TOWARD (A) FAITHFUL AGENCY IN THE SUPREME COURT'S PREEMPTION JURISPRUDENCE

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INTRODUCTION

Preemption has become one of the most frequently recurring and perplexing public law issues facing the federal courts today.[1] The stakes in these cases can be enormous, as preemption questions meld some of the nation's most fundamental concerns over procedural justice for individual litigants, state regulatory autonomy, and the optimal size of the federal administrative state. In recognition of its abiding importance, preemption has increasingly commanded the attention of both Congress and the Supreme Court over the past several years. A central point of continuing concern is which organ of the federal government should be charged with managing preemption problems.

According to the Supreme Court, Congress has sole responsibility for forming preemption policy. Its preemption decisions routinely remind us that judicial "inquir[ies] into the scope of a statute's pre-emptive effect [are] guided by the rule that '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case."[2] Thus, according to the Court, Congress sets the terms on which state law is displaced or preserved so as to advance federal interests. Despite increasing urgency and its institutional

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[1] The federal judiciary's focus on preemption questions is evidenced by the spike in preemption cases decided by the Supreme Court in recent years. *See* JAMES T. O'REILLY, FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION AND LITIGATION § 1.2 (2006) ("Legal scholars examining federal preemption have noted a sharp increase in the preemption cases decided by the U.S. Supreme Court in the past two decades compared to prior decades . . . .").

[2] Altria Grp., Inc. v. Good, 129 S. Ct. 538, 543 (2008) (second alteration in original) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)); *see also* Wyeth v. Levine, 129 S. Ct. 1187, 1194 (2009); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992); English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990); Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299 (1988); La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983).

responsibility, Congress has systematically failed to address whether and to what extent federal law displaces state laws and actions. The reasons are essentially twofold. First, the frequency and variety with which preemption questions arise in the federal courts have outpaced the frequency with which Congress has mustered the institutional will or resources to address them. Second, when Congress does specifically address preemption through legislation, the extent to which it has preempted state law is often unclear.[3] In the end, the Court is left to decipher Congress's preemption policy choices with only a modicum of congressional guidance.

The Court's response to this predicament has been to strenuously reassert its role as "faithful agent" in the formation of federal preemption policy; it claims only the responsibility of interpreting and applying Congress's policy prerogatives—not the task of formulating or implementing its own.[4] However, preemption analysis is anything but a routine exercise in statutory interpretation. Whereas ordinary statutory interpretation questions do not portend the nullification of state law, every preemption case raises this possibility.[5] In fact, preemption cases almost invariably involve three difficult and far-reaching policy considerations as a direct result of their potential effacement of state law: federalism, corrective justice, and regulatory efficiency.[6]

Moreover, the Court's preemption doctrine "systematically exaggerates the role of congressional intent,"[7] and "courts are actually making substantive [policy] decisions in the name of preemption."[8] Put another way, there is a puzzling and fundamental disconnect between what the Supreme Court says in its preemption cases and what it does in its preemption cases. The more insistently the Court disavows any independent role in formulating preemption policy, the more it actually assumes the role of policymaking principal.[9] Ultimately, the Court does not frequently operate as a vehicle of congressional will, despite what the rhetorical framing of its

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3 O'REILLY, *supra* note 1; Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 43 (1996) ("Congress often does not attempt to expressly articulate its intent regarding preemption.").

4 *See* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2092 (2000) ("[T]he task for the Court [in preemption cases] is to discern what Congress has legislated and whether such legislation displaces concurrent state law—in short, the task of statutory construction.").

5 *See* Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 742 (2008) ("The interpretation of a federal statute does not ordinarily entail a judgment nullifying state law, yet that far-reaching result is precisely what happens when courts apply preemption doctrine.").

6 *See id.* at 732 (describing the impact of preemption doctrine on regulatory structures and federalism); Devon E. Winkles, *Weighing the Value of Information: Why the Federal Government Should Require Nutrition Labeling for Food Served in Restaurants*, 59 EMORY L.J. 549, 580 (2009) ("Federal preemption . . . may eliminate the corrective justice role of courts.").

7 Merrill, *supra* note 5, at 741.

8 *Id.* at 742.

9 *Id.* at 741.

preemption doctrines and decisions would otherwise lead one to believe. Preemption in the Supreme Court, it turns out, is far less about deference to Congress and far more about the art of federal common lawmaking.[10] In several recent instances where Congress's preemptive intent is actually discernable, the Court's decisions disregard it.[11]

The Court's reaction to Congress's inaction is perhaps understandable. Lower federal courts are routinely asked to resolve conflicts, both real and imagined, between federal and state laws and interests.[12] Institutional, cultural, and litigant demands for clarity and consistency all but force the Court to step into the preemption-policymaking void often left by Congress. This task has proven as difficult for the Court as it has for Congress. Although the language used to describe the various preemption analyses applied by the Court has remained stable for decades,[13] the Court has struggled to provide commensurate levels of outcome predictability in its preemption decisions.[14] While the Court may be acting out of necessity when it creates preemption policy, the framework it has implicitly adopted for responding to Congress's inability to formulate comprehensive federal preemption policies is highly problematic.[15] In essence, it elides an underlying, dysfunctional aspect of preemption policymaking: Congress cannot be responsible for both formulating and implementing federal preemption policy. The act of implementation, routinely glossed over by the Court, is critically important to the shape of preemption policy.[16] It is for this reason that no single institution—neither Congress nor the Court—can effectively manage preemption standards on its own. Adopting such institutional singularity is a fool's errand.

By developing three unique models for understanding the allocation of preemption-policymaking business between Congress, the Court, and federal administrative agencies—the Legislative Primacy, Judicial Primacy,

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10 This Article uses the term "federal common law" narrowly to refer to rules that the federal courts fashion without reference to statutory text. *Cf.* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) (using the term "[f]ederal common law" to refer to "*any* federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of 'interpretation' in either a conventional or an unconventional sense" (internal quotation marks omitted)).

11 *See* Merrill, *supra* note 5, at 739 nn.47-50 (explaining that the Court has at times ignored Congress's express and implied preemptory intent).

12 *See, e.g.*, Sykes v. Glaxo-SmithKline, 484 F. Supp. 2d 289, 296-97 (E.D. Pa. 2007) (demonstrating the numerous ways preemption theories can be raised).

13 *Cf.* Wyeth v. Levine, 129 S. Ct. 1187, 1194-95 (2009) (demonstrating the consistent application of particular language dating back to 1947).

14 *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000) (noting that most commentators view the Court's "[m]odern preemption jurisprudence [as] a muddle").

15 *See* Dinh, *supra* note 4, at 2085 (describing how the Court has "profess[ed] adherence to established analytical frameworks" but has not appeared to follow them).

16 *See* Merrill, *supra* note 5, at 744 & n.75 (describing the difficulty and importance of courts considering the real world implications regarding how preemption decisions will be implemented).

and Agency Delegation Models[17]—this Article contributes an insight to the literature on preemption that has been overlooked in previous treatments of the subject. Namely, it demonstrates that the Court has implicitly adopted a subtle, though counterproductive, "all-or-nothing" assumption of institutional singularity in its preemption jurisprudence. Under the Legislative Primacy Model, the Court rhetorically ascribes all preemption-policymaking responsibility to Congress. The Court assumes the largely passive role of implementing that policy and has little to no impact on its ultimate scope or effects. This is the model that most closely resembles the manner in which the Court describes its preemption doctrines and decisions.[18] Under the Judicial Primacy Model, the Court assumes the lion's share of responsibility for formulating and implementing preemption policymaking. This is the model that most closely resembles the practice of the Court's preemption jurisprudence.[19]

As both the Legislative Primacy and Judicial Primacy Models share the congenital defect of institutional singularity, neither can effectively address the concerns raised by federal preemption. Congress, for a host of practical and political reasons,[20] will never articulate a clear federal preemption policy covering all of the uncertainties the Court will face. For this reason, the Court will never be able to claim, without straining credulity to the breaking point, that its preemption decisions are based exclusively (or in some instances even partially) on Congress's legislative intentions. Conversely, the Court cannot simply assume the essentially legislative authority to decide which state laws and interests are worthy of preservation or worthy of preemption.[21] In addition to the questions of legitimacy raised by such federal common lawmaking, there are reasons to doubt the Court's institutional capacity for this type of social welfare decision making.[22]

This Article proposes a third way forward. Instead of continuing to put faith in the false promises of either the Legislative Primacy or Judicial Pri-

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17 For definitions and detailed discussions of each model, see *infra* Part II.B-C ("Legislative Primacy Model" and "Judicial Primacy Model") and *infra* Part III ("Agency Delegation Model").

18 *See Wyeth*, 129 S. Ct. at 1194 ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted)).

