the Secretary of the Department of Health and Human Services’ role in administering the Medicaid Act forecloses petitioner’s pre-emption claim.”<sup>245</sup> Specifically, Thomas emphasizes that “the Secretary’s mandate from Congress is to conduct, with greater expertise and resources than courts, the inquiry into whether Maine Rx upsets the balance contemplated by the Medicaid Act.”<sup>246</sup> His analysis parallels that in *Cuomo*, although in *PhRMA* Thomas is less guarded about *Chevron*’s applicability to preemption determinations. He begins from the premise that Congress has not spoken directly to preemption.<sup>247</sup> Thus, under *Chevron*, the administering agency should be free to resolve the ambiguity.<sup>248</sup> Indeed, Thomas goes so far as to claim that “where an agency is charged with administering a federal statute as the Secretary is here, *Chevron* imposes a perhaps-insurmountable barrier to a claim of obstacle pre-emption.”<sup>249</sup> Citing approvingly the United States’ amicus brief, Thomas points out that the agency

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<sup>242</sup> *Id.* at 2720.

<sup>243</sup> 538 U.S. 644 (2003).

<sup>244</sup> *Id.* at 675 (Thomas, J., concurring).

<sup>245</sup> *Id.* at 676.

<sup>246</sup> *Id.* at 682.

<sup>247</sup> *Id.* at 681.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 681; *id.* at 682 (“Congress’ delegation to the agency to perform this complex balancing task precludes federal-court intervention on the basis of obstacle pre-emption . . .”).

had adopted an interpretation of the Medicaid Act that would not preempt state plans.<sup>250</sup>

*Chevron* deference may no longer be a tool in Justice Thomas's arsenal for implied obstacle preemption cases—because he would do away with that doctrine altogether. But the implications for express preemption cases (as in *Cuomo*<sup>251</sup>) remain. The back-and-forth between the majority and dissent in *Cuomo* is revealing indeed. For note how neither the majority nor dissent invokes the presumption against preemption, and each insists that the Act's plain meaning supports its respective—and diametrically opposed—interpretations of the preemptive scope of the statute.<sup>252</sup> In this analytical framework, odes to abstract federalism values are simply window dressing.

#### CONCLUSION: AGAINST JUDICIALLY MANUFACTURED POLICIES

The assessment of Justice Thomas as the lone principled federalist—supported on its face by his concurrence in *Wyeth*, which solidifies his rejection of implied obstacle preemption, coupled with his resolute rejection of the dormant Commerce Clause—is far more complicated, due to the chimerical nature of abstract federalism arguments in preemption and statutory interpretation cases. Michael Greve has described Thomas as an occasional defector in preemption cases who has “succumb[ed] to the gravitational pull of states' rights rhetoric.”<sup>253</sup> Greve's assessment certainly underestimates Thomas's conviction, at least in the realm of implied obstacle preemption and dormant Commerce Clause doctrine. That said, those who now attribute to Thomas a resolute pro-state regulatory autonomy position likewise overstate the case.

What seems to animate Justice Thomas above all is a disdain for “judicially manufactured policies.”<sup>254</sup> Thomas admonishes his

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<sup>250</sup> *Id.* at 681 (“[T]he Department of Health and Human Services has already adopted an interpretation of the Medicaid Act that ‘does not preclude States from negotiating prices, including manufacturer discounts and rebates for non-Medicaid drug purchases.’”) (quoting App. to Brief for United States as *Amicus Curiae* 48a)).

<sup>251</sup> *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009).

<sup>252</sup> Compare *id.* at 2720–21, with *id.* at 2722–2733 (Thomas, J., dissenting).

<sup>253</sup> Greve, *supra* note 22, at 117.

<sup>254</sup> *Wyeth v. Levine*, 129 S. Ct. 1187, 1217 (Thomas, J., concurring in judgment).

brethren that: “Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by Congress is to be put aside in the process of interpreting a statute.”<sup>255</sup> Again and again, he returns to a truth he holds dear: the role of a judge is simply “to interpret the language of the statutes enacted by Congress.”<sup>256</sup>

It is unclear whether abstract federalism values have any definitive role to play, at least in judicial decision-making. Justice Thomas’s jurisprudence also places great responsibility with Congress: “[I]t is Congress rather than the courts that pre-empt state law.”<sup>257</sup> On pure federalism grounds, it is debatable whether Congress is the superior guardian of federalist values. Nonetheless, where Congress has been explicit about the extent to which federal law ousts competing state law, that ends the matter.

But it is often the case that Congress equivocates or essentially abdicates its role to decide. A view of preemption that hinges entirely on Congress, in other words, leaves a lot of actual territory uncharted. Courts need some interpretive options. Justice Thomas is right to disavow the crutch of the presumption against preemption; although the Court continues to use it erratically, it is intellectually

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<sup>255</sup> *Id.* (citing *TVA v. Hill*, 437 U.S. 153, 194 (1978)).

<sup>256</sup> *Id.* at 1217 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002)). Scholars have likewise linked Thomas’s fidelity to originalism to his aversion to judicial lawmaking. See, e.g., Judge H. Brent McKnight, *The Emerging Contours of Justice Thomas’s Textualism*, 12 REGENT U.L. REV. 365, 372 (1999) (“Justice Thomas’s opinions often give voice to his conviction that textual departure leads to political theorizing which, he believes, is beyond the Court’s province in the federal scheme of separation of powers.”); Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 9 (1997) (“Thomas’ stated purpose in following the Framers is to limit the power of judges to impose their own values and policy preferences upon the law.”); Christopher E. Smith, *Bent on Original Intent: Justice Thomas is Asserting a Distinct and Cohesive Vision*, 82 A.B.A. 48, 50 (1996) (“Thomas’ adherence to the text and original intent of the Constitution seeks to limit governmental power and, in particular, keep federal judges from exceeding their authority by meddling in various policy issues.”); see also Smith, *supra* note 10, at 632 (“That rule [of obstacle preemption], Justice Thomas says in substance, is so amorphous that it gives judges a license to legislate. If they like the state law, they will find no interference with federal purposes and objectives, and if they dislike it, they will find a hopeless inconsistency.”).