19 *See* Merrill, *supra* note 5, at 742 ("And nowhere does the Court's doctrine invite litigants or judges to consider pragmatic arguments for or against federal uniformity or state diversity, which many commentators believe are of paramount importance in resolving displacement decisions. In a word, the Court's preemption doctrine is substantively empty. This emptiness helps mask the fact that courts are actually making substantive decisions in the name of preemption." (footnote omitted)).

20 *See* discussion *infra* Part II.

21 *See* discussion *infra* Part II.

22 Merrill, *supra* note 5, at 744 ("The decision to displace, in short, is a multifaceted, high-stakes discretionary policy judgment that requires considerable sophistication if it is to be exercised properly. It is a fair question whether any legal institution is up to the task.").

macy Models, both of which ignore the inherent limitations of institutional singularity, Congress and the Court should adopt an Agency Delegation Model that directly addresses those limitations. The Agency Delegation Model consciously embraces and encourages dialogue among Congress, the Court, federal administrative agencies, states, and interest groups, while also minimizing the need for preemption policymaking by the judiciary. Instead of rhetorically or practically investing any single institution with the power to define the full extent of federal preemption, the responsibility should be shared among Congress, the Court, and regulatory agencies in a way that promotes nimble and responsive policymaking. Such shared responsibility will also provide for meaningful review to ensure that the most salient factors and interests informing the preemption decision are properly considered.

This Article proceeds in three parts. Part I begins by describing how the most fundamental considerations of preemption policymaking—federalism, corrective justice, and regulatory efficiency—are subjective values best addressed through dialogue and consensus building. Part I then analyzes a selection of the Supreme Court's preemption cases to elucidate its decisional rhetoric and practices.[23] It demonstrates that the Court insistently deemphasizes its role in creating preemption policy, even as it makes critical independent judgments regarding that policy. Part II develops and describes the Legislative Primacy and Judicial Primacy Models. By assuming different levels of policymaking independence enjoyed by the Court in its preemption cases, these models clarify how the Court has implicitly adopted institutional singularity when it comes to managing federal preemption. Part III sets out the Agency Delegation Model and describes how the relationships among Congress, the Court, and administrative agencies should be reconceptualized both to promote institutional interaction and to discourage institutional insularity. A brief conclusion follows.

I. THE DISCONNECT BETWEEN PREEMPTION RHETORIC AND PRACTICE

A prerequisite for determining whether Congress or the Supreme Court takes primary responsibility for the creation of preemption policy—whether the Court indeed acts as Congress's "faithful agent"—is an accurate account of the concerns typically raised by preemption cases. Preemption, like many other instances in which the Court is tasked with determining legislative intent, is therefore best "understood in a broader sense than

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[23] Although this Article generally limits itself to the Supreme Court's products liability decisions, in which preemption issues arise as defenses to state tort law claims, preemption arises in a variety of other factual contexts. *See, e.g.*, Watters v. Wachovia Bank, N.A., 550 U.S. 1, 1-2 (2007) (addressing preemption under the National Bank Act); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 88 (1983) (addressing action for declaratory judgment based on ERISA preemption claim).

the search for the specific intentions of the draftsmen."[24] Understanding what the Court is or should be looking for when it interprets putatively preemptive federal legislation provides insight into whether its conclusions can be reasonably attributed to congressional intent. For instance, it would strain credulity to attribute resolution of an issue to Congress if Congress is unlikely to have ever considered it.[25] Conversely, it is difficult for the Court to plausibly deny that it has reached a conclusion independent of congressional judgment when it rejects conclusions that Congress has plainly made.[26] When the Court does either, the most reasonable inference is that it has engaged in independent policymaking.

A. *The Arbitrary Nature of Preemption Policymaking*

Although the Court routinely frames preemption analysis as primarily an inquiry into congressional purposes,[27] such framing merely points to the governmental institution charged with making the preemption decision. It provides no information regarding the host of competing considerations and interests that necessarily inform that decision. Thankfully, it is unnecessary for present purposes to provide an exhaustive description of all such considerations and interests.[28] Focusing instead on three of the most important considerations indicates that preemption policymaking does not necessarily involve the logical application of preconceived, externally created principles to a narrow set of retrospective facts—the method of decision making sometimes ascribed to judicial actors.[29] Rather, it involves judgments,

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24 Merrill, *supra* note 10, at 5.

25 The Court itself has made this point on several occasions. *See, e.g.*, Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865, 877 (1999) (finding that Congress did not intend to reserve solid coal, but instead intended to convey coalbed methane gas in land patents issued under the Coal Lands Acts of 1909 and 1910 because "[i]t seems unlikely . . . that Congress considered this limited drilling for CBM gas"); Wardair Can., Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 6-7 (1986) (refusing to infer from statutory language setting out permissible categories of airline taxes the intent to exempt foreign air carriers because "[i]t is . . . plausible that Congress never considered whether States should be permitted to impose sales taxes on foreign, as opposed to domestic, carriers"); Rose v. Lundy, 455 U.S. 509, 516-17 (1982) (refusing to infer that Congress intended to subject mixed petitions to the exhaustion requirement of 28 U.S.C. § 2254 because "in all likelihood Congress never thought of the problem").

26 *See* Nelson, *supra* note 14, at 291 ("The presumption [against preemption] has taken on a life of its own, and is now being applied even to federal statutory provisions that plainly *do* manifest an 'inten[t] to supplant state law.'" (second alteration in original)).

27 *See, e.g.*, Wyeth v. Levine, 129 S. Ct. 1187, 1194 (2009) ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted)).

28 For an example of a work identifying eight separate preemption considerations, see Merrill, *supra* note 5, at 747-53.

29 *See* Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1501 (2000) ("[A]djudication for the most part is retrospective; it assesses events that already have

compromises, and tradeoffs made largely in the absence of clear directives or objective analytical guideposts definitively indicating the rectitude of one choice relative to another.[30]

The first broad consideration is federalism.[31] More specifically, it is the identification of the federal interest underlying federal legislation and the relative importance of that interest when compared to the states' interest in regulatory autonomy. Addressing this federalism consideration in preemption cases involves attempts to find the proper constitutional balance of federal and state regulatory authority. Stated differently, the question is whether the Constitution places substantive limits on the reach of federal regulatory authority such that states are ensured an irreducible sphere of either exclusive or concurrent control.[32]

In certain areas, Congress enjoys such singular authority that the states are entitled to no such guarantee.[33] In the majority of areas, however, the proper balance between federal and state authority is much more difficult to discern.[34] The presumption against preemption, which the Court at least mentions in several (though not all) of its preemption analyses, instructs courts to hesitate before eliminating state laws in areas historically regulated by the states.[35] The idea underlying the presumption is that states have historically served as the primary caretakers with respect to certain private

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occurred."); *cf.* 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02 (1958) (distinguishing between "adjudicative facts," which relate to the actions of individuals, and "legislative facts," which relate to general facts used to craft rules governing primary conduct).

30 *See* Merrill, *supra* note 5, at 743 (emphasizing the necessity of pragmatic considerations in making preemption decisions).

31 *See* Dinh, *supra* note 4, at 2096 ("Since *Gibbons v. Ogden*, . . . the Supreme Court has mentioned federalism concerns in virtually all its preemption cases.").

32 *Cf.* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985) ("The States unquestionably do 'retai[n] a significant measure of sovereign authority.' They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." (citation omitted) (quoting Equal Emp't Opportunity Comm'n v. Wyoming, 460 U.S. 226, 269 (1983) (Powell, J., dissenting))).

33 *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 371 (2000) (stating that the federal government maintains exclusive authority over foreign policy); Hines v. Davidowitz, 312 U.S. 52, 68 (1941) (invoking an exclusive federal interest on immigration issues).

34 *See* Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) (establishing that when the text of a preemption clause is susceptible to more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption").

35 *See* Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 715 (1985) ("Where . . . the field that Congress is said to have pre-empted has been traditionally occupied by the States we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)) (internal quotation marks omitted)).

relationships and that in the absence of clear congressional instruction, courts should not sweep away the protections states provide.[36]

If there are indeed substantive constitutional limits on federal authority that undergird the presumption against preemption, they do not appear to come directly from constitutional text. As several commentators have persuasively argued, the Constitution provides no clear instruction on what this balance between state and federal power must or even should be.[37] While courts and commentators have attempted to derive broad "federalism values"[38] from a collection of specific constitutional provisions,[39] these values are largely tautologies. They come not from the constitutional text to which they are attributed, but rather from individualized preconceptions about whether state or federal prerogatives should prevail when the two arguably overlap or conflict.[40] Accordingly, any claims these values make to binding, permanent universality are highly dubious.[41] If anything, the ambiguity of the Constitution's text and drafting history with respect to federalism concerns indicates that federalism is less a set of immutable principles than it is an ongoing and dynamic process. Federalism issues are therefore best re-

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[36] *See* Jay S. Bybee, *Insuring Domestic Tranquility:* Lopez*, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 82 (1997) (affirming the "primacy of the states as the caretakers of the public peace").

[37] *See* Robert A. Schapiro, *From Dualism to Polyphony*, *in* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 33, 46-52 (William W. Buzbee ed., 2009) (describing the flaws in a conception of federalism that attempts to demarcate exclusive spheres of federal and state regulatory authority). *See generally* EDWARD A. PURCELL JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 4 (2007) (arguing that no definitive conclusions regarding the balance between state and federal power can reasonably be drawn from the Constitution's history or text).

[38] *Cf.* PURCELL, *supra* note 37, at 24 & 213 n.49 ("One political scientist identified thirty-four types of federalism, while another bested him by ten, counting forty-four." (citing Harry N. Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 663, 669 (1980))).

[39] *See, e.g.*, John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2028-29 (2009) (arguing that the Court in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), formulated its "clear statement rule" by "abstract[ing] from the specific enumeration of powers in Article I a general purpose of 'federalism' that is both broader and more potent than the enumeration from which it is derived").

[40] *See, e.g.*, Merrill, *supra* note 5, at 752 (discussing the value of "a single national commercial market" as a benchmark for determining whether state or federal interests should prevail in preemption matters).

[41] As Professor Purcell has explained:

> [A]ny claim that the "original" nature of American federalism can serve as a specifically directive norm—such as Chief Justice William Rehnquist's invocation of "the Framers' carefully crafted balance of power between the States and the National Government"—is simply mistaken. No such "true" or "correct" balance ever existed. Equally important, . . . even had there been some true "original" balance, the constitutional structure the founders established was inherently incapable of maintaining it.

PURCELL, *supra* note 37, at 6 (footnotes omitted); *see also* Schapiro, *supra* note 37, at 43-44 (arguing for a process-oriented approach to federalism that promotes "plurality, dialogue, and redundancy").

solved through a process of continuous negotiation and compromise among interested federal and state parties,[42] a hallmark of the legislative decision-making process.

The second broad preemption consideration relates to corrective justice. This frequently manifests itself in arguments about whether Congress would intentionally preempt state tort laws without also providing allegedly injured parties an alternative means of redress.[43] At first blush, corrective justice and federalism considerations appear to have more similarities than differences. After all, the means by which allegedly injured plaintiffs seek redress in preemption cases is through state tort law;[44] elimination of the latter would therefore result in elimination of the former. In reality, however, the two are distinct. It is more than conceivable that Congress would provide an injured party with a federally based means of legal redress, while simultaneously wresting from the states the authority to create or enforce alternative remedies.[45]

As with many of the core concerns involved in preemption policymaking, Congress addresses corrective justice concerns somewhat sporadically. In those instances where Congress directly addresses the issue, it includes saving clauses in otherwise sweeping preemptive legislation, thereby specifying the extent to which state common law actions remain available to aggrieved parties.[46] More often than not, however, Congress says nothing about whether states may continue to provide legal redress to the injured or aggrieved. The Court is thus left to infer from available legislative evidence and assumptions about legislative behavior whether Congress intended to

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42 *Cf.* PURCELL, *supra* note 37, at 197; Schapiro, *supra* note 37, at 52.

43 *See, e.g.*, Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 617 (1997) ("[E]vidence that preemption would create a remedial vacuum in a particular case reinforces the notion that, absent a clear statement to the contrary, Congress chose not to preempt state tort claims."); Richard A. Nagareda, *FDA Preemption: When Tort Law Meets the Administrative State*, 1 J. TORT L. 4, 15 n.60 (2006) (noting "the underlying rift in tort theory between corrective-justice and regulatory accounts" in the Supreme Court's preemption cases).

44 *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 886 (2000) (holding that the National Traffic and Motor Vehicle Safety Act of 1966 and related legislation preempted a plaintiff's negligence claim brought under state tort law).

45 The Court has previously stated that it is reluctant to infer that Congress intended to preempt state tort actions where there is no indication that Congress intended to do so in an act's legislative history and where Congress has not provided a federal remedy to replace them. *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."). While the Court's observation that it is reluctant to preempt state tort law where Congress has provided no alternative remedy indicates a heightened concern for corrective-justice considerations, it does not amount to a steadfast right to them. *But cf.* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 560-61 (2005) (arguing that the Constitution's text and history support an individual right to a body of tort law).

46 *See* Sandra Zellmer, Saving Savings Clauses from Judicial Preemption 6 (Aug. 29, 2007) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010625.

preserve or eliminate private remedies. As evidenced by the Court's handling of this aspect of preemption policymaking, making such inferences is a tricky business. Depending on which Justice is writing the opinion, the result may come out pro-plaintiff or pro-defendant.[47]

Regardless, the core judgments here have consequences for current and future litigants. If the Court is correct that Congress's words and actions (or omissions) manifest some discernable decision either to preempt or not to preempt, it should also be presumed that Congress understands the real-world consequences of that decision.[48] Legislation is not, after all, an academic exercise; when Congress enacts a law, it does so to alter the rights, obligations, and behaviors of those subject to it. The question in the corrective-justice context then becomes whether it is "fair" to eliminate state-based causes of action against manufacturers in federally regulated industries. Absent some statutory or constitutional right forbidding the imposition of negative distributional effects on potential plaintiffs—which the Court has yet to identify—there are no legally binding standards by which to gauge whether the corrective justice consequences of federal preemption are "fair" or "unfair."[49] We are left, once again, with managing the issue through negotiation and compromise.

The third major preemption consideration involves regulatory efficiency and revolves around whether diverse or uniform control[50] most effectively manages the primary conduct targeted by federal and state regulations. As with unsuccessful attempts to derive substantive federal/state demarcations from the Constitution's text or drafting history, arguments over the relative merits of centralization and decentralization in the preemption context do not involve a search for catholicity.[51] Instead, they frequently reflect subjective judgments about how best to prioritize and operationalize the

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47 *See* discussion *infra* Part I.C.

48 *Cf.* Peter D. Jacobson & Scott D. Pomfret, *Form, Function, and Managed Care Torts: Achieving Fairness and Equity in ERISA Jurisprudence*, 35 HOU. L. REV. 985, 1054-55 (1998) (discussing possible tradeoffs Congress could have made when enacting ERISA).

49 *Cf. id.*

50 *See* O'REILLY, *supra* note 1, § 3.2 (describing federal agency assertions regarding the need for uniform regulatory control); Merrill, *supra* note 5, at 752 ("The central concern [in resolving many preemption issues] . . . is whether uniformity is needed in order to preserve a single national commercial market. This meta-principle . . . pervades nearly all preemption controversies.").

51 *Compare* Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) (establishing that there are areas of "traditional state regulation" that the federal government supplants unless "Congress has made such an intention 'clear and manifest'" (quoting N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995))), *with* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 371 (2000) (stating that the federal government maintains exclusive authority over international relations), *and* Hines v. Davidowitz, 312 U.S. 52, 68 (1941) (invoking an exclusive federal interest on immigration issues).

goals of federal legislation.[52] These judgments are not typically informed by neutral and universally binding principles that dictate the appropriate instances and extent of preemption in all cases. Rather, they are often informed by instrumentalist concerns about achieving particular policy outcomes or maximizing certain underlying values.[53] Depending on the federal goals identified, these regulatory-efficiency questions can be framed as: (1) whether it is ultimately more beneficial than harmful to potential tort victims to preempt state tort law; or (2) whether the distributional effects (positive or negative) of that decision on various demographic or interest groups—on balance—advance or impede predefined policy goals.

How to manage each of these federalism, corrective-justice, and regulatory-efficiency considerations is, in some sense, arbitrary, at least in that there are no binding legal guidelines or logical analyses that require the selection of one option over any another.[54] Moreover, there are no definitive guidelines dictating how to prioritize one consideration over the others. As a general matter, the Court has frequently disclaimed the constitutional authority or the institutional competence to undertake the social welfare calculations needed for such broad-ranging policy decisions.[55] With respect to the Constitution, it is Congress, not the courts, that has been charged with "provid[ing] for the . . . general Welfare of the United States."[56] With regard to competence, the Court has openly acknowledged its comparatively limited institutional capacity for the type of social welfare balancing critical

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52 *See, e.g.*, Merrill, *supra* note 5, at 752 (asserting that the goal is to determine "whether uniformity [as under a centralized regime] is needed in order to preserve a single national commercial market").

53 *See* William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 207-19 (1997) (describing the theoretical underpinnings of "competitive" federalism and its application in multiple areas of regulation); David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 512 (2008) (arguing that preemption doctrine should be used to enhance principles of popular sovereignty).