<sup>257</sup> *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 682 (2003) (Thomas, J., concurring) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment)).

bankrupt and compromised as a matter of precedent.<sup>258</sup> Thomas, likewise, is right to be wary of judicial policy-making—indeed, this appears to be the true target of Thomas’s disaffection in both implied preemption and dormant Commerce Clause cases. Thomas resists the urge of a court to stand in as a surrogate of Congress, ousting state law to the extent consistent with Congress’s divined aims. As he states in his *Wyeth* concurrence, “application of ‘purposes and objectives’ pre-emption requires inquiry into matters beyond the scope of proper judicial review.”<sup>259</sup> Obstacle preemption and the dormant Commerce Clause are linked in Thomas’s mind as essentially federal common law—an illegitimate (following *Erie R.R. Co. v. Tompkins*<sup>260</sup>) enterprise whereby courts fashion law to “fill in great silences left by Congress.”<sup>261</sup>

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<sup>258</sup> See Sharkey, *Products Liability Preemption*, *supra* note 1, at 459 (“Here, I join a veritable chorus of scholars pointing out the Court’s haphazard application of the presumption. In the realm of products liability preemption, the presumption does yeoman’s work in some cases while going AWOL altogether in others.”).

<sup>259</sup> *Wyeth*, 129 S. Ct. at 1216 (Thomas, J., concurring in judgment).

<sup>260</sup> 304 U.S. 64 (1938).

<sup>261</sup> *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 615 (1997) (Thomas, J., dissenting). See also Benjamin & Young, *supra* note 154, at 2150 (“[T]he advent of nonlegislative lawmaking processes, including not only administrative agency action but also federal common lawmaking . . . evade[s] the burdens of overcoming inertia inherent in the Article I legislative process.”); Monaghan, *supra* note 20, at 35 (“A[n] . . . objection to a constitutional common law is that it allows Supreme Court intrusion upon areas of state competence in a manner inconsistent with *Erie*’s fundamental presuppositions with respect to the limits of federal judicial power to displace state law.”). Cf. Stephen Gardbaum, *Congress’s Power to Preempt the States*, 33 PEPP. L. REV. 39, 53–54 (2005) (“[T]here should be a constitutional requirement that Congress can only exercise this power [of preemption] expressly. There must be some statutory text in which Congress specifies that it is altering the default constitutional position of concurrency plus supremacy. In the context of preemption, a purely implied exercise of an implied power—in which the courts fill in the nuances of congressional silence— . . . violates the duty that Congress has to exercise its best judgment on the necessity of preemption.”).

Given his aversion to federal common law, Justice Thomas’s embrace of the majority position in *Exxon Shipping Co. v. Baker*, a federal admiralty decision in which the Court fashions a common law excessiveness standard for punitive damages, may appear puzzling at first glance. See *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2626–67 (2008) (“Our review of punitive damages today, then, considers not their intersection with the Constitution, but the desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute.”). Indeed, on one critic’s view, the Court in *Exxon Shipping* “[d]ismiss[ed] *Erie*’s requirements[,] . . . misinterpreted congressional

There is an alternative to courts stepping in full stop. As I have argued, federal agencies, charged with administering the federal regulatory schemes, could be relied upon to provide critical guidance here. Here, I have less sympathy with Justice Thomas's aversion to federal agency participation. It is a formidable task to ensure "federalism accountability" in agencies—but the judicial review of agency rulemaking offers some promise.<sup>262</sup> It is superior to judicially manufactured policies, built upon either divined purposes of Congress or odes to abstract federalism principles. And it is more intellectually honest than an approach that insists that statutory construction of terms is wholly distinct from preemption analysis, even where the net result is that federal law reigns supreme over ousted state law.

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silence as acquiescence and proceeded to fashion a new maritime rule with inadequate legal authority." Jessica Vu, *Shifting Course in Admiralty: Exxon Shipping Co. v. Baker*, 32 HARV. J.L. & PUB. POL'Y 799, 810–11 (2009).

But it may well be that, with respect to federal admiralty punitive damages cases, Justice Thomas follows the "command" of traditional, longstanding common law principles—in effect, an extension of his obeisance to the commands of Congress and agencies, see *supra* text accompanying note 14. (I am grateful to Henry Monaghan for pressing me on this line of inquiry.) See, e.g., *Exxon Shipping Co.*, 128 S. Ct. at 2629–30 ("Traditionally, courts have accepted primary responsibility for reviewing punitive damages and thus for their evolution, and if, in the absence of legislation, judicially derived standards leave the door open to outlier punitive-damages awards, it is hard to see how the judiciary can wash its hands of a problem it created, simply by calling quantified standards legislative."); *Atlantic Sounding Co. v. Townsend*, 129 S. Ct. 2561, 2572 (2009) (Thomas, J.) ("[B]oth the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act. Also . . . the Jones Act does not address maintenance and cure or its remedy. It is therefore possible to adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act; unlike wrongful-death actions, this traditional understanding is not a matter to which 'Congress has spoken directly.'" (citation omitted).

<sup>262</sup> Sharkey, *Federalism Accountability*, *supra* note 1.