54 The term "arbitrary" is not used here to denote "arbitrary and capricious" decisions that are only informed by irrelevant or insufficient information. Rather, the term "arbitrary" is used in a manner similar to Judge Posner's opinion in *Hoctor v. USDA*, 82 F.3d 165 (7th Cir. 1996), to denote policy choices that cannot be dictated by the operation of logic, reason, or preexisting rules and standards. *See id.* at 170 (describing as "arbitrary" rules promulgated in the absence of clear and rational justifications). Put another way, the power of independent policy selection referred to here is analogous to that which the Court has previously denied administrative agencies. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472-73 (2001) (holding that Congress cannot invest the EPA with authority to make discretionary policy decisions without also providing "intelligible principle[s]" to guide the exercise of that discretion (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)) (internal quotation marks omitted)).

55 *See* Buckley v. Valeo, 424 U.S. 1, 90 (1976) (per curiam) ("It is for Congress to decide which expenditures will promote the general welfare . . . .").

56 U.S. CONST. art. I, § 8, cl. 1; JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 152 (1985) ("It is the Congress (and state legislatures), not the Court, that has the constitutional mandate to 'promote the general welfare.'").

to preemption policymaking.[57] Accordingly, the Court not only insists that Congress should make these arbitrary policy choices, it also frequently insists that Congress actually does make or would have made these arbitrary policy choices.[58] Such is the necessary implication to be drawn from framing federal preemption analysis as primarily a question of legislative purpose.

Nevertheless, Congress persistently fails to make these necessary policy choices in any systematic way. Members of Congress tend to focus on the core substance of legislation when building voting coalitions, not on the ancillary consequences of that legislation.[59] Preemption is often considered one of those ancillary consequences.[60] From a mechanical rulemaking perspective, the prescience needed to anticipate all of the situations in which a preemption question might arise is simply beyond the ken of any legislator or legislative body; attempts at creating any such all-encompassing codes are futile.[61] Even if Congress could understand how its legislation will af-

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[57] *See, e.g.*, Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329-30 (2006) (observing that the Court's "constitutional mandate and institutional competence are limited" and cautioning that judicially created remedies "in a murky constitutional context, or where line-drawing is inherently complex, may call for a 'far more serious invasion of the legislative domain' than [the Court] ought to undertake" (quoting United States v. Treasury Emps. Union, 513 U.S. 454, 479 n.26 (1995))); Corr. Servs. Corp. v. Malesko, 534 U.S. 68, 68 (2001) (listing "Congress' institutional competence in crafting appropriate relief for aggrieved federal employees as a 'special factor counseling hesitation in the creation of a new remedy'" and observing that "Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees" (quoting Bush v. Lucas, 462 U.S. 367, 380, 389 (1983)) (internal quotation marks omitted)); Gen. Motors Corp. v. Tracy, 519 U.S. 278, 309 (1997) ("Congress has the capacity to investigate and analyze facts beyond anything the Judiciary could match . . . ."); Patsy v. Bd. of Regents, 457 U.S. 496, 513 (1982) (observing that where "relevant policy considerations do not invariably point in one direction" and as a result produce "vehement disagreement over the validity of the assumptions underlying many of them[,] . . . Congress' superior institutional competence to pursue [such] debate[s], suggest[s] that legislative not judicial solutions are preferable"); United States v. Gilman, 347 U.S. 507, 511-13 (1954) ("The selection of that policy which is most advantageous to the whole [of society] involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them.").

[58] *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996) ("[A]ny understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.'" (quoting Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 530 n.27 (1992))); Dinh, *supra* note 4, at 2085 ("Because the Supremacy Clause prescribes that federal law trumps conflicting state laws, Congress in effect possesses 'an extraordinary power in a federalist system' to displace state regulation." (footnotes omitted) (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991))).

[59] *See* Fisk, *supra* note 3, at 95 (admitting that there are situations in which "Congress obviously fails to consider fully the effect of a new federal law on a complex body of state regulation").

[60] *See id.* at 102 (observing that preemption clauses enacted by Congress are frequently products of "last-minute compromise in a massive piece of new legislation").

[61] *Id.* ("Congress simply cannot anticipate all preemption problems when it enacts a far-reaching law that displaces a substantial amount of state law."); *see also* O'REILLY, *supra* note 1, § 7.3 (concluding that focusing preemption analysis on congressional intent is suboptimal because federal legislators

fect the laws of all fifty states, those states are well within their rights to change their laws at any time. Finally, from a purely political point of view, the fact that preemption shifts the balance of regulatory power away from states and towards the federal government can make it highly unpopular in a congressperson's or a senator's home district or state.[62] Assuming that such local constituencies are more vociferous or persistent than others who would benefit from federal preemption, this further reduces the likelihood that members of Congress would be willing to expend political capital to make Congress's preemptive intentions comprehensive or clear. At a minimum, it increases the likelihood that Congress will either purposely ignore the issue or make vague pronouncements that do not offend competing interest groups.[63]

Despite the intractability of the problem, courts must still decide the cases in front of them, and that means that they must resolve preemption questions when they inescapably arise. When the Supreme Court decides to hear a preemption dispute, it has every incentive to do so in a manner that expends as little of its political capital, and draws as little attention to itself, as possible. Whether to adhere to metaconstitutional notions of political accountability[64] or to well-established judicial norms,[65] or simply to reduce the potential for meddlesome congressional monitoring,[66] it is sensible for

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are generally unconcerned with preemption and because Congress's procedural mechanisms are ill-equipped to undertake "serious preemption analysis").

62 If anything, members of Congress may be more inclined to side with state and local governments against federal preemption. *Cf.* O'REILLY, *supra* note 1, § 6.4 (describing how state and local governments rally federal representatives against the adoption of administrative agency regulations that would have preemptive effect).

63 *See id.* (asserting that anti-preemption sentiment can pressure a federal director or secretary "to make a careful prioritization of the degree to that the federal agency must preempt" and that "[i]f preemption is a peripheral issue that catches extensive opposition, then it should be able to be dropped, left unstated, and the courts can later figure out the relative obligations").

64 *See* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 779-80 (2009) (describing ways in which the Supreme Court can deplete its store of legitimacy by rendering decisions "that antagonize a significant portion of the population, smack of blatant partisanship or unprincipled vacillation, or otherwise blur the distinction between legal decisionmaking and ordinary political decisionmaking upon which courts stake their claim to obedience" (footnotes omitted)).

65 *See* David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CALIF. L. REV. 1125, 1162 (1999) ("[B]ecause judicial norms proscribe citing political pressures or policy preferences as the basis for judicial decisions, all (or nearly all) preemption opinions are cloaked in the language . . . of decision rules, regardless of the actual basis of the decision.").

66 Understanding that Congress is unlikely to speak clearly or comprehensively to preemption concerns, the Court may prefer the second-best option of unencumbered policymaking authority. It may accordingly shape its opinions so as to deemphasize its policymaking independence, which, if exercised more openly, would invite increased congressional monitoring. *Cf.* Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 782-83 (2008) (describing how a judge's choice of interpretive method can make it more likely that her opinions will be brought to the attention of legislators).

the Court to frame its decisions as nothing more than "routine exercise[s] in statutory interpretation."[67]

B. *The Rhetoric of Dissociation*

Though the Court steadfastly disavows as much, the manner in which it applies its preemption doctrines involves more judicial policymaking than unassuming statutory interpretation. The Court often grounds its preemption decisions on policy justifications that cannot be convincingly traced back to Congress.[68] To assist it in determining Congress's intent, the Court has developed the now familiar distinction between instances of express preemption and implied preemption.[69]

1. Express Preemption

Express preemption refers to those occasions in which Congress has explicitly indicated its preemptive intent in statutory text.[70] Regulations promulgated by federal agencies charged by Congress with implementing a federal statutory scheme may also expressly preempt state law.[71] Moreover,

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67 *See* Merrill, *supra* note 5, at 742.

68 *Id.* at 733 ("[Preemption, in the sense of] displacement, like the dormant commerce clause, requires a discretionary judgment about the benefits and costs of legal uniformity that is largely unguided by the text of any authoritative enactment.").

69 *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001) ("State action may be foreclosed by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment." (citations omitted)); Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-53 (1982) ("Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)) (internal quotation marks omitted)).

70 *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96 (1992) ("To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." (quoting Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138 (1990)) (internal quotation marks omitted)).

71 Dinh, *supra* note 4, at 2113 ("[V]alidly promulgated regulations authorized by the agency's organic statute have the force of law and thus trump conflicting state law by operation of the Supremacy Clause."). The Court in *Wyeth* sought to clarify what had been its somewhat confusing position with respect to both the instances in which an agency articulates views on the preemptive effect of its regulations and the level of judicial deference that should be accorded those views. Wyeth v. Levine, 129 S. Ct. 1187, 1201 (2009). In its prior cases, the Court declined to specifically accord either *Chevron* or *Skidmore* deference to agency regulations, instead according them the nebulous level of "some weight." *Id.* (internal quotation marks omitted). It now appears that the Court has settled on some form of *Skidmore* deference, at least when Congress has not expressly delegated to the agency the authority to preempt state law. *See id.* ("The weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness."). *See generally* Skid-

Congress may express its intent not to preempt state law, just as it may express its intent to do so.[72] In these so-called "saving" clauses, Congress includes statutory language expressly permitting state law to operate alongside federal laws and interests.[73]

Though express preemption and saving clauses indicate Congress's intention to supersede or preserve state law, expression of such intent can only be a first step in the preemption analysis. As is the case with any statutory text, express preemption or saving clauses call for judicial exposition and application in particular cases, requiring courts to examine their contents in light of the state law or action under review.[74] Moreover, such review necessarily brings into question whether and how Congress chose to resolve the three broad preemption policy concerns of federalism, corrective justice, and regulatory efficiency.[75] The Court is consistently careful, however, to soft pedal any potentially intrusive forays into Congress's preemption-policymaking domain.

The Court's recent opinion in *Riegel v. Medtronic, Inc.*[76] proves instructive in this respect. There, the Court was asked to apply the express preemption clause that Congress included in the Medical Device Amendments of 1976 ("MDA") to petitioner's New York products liability claim.[77] More specifically, the Court addressed whether, under the language of the clause, state tort laws imposed "requirement[s]" that were "different from, or in addition to" federal standards setting "the safety or effectiveness of the device."[78] The Court divided this broader issue into two separate interpre-

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more v. Swift & Co., 323 U.S. 134, 140 (1944). It is still an open question as to whether and under what conditions agency views on preemption can be accorded more robust *Chevron* deference. *See Wyeth*, 129 S. Ct. at 1201 (strongly implying in dicta that agencies might have "special authority to pronounce on pre-emption" when expressly delegated that authority by Congress).

72 *See Wyeth*, 129 S. Ct. at 1195-96 ("Congress took care to preserve state law . . . add[ing] a saving clause, indicating that a provision of state law would only be invalidated upon a direct and positive conflict . . . ." (quoting Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 202(d) (1962)) (internal quotation marks omitted)).

73 There are several notable instances in which Congress has enacted saving clauses to protect state law from federal preemption. *See* O'REILLY, *supra* note 1, § 7.8 (briefly discussing saving clauses in the Clean Water Act, the Reclamation Act, the McCarran-Ferguson Act, and ERISA).

74 *See id.* § 7.7 (observing that express preemption cases require courts to "examine the content of the state action against the literal terms of the federal norms; this is a 'pragmatic process of determining when the enforcement of state law is consistent with the objectives of federal regulation.'" (quoting Fisk, *supra* note 3, at 35, 45)).

75 *See supra* Part I.A.

76 552 U.S. 312 (2008).

77 *Id.* at 321-22.

78 *Id.* at 323 (quoting 21 U.S.C. § 360k(a) (2006)) (internal quotation marks omitted). The MDA's express preemption clause states, in relevant part:

> Except as provided in subsection (b) of this section, no state or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—

tive inquiries. First, the Court addressed "whether the Federal Government has established requirements applicable to Medtronic's catheter."[79] Eight years earlier in *Medtronic, Inc. v. Lohr*,[80] the Court had already determined that its interpretation of the MDA's preemption provision should be "substantially informed" by regulations promulgated by the FDA,[81] and it did so because "Congress has given the FDA a unique role in determining the scope of § 360k's pre-emptive effect."[82]

Concluding that the FDA's regulations did in fact impose safety and effectiveness requirements on device manufacturers, the Court turned to the second question: whether the common law tort claims brought by petitioners constituted different or additional "requirement[s]" that conflicted with the FDA's regulations.[83] Implying that the language of the MDA's preemption clause left the question largely unanswered, the Court proceeded to fill in the gaps itself.[84] It did this by framing its analysis as driven by pure necessity (as it almost certainly was): "Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments."[85] In order to make informed decisions about how its statutory schemes will be implemented, Congress must be notified of the Court's definitions of its preferred terms. Presumably, providing stable and clear definitions of recurring terminology will give Congress greater control over statutory meaning, which it can then use to ratify, reject, or replace the Court's chosen definitions as it sees fit.[86] Concluding that common law duties are in fact "requirements,"[87] the Court held that Congress intended to preempt the petitioner's claims.[88]

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

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

21 U.S.C. § 360k(a).

79 *Riegel*, 552 U.S. at 321.

80 518 U.S. 470 (1996).

81 *Id.* at 495-96.

82 *Id.*

83 *Riegel*, 552 U.S. at 321 (quoting 21 U.S.C. § 360k(a) (2006)) (internal quotation marks omitted).

84 *See id.* at 325 & n.4 ("[T]he broad language Congress chose in the MDA" fails to "provide[] . . . guidance as to which state-law claims are pre-empted and which are not.").

85 *Id.* at 324.

86 It is an open question whether the textualist-interpretive approach adopted by the Court in several of its preemption decisions has the effect of supporting congressional intent, rather than thwarting it. For a skeptical view, see Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 217, 223-24 (1992) (describing how forcing Congress to express itself solely through legislative text, as opposed to also allowing consideration of legislative history, can make enactment of legislative overrides prohibitively difficult).

87 *Riegel*, 552 U.S. at 324-25 (internal quotation marks omitted).

88 *Id.* at 326-27.

In defending the methods by which it reached its decision, the Court went to great lengths to deny that any subjective policy judgments informed its holding. With respect to Congress's regulatory-efficiency choices, the Court framed its conclusions as matters of common sense with which no reasonable person could disagree. First observing that "excluding common-law duties from the scope of pre-emption would make little sense,"[89] the Court proceeded generally to discredit the notion that an optimal regulatory system would place state courts at its decisional center:

> [O]ne would think that tort law, applied by juries under a negligence or strict-liability standard, is less deserving of preservation [than state regulations and laws]. A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.[90]

The Court's analysis here is nothing more than speculation; it essentially acknowledges that it does not know whether Congress actually decided the issue of preemption on such regulatory-efficiency considerations. It nevertheless concluded that this is the only sound basis on which such a decision could have been made and hence this is the basis on which Congress must have made it.[91]

In her dissent, Justice Ginsburg rejected the *Riegel* majority's assumption that Congress prioritized regulatory-efficiency considerations over corrective-justice considerations. As the majority pointed out, "[t]he dissent would narrow the pre-emptive scope of the term 'requirement' on the grounds that it is 'difficult to believe that Congress would, without comment, remove all means of judicial recourse' for consumers injured by FDA-approved devices."[92] Justice Ginsburg's disbelief was as speculative as the majority's common sense; neither established what Congress actually did but only pointed out what Congress must have done given the suppo-

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89 *Id.* at 325.

90 *Id.*

91 A general inclination to prioritize regulatory-efficiency considerations over federalism and corrective-justice concerns can be inferred from the frequency with which the Court has adopted the preemption positions of federal regulatory agencies. *Cf.* Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 471 (2008) ("[F]rom *Cipollone* [*v. Liggett Group, Inc.*] in 1992 to *Riegel* in 2008, the Supreme Court's position in every products liability preemption case (save one—*Bates*[*v. Dow Agrosciences LLC*]) aligned with the relevant underlying federal agency's take on preemption."). *But see* Wyeth v. Levine, 129 S. Ct. 1187, 1229 (2009) (Alito, J., dissenting) (observing that the Court rejected the FDA's contention "that State tort suits will 'disrupt the agency's balancing of health risks and benefits'" (quoting Brief for United States as Amicus Curiae at 9, Wyeth v. Levine, 129 S. Ct. 1187 (2009) (No. 06-1249))).

92 *Riegel*, 552 U.S. at 326 (quoting *id.* at 337 (Ginsburg, J., dissenting)).

sedly obvious implausibility of a different choice.[93] Unsurprisingly, the majority categorically rejected the idea that its preemption analysis should take the distributional consequences of corrective justice into account.[94] Such a task, according to the Court, fell exclusively within the province of congressional authority.[95] In other words, deciding whether the benefits gained by preempting state-based tort suits against medical device manufacturers were greater than any resultant harms left unremedied was a policy decision that fell outside the scope of express preemption analysis, and therefore outside the purview of the Court's authority. Curiously, the Court quickly added that *if it were* to speculate on Congress's motives, the plain text of the statute proved that Congress valued the interests of those who would benefit from medical products deemed defective under New York tort law more than the litigation interests of those allegedly harmed by the products.[96]

The Court also stated that "the only indication available" of whether Congress intended to eliminate all judicial remedies for patients injured by FDA-approved medical devices is "the text of the statute."[97] Of course, this is a clear exaggeration.[98] As shown by Justice Stevens's concurrence and Justice Ginsburg's dissent, legislative and regulatory history,[99] the surrounding legislative text,[100] and intuited background assumptions about congressional policymaking[101] could all be marshaled to reconstruct Congress's deliberations and its resultant preemption policy choices. In fact, Justice Scalia's analysis itself illustrates the hollowness of the limitation he insisted upon.[102] Rather than rely solely on the MDA's text to define the term "requirement[]," he resorts to the most basic of statutory interpretation methods, treatise and dictionary definitions, to construe the term.[103]

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93 *See id.* at 324-25; *id.* at 333-35 (Ginsburg, J., dissenting).

94 *See id.* at 329-30 (Ginsburg, J., dissenting).

95 *Id.* at 326 (majority opinion) (stating, without a hint of irony, that "[i]t is not our job to speculate upon congressional motives").

96 *Id.*

97 *Id.*

98 *Cf.* Sprietsma v. Mercury Marine, 537 U.S. 51, 62-63 (2002) (observing that "the plain wording" of an express preemption clause "necessarily contains the *best* evidence of Congress' pre-emptive intent" (emphasis added)).

99 *Riegel*, 552 U.S. at 331 (Stevens, J., concurring) (briefly describing the MDA's legislative history); *id.* at 335-36 (Ginsburg, J., dissenting) (describing the MDA's legislative history); *id.* at 336-37 & n.6 (describing state regulation of Dalkon Shield intrauterine device).

100 *Id.* at 335 n.3 (Ginsburg, J. dissenting) (describing state exemption provision in MDA § 360k(b)).

101 *Id.* at 337 (expressing disbelief that Congress would choose to eliminate all tort remedies available to patients injured by FDA-approved medical devices).

102 *See id.* at 324-25 (majority opinion).

103 *Id.* at 323-25. More accurately, Justice Scalia relied on the *Cipollone* Court's definition of the term "requirement," which in turn relied on a treatise and a dictionary. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 522 (1992) ("[C]ommon-law damages actions . . . are premised on the existence of a

It is more likely that the Court made a conscious effort to limit its evidence to plain text to demonstrate how carefully it avoided making policy. Anchoring its legal conclusion exclusively in the express language that Congress itself chose signals a resistance to the temptations of discretion that come with reliance on nontextual evidence.[104] The Court's sensitivity to the issue was most obvious in its pointed response to Justice Stevens's assertion that it "advanced" the policy argument that the cost of injuries from FDA-approved devices was outweighed by their benefits;[105] the majority stated: "Contrary to Justice Stevens' contention, we do not 'advanc[e]' this argument. We merely suggest that if one were to speculate upon congressional purposes, the best evidence for that would be found in the statute."[106]

Sprietsma v. Mercury Marine,[107] which also raised an express preemption issue and was decided six years prior to *Riegel*,[108] provides an interesting contrast to *Riegel*'s corrective-justice policymaking pronouncements. There, the Court decided that the plaintiff's state-based design defect case was not expressly preempted by the Federal Boat Safety Act ("FSBA") or by the regulations promulgated by the Coast Guard to implement it. Writing for a unanimous Court, Justice Stevens first relied on basic tools of statutory construction—such as plain meaning and the interpretive canon that "a word is known by the company it keeps"[109]—to scrutinize Congress's choice of words in the text of the express preemption and saving clauses, concluding that both indicated Congress's intent to preserve state common law actions.[110] Justice Stevens then sought further support for his conclusion by noting that preserving state tort actions would "not produce anomalous results."[111] Citing the Court's decision in *Silkwood v. Kerr-McGee Corp.*,[112] Justice Stevens emphasized that "[i]t would have been perfectly rational for Congress not to pre-empt common-law claims, which[—unlike most administrative and legislative regulations—]necessarily perform an important

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legal duty, and it is difficult to say that such actions do not impose 'requirements or prohibitions.'" (citing BLACK'S LAW DICTIONARY 1489 (6th ed. 1990); WILLIAM PROSSER, LAW OF TORTS 4 (4th ed. 1971))).

104 *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 26 (2006) ("[Textualists] elevated statutory text over statutory purposes and legislative history because they believed this would narrow judicial leeway and minimize judicial creativity.").

105 *Riegel*, 552 U.S. at 331 (Stevens, J., concurring).

106 *Id.* at 326 n.5 (citation omitted).

107 537 U.S. 51 (2002).

108 In addition to the express preemption and saving clause issues raised by the case, the Court also addressed and rejected the argument that the plaintiff's tort action was impliedly preempted under theories of field and conflict preemption. *See id.* at 64-70.

109 *Id.* at 63 (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995)) (internal quotation marks omitted) (applying common law canon of *noscitur a sociis* to text of express preemption clause).

110 *Id.* at 63-64.

111 *Id.* at 64.

112 464 U.S. 238 (1984).

remedial role in compensating accident victims."[113] Like Justice Scalia's opinion in *Riegel*, Justice Stevens largely ignored federalism considerations. In fact, he neglected to even mention the presumption against preemption. Rather, he focused on the corrective-justice implications of preempting the plaintiff's tort claim.[114] Just as Justice Scalia imputed consequentialist considerations to Congress in *Riegel*, Justice Stevens imputed to Congress the "rational" decision to preserve a means of recovery. He therefore assumed, in stark contrast to Justice Scalia's opinion in *Riegel*, that corrective justice considerations were at the forefront of Congress's deliberations when it enacted the FSBA.[115]

In other decisions where the Court has expressly disavowed the need to step beyond plain statutory text, it has nevertheless done so purportedly to support (as opposed to determine) its understanding of that text. In *Cipollone v. Liggett Group, Inc.*,[116] which considered the preemption provision of the Federal Cigarette Labeling Act of 1965, the Court concluded that "the precise words of [the] provisions" under review were sufficient to find that Congress "merely prohibited state and federal rulemaking bodies from mandating particular cautionary statements on cigarette labels or in cigarette advertisements."[117] Nevertheless, the Court felt compelled to add that its reading of the statute was "appropriate[]" because of the presumption against preemption of state police power, its consistency with other language contained in the statute, and the absence of conflict between the federal interest in regulating cigarette warning labels and state tort laws.[118] The Court employed the extratextual methods of statutory interpretation it had previously concluded were largely inapplicable to express preemption clauses,[119] but it did so as putative reinforcement of what Congress had already made clear through statutory text.[120]

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113 *Sprietsma*, 537 U.S. at 64 (citing *Silkwood*, 464 U.S. at 251).

114 *Id.* at 63-64.

115 *See id.* Curiously, Justice Scalia joined the Court's opinion in *Sprietsma*.

116 505 U.S. 504 (1992).

117 *Id.* at 518 (citation omitted). The Court stated, as a general matter:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.

Id. at 517 (citation omitted) (quoting Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 282 (1987); Malone v. White Motor Corp., 435 U.S. 497, 505 (1978)) (internal quotation marks omitted).

118 *Id*. at 518-19.

119 For instance, the Court relied on the common law maxim of *expressio unius est exclusio alterius* to explain its conclusion that the language of a preemption clause defines the full scope of Congress's preemptive intent. Those activities not specifically included in the clause are, under this ancient rule of interpretation, implicitly excluded from its effect. *See id.*

120 Not all members of the Court were convinced by the majority's use of extratextual support. *See id.* at 535-36, 539 (Blackmun, J., concurring in part and dissenting in part) (arguing that the definitions of "requirement" and "prohibition" adopted by the plurality are broader than those set out in *Webster's New International Dictionary* and *Black's Law Dictionary* and that the part of the 1965 Act's legislative

What these and other Supreme Court express preemption decisions demonstrate is the inherent difficulty of being Congress's "faithful agent" in preemption cases, even where Congress has provided express instructions in enacted statutory language. In *Riegel*, the presence of a preemptive conflict between state and federal law turned on the definition of the term "requirement" in the MDA's express preemption provision, a term that was nowhere defined in the statute.[121] Any judge asked to interpret the provision would be left with the task of conjuring up a meaning for this term and, by extension, determining whether there was an irreconcilable conflict between state and federal law. Justice Scalia is slightly more forthcoming in this regard than his concurring and dissenting brethren, at least in that he comes closest to stating that he is making an independent choice with respect to defining the preemption clause's key term. Unlike Justices Stevens and Ginsburg, who would have described their choice of definition as one made by Congress rather than by them, Justice Scalia tacitly acknowledged that Congress provided no such clear identifications in its statutory language.[122] Instead, he reached for a treatise and a dictionary, which were as close to uncontroversial (i.e., objective) sources of meaning as he presumably could find. Whether the Court ultimately adopted Justice Scalia's approach or Justices Stevens and Ginsburg's approach, the intended effect was the same: to leave the impression that it was either neutral-extrajudicial principles or extrajudicial-legislative processes that determined whether state law was preempted or preserved.

2. Implied Preemption

Any difficulties the Court encounters when playing the "faithful agent" in express preemption cases are only magnified when it conducts implied preemption analyses. The Court must first locate Congress's underlying objectives before it can determine whether state laws or actions interfere with them.[123] The primary difficulties here are identifying a federal interest and determining the presence of an actual conflict, which often entail consideration of whether Congress intended to set exclusive standards or merely minimum standards permitting states to impose more stringent controls.[124] Whether conflict, obstacle, or field preemption, the Court must

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history rejected by the plurality flatly contradicts the breadth of its reading (internal quotation marks omitted)); *id.* at 546 (Scalia, J., concurring in the judgment in part and dissenting in part) ("In light of our willingness to find pre-emption in the absence of *any* explicit statement of pre-emptive intent, the notion that such explicit statements, where they exist, are subject to a 'plain-statement' rule is more than somewhat odd.").

121 *See* Riegel v. Medtronic, Inc., 552 U.S. 312, 321-26 (2008) (internal quotation marks omitted).

122 *Id.* at 326.

123 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 5.2.5 (3d ed. 2006).

124 *See id.* §§ 5.2.3-5.2.4.

consistently identify the indicia of congressional intent without leaving the impression that such identification is merely a pretext for the Justices' individual preferences.

Since its decision in *Cipollone*, the Court has repeatedly emphasized that "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict."[125] In other words, a pellucidly clear preemption clause (assuming one could ever be written) is the most conclusive evidence the Court will accept when determining Congress's preemptive intent, but it need not be the only evidence. The Court may displace or eliminate state regulatory activity when it concludes from a statute's structure or purpose that such was Congress's intention,[126] and it will do so without regard to whether Congress has included an express preemption or saving clause in the statutory language.[127]

As with express preemption analysis, the Court is quite careful to eschew any appearance of independent policymaking in its implied preemption cases. Though certainly more estranged from statutory text than express preemption, implied preemption analysis similarly purports to be guided by the principles of complete deference to congressional intent and the presumption against preemption invoked in the Court's express preemption analyses. Given that, by definition, implied preemption analysis operates in the absence of express preemption language, the Court describes its methodology as taking uncontroversial inferential steps away from indirect evidence of Congress's intentions and purposes.[128] What denotes an "uncontroversial" inferential step in this context is not entirely clear, but it seems to assume that congressional activity in an area of regulation implies that Congress intends to be the primary or exclusive regulator of private conduct in that area.[129] Where Congress does not provide any explicit textual indication of its preemptive intent, but the Court nevertheless finds one, the Court is essentially concluding that the most logical (i.e., uncontroversial) inference to be drawn from Congress's silence is that it intended that the interfering state laws or actions be preempted. Thus, where the Court identifies an irreconcilable conflict between state and federal regulation, the Court will conclude that Congress intended to take control. It does not typically consider that Congress, having the authority to supersede state law under

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125 Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000) (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); *see also* Sprietsma v. Mercury Marine, 537 U.S. 51, 64-65 (2002); Geier v. Am. Honda Motor Co., 529 U.S. 861, 884 (2000); Freightliner Corp. v. Myrick, 514 U.S. 280, 287-88 (1995).

126 *See* O'REILLY, *supra* note 1, § 8.1.

127 *Id.* § 7.5.

128 *See id.* § 8.1.

129 *See id.* § 8.3.

the Supremacy Clause, would have decided not to exercise this authority upon identifying the conflict.[130]

Each of the implied preemption subcategories developed by the Court[131] involves different degrees of extrapolation from touchstone statutory text and can call upon different types of evidence to demonstrate the requisite overlap or conflict between federal interests and state laws or actions.[132] Due largely to the absence of express statutory language, the Court has had difficulty settling on a stable body of evidence that indicates Congress's preemptive intentions. It has instead identified a host of relevant factors.[133] Relied upon either in isolation or in combination,[134] these factors can include the federal interest at issue, any expressions of Congress's purposes in establishing the regulatory scheme,[135] or the history of federal and state regulation in the field.[136] Moreover, this difficulty transcends the textualist or purposivist interpretive approaches adopted by different Justices.[137] Both approaches agree that the judge interpreting a statue must begin

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130 While the presumption against preemption would seem to require a different result in many cases, the Court has invoked it sporadically at best. *See* Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1318 (2004) (arguing that the Court has abandoned the presumption against preemption and instead adopted a presumption in favor of it); Sharkey, *supra* note 91, at 458 ("In the realm of products liability preemption, the presumption does yeoman's work in some cases while going AWOL altogether in others." (citation omitted)). *Compare* Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) ("Even if Dow had offered us a plausible alternative reading of [the express preemption provision]—indeed, even if its alternative were just as plausible as our reading of that text—we would nevertheless have a duty to accept the reading that disfavors pre-emption. '[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.'" (second alteration in original) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996))), *with* Riegel v. Medtronic, Inc., 552 U.S. 312, 315-30 (2008) (failing to even mention the presumption), *and* Geier v. Am. Honda Motor Co., 529 U.S. 861, 906 (2000) (Stevens, J., dissenting) (observing that "the Court simply ignores the presumption").

131 It is true that the precise number of implied preemption subcategories depends in large measure "on who is doing the counting." Merrill, *supra* note 5, at 739.

132 *Id.* at 747-53.

133 *Cf.* CHEMERINSKY, *supra* note 123, § 5.2.3 ("[I]t must be recognized that the Court usually has great discretion in deciding whether a particular area has been left exclusively to federal law and, if so, how far the preemption extends.").

134 As one would expect, these factors are not necessarily mutually exclusive, and the more a defendant can marshal to its side, the greater the likelihood that the Court will find the plaintiff's claims preempted. *See id.*

135 City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 633-38 (1973) (describing committee reports and a presidential signing statement in establishing that the federal government has occupied the field of aviation regulation); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 233-34 (1947) (finding federal field occupation by relying on statements made in Senate and House committee reports); CHEMERINSKY, *supra* note 123, § 5.2.3 (observing that the Court will look to either the text or the legislative history of a federal law in search of some expression of Congress's intent).

136 *See* Wyeth v. Levine, 129 S. Ct. 1187, 1201 (2009); CHEMERINSKY, *supra* note 123, § 5.2.3.

137 *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006).

and end with the statutory text if it is clear.[138] Similarly, at least in the implied preemption context, even avowed textualists are undeterred by the absence of clear text; just like avowed purposivists, they reach for extratextual evidence when trying to determine congressional intent.

For example, the Court applies its "field" preemption analysis when it determines that "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'"[139] Put another way, where the federal scheme so pervasively addresses conduct simultaneously addressed by state law, the Court infers that Congress intended to regulate that conduct without state involvement. Even state laws that complement federal interests, or merely fill in gaps left by the federal regulatory scheme, are preempted if the Court concludes that Congress has cordoned off the field.[140]

Consider the seminal field preemption case of *Hines v. Davidowitz*.[141] There, the Court encountered a Pennsylvania law imposing numerous obligations solely on aliens residing within the state. These obligations included yearly registration, payment of registration fees to the state, and the purchase of an alien registration card to be carried at all times while within state borders.[142] In concluding that the law impermissibly interfered with the federal Alien Registration Act of 1940,[143] the Court relied on constitutional text and history,[144] the potentially negative impact the Pennsylvania law would have on the nation's relations with foreign powers,[145] the nation's collective experiences with and commitment to protecting aliens from local prejudice,[146] and the breadth of the general scheme under which Congress

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138 *See id.* at 75, 78.

139 Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) (quoting Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982)). Immigration and foreign policy are the areas in which the Court most frequently finds that Congress has occupied the field. *See* Pennsylvania v. Nelson, 350 U.S. 497, 504 (1956) (holding that federal anti-sedition statutes preempted a similar Pennsylvania statute because the former "evince[d] a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it"); Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (concluding that the federal Alien Registration Act preempted the Pennsylvania Alien Registration Act because the latter was "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). Another such area of complete federal occupation is nuclear safety regulation. *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212 (1983) ("[T]he Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.").

140 *See* Dinh, *supra* note 4, at 2105 ("Field preemption displaces state law even where it may not frustrate any purpose of Congress or conflict in any way with some federal statutory provision.").

141 312 U.S. 52 (1941).

142 *Id.* at 59.

143 *Id.* at 74.

144 *Id.* at 62-63.

145 *Id.* at 63-66.

146 *Id.* at 70-73.

regulated the presence of foreign nationals within the country.[147] The Court was fully aware that it was basing its conclusions on a group of motley factors.[148] Writing for the Court, Justice Black intimated that there are not, nor could there be, settled formulas for determining the validity of state laws when Congress has also legislated on the subject.[149] He further observed that "[t]he nature of the power exerted by Congress, the object sought to be attained [by Congress], and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject."[150]

Like the Court's rhetoric in *Riegel* and *Sprietsma*, the manner in which the *Hines* Court used this evidence of congressional intent was dissociative. The Court intimated that the Framers, Congress, and the public have said that states cannot regulate immigration and purported to merely acknowledge such intentions.[151] The Court's frequent use of the passive voice throughout the opinion is also telling in this regard.[152] As importantly, the Court framed the terms of its analysis to leave the impression that the only reasonable inference to be drawn from these statements is that Congress (and the American people more generally) had concluded that state law and federal law could not coexist.[153]

Like its field preemption jurisprudence, the Court's "conflict" and "obstacle" preemption decisions are predicated on, but estranged from, clear expressions of congressional intent.[154] As the label implies, conflict preemption involves the displacement of state regulations when they directly conflict or are otherwise incompatible with federal statutory or regulatory objectives.[155] Thus, neither may a deceased nullify an annuity entitlement guaranteed by ERISA through operation of a will created under state law,[156] nor may a state through its tort laws require auto manufacturers to install

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147 *Hines*, 312 U.S. at 72-73 (emphasizing that Congress had passed the 1940 Act without the restrictions placed on aliens included in the Pennsylvania act).

148 *See id.* at 68.

149 *Id.* at 67.

150 *Id.* at 70.

151 *See id.* at 66-68.

152 *See, e.g.*, *id.* at 68 (observing that international relations "from the first has been most generally conceded imperatively to demand broad national authority").

153 *Hines*, 312 U.S. at 67-68.

154 *See* CHEMERINSKY, *supra* note 123, §§ 5.2.3-5.2.4.

155 *See id.* § 5.2.4 ("If federal law and state law are mutually exclusive, so that a person could not simultaneously comply with both, the state law is deemed preempted."). Conflict preemption arises frequently in the products liability context and has figured prominently in several of the Court's most recent decisions. *See, e.g.*, Wyeth v. Levine, 129 S. Ct. 1187, 1200-04 (2009); Sprietsma v. Mercury Marine, 537 U.S. 51, 64-70 (2002); Geier v. Am. Honda Motor Co., 529 U.S. 861, 874 (2000); *cf.* Medtronic, Inc. v. Lohr, 518 U.S. 470, 507-08 (1996) (Breyer, J., concurring).

156 *See* Boggs v. Boggs, 520 U.S. 833, 844 (1997) (holding that ERISA preempted application of community property laws allowing a first wife to make a testamentary transfer to her sons of her interest in a survivor annuity and her deceased husband's retirement benefits).

driver's-side airbags when federal regulations permit them to choose and install other safety devices in some of their vehicles.[157] "Obstacle" or "frustration of purpose" preemption "refers to the circumstance[s] in which the state activity does not prohibit the federally approved activity, but 'acts as an obstacle' to the achievement of the objectives of Congress in adopting the federal statute."[158] Unlike conflict preemption, obstacle preemption permits the displacement of state law even when compliance with state laws does not result in a violation of federal law; the former need only impede accomplishment of the underlying purposes of the latter.[159] A state law suspending a driver's license for failing to pay an auto accident judgment may therefore be preempted because it hampers national uniformity in the standards for discharging debts, an underlying purpose of federal bankruptcy laws.[160]

As is the case with express and field preemption, the Court has consciously distanced itself from any policymaking responsibility in its obstacle and conflict preemption decisions. In *Geier v. American Honda Motor Co.*,[161] for example, the Court was initially asked to determine the preemptive scope of express preemption and saving clauses in the National Traffic and Motor Vehicle Safety Act of 1966 ("NTMVSA").[162] Pursuant to the statute, the Department of Transportation promulgated Federal Motor Vehicle Safety Standard ("FMVSS") 208, which "required auto manufacturers to equip some but not all of their 1987 vehicles with passive restraints."[163] Although the auto manufacturer complied with FMVSS 208, the petitioner claimed that it should have also installed airbags in the vehicle in which he was injured.[164] The NTMVSA's express preemption clause prohibited states from establishing or enforcing "any safety standard applicable to the same aspect of performance of [a motor vehicle's] item of equipment which is not identical to the Federal standard."[165] Although the language of the clause swept broadly enough to preclude states from establishing and enforcing statutes, regulations, and common law standards different from

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157 *See Geier*, 529 U.S. at 874-75.

158 O'REILLY, *supra* note 1, § 8.5 (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992)). While some scholars believe that there is no need for both conflict and obstacle preemption, *see, e.g.*, Nelson, *supra* note 14, at 265, others argue that the two have materially different consequences and thus warrant separate categorization. *See* Merrill, *supra* note 5, at 739 (asserting that frustration preemption results in the elimination of state law, whereas conflict preemption only results in its subordination to federal law in a particular case).

159 CHEMERINSKY, *supra* note 123, § 5.2.4.

160 Perez v. Campbell, 402 U.S. 637, 654-56 (1971).

161 529 U.S. 870 (2000).

162 15 U.S.C. § 1381 (1988) (current version at 49 U.S.C. § 30101 (2006)).

163 *Geier*, 529 U.S. at 864-65.

164 *Id.* at 865.

165 *Id.* at 867 (quoting 15 U.S.C. § 1392(d) (1988) (current version at 49 U.S.C. § 30103(b)(1))) (internal quotation marks omitted).

the federal standard, the NTMVSA also included a saving clause stating that "'[c]ompliance with' a federal safety standard 'does not exempt any person from any liability under common law.'"[166]

Writing for the Court, Justice Breyer first read both the preemption and saving clauses together, concluding that Congress intended FMVSS 208 to be only a floor of vehicle safety; states were free to create and enforce more stringent requirements through operation of common law tort actions.[167] Justice Breyer then reached a second, more pertinent question: "[D]oes [the NTMVSA saving clause] foreclose or limit the operation of ordinary pre-emption principles insofar as those principles instruct us to read statutes as pre-empting state laws (including common-law rules) that 'actually conflict' with the statute or federal standards promulgated thereunder?"[168]

Despite Congress's inclusion of a clause expressly preserving state common law actions, the Court concluded that the plaintiff's state tort action conflicted with, and was therefore *impliedly* preempted by, the NTMVSA and FMVSS 208.[169] After identifying several objectives underlying the Act and the Department of Transportation's regulations,[170] Justice Breyer determined that a state tort rule requiring manufacturers to install airbags "would have presented an obstacle to the variety and mix of devices that the federal regulation sought" and "would have stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed."[171]

To support the Court's holding, Justice Breyer appealed not only to the language of the statutory text[172] and statements made by members of Congress and Department of Transportation officials describing their understanding of the purposes behind the act and its enabling regulations,[173] but also to consequentialist regulatory policy rationales he assumed Congress must have considered in enacting the NTMVSA. Referring to the cost-

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166 *Id.* at 868 (alteration in original) (quoting 15 U.S.C. § 1397(k) (1988) (current version at 49 U.S.C. § 30103(e))).

167 *Id.* ("We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions . . . .").

168 *Id.* at 869.

169 *Geier*, 529 U.S. at 869-70.

170 These objectives included providing automakers with the flexibility to test and market a mix of vehicle safety devices and facilitating acceptance by automakers of passive restraint devices. *See id.* at 881-82.

171 *Id.* at 881.

172 In attempting to reconcile the tension between the express preemption and saving clauses, Justice Breyer concluded that Congress must have intended the saving clause only to bar a defendant from claiming immunity from suit based on its compliance with the federal regulation. *Id.* at 869. Such a reading would, according to Justice Breyer, explain why Congress chose to eliminate only compliance with federal regulations as a defense. *Id.* In addition, such a narrow reading would not "conflict with the purpose of the saving provision . . . by rendering it ineffectual." *Id.* at 870.

173 *See, e.g.*, *id.* at 871, 876-81.

benefit analysis Congress must have undertaken when drafting the statute, Justice Breyer observed that "[o]n the one hand, the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards."[174] The benefits of centralization, which it was presumably reasonable to believe Congress wanted to garner, would be "to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create."[175] While the saving clause diminished the benefits of uniformity by allowing multijurisdictional enforcement of potentially disparate safety standards, it too had benefits that Congress likely wanted to achieve.[176] Notably, Justice Breyer made no mention of how the regulatory-efficiency concerns weighed against competing federalism concerns, and he only alluded to corrective-justice concerns in passing.[177] Rather, the benefits and costs of centralization versus decentralization were presented as the greatest (and perhaps only) policy consideration that Congress took into account during its deliberations.[178]

Despite this tendency toward dissociation in its implied preemption cases, the Court has been conspicuously reluctant to defer to another of Congress's implementation agents: administrative agencies. More specifically, the Court has declined until relatively recently to clarify its view on the role administrative agencies play in interpreting ambiguous but putatively preemptive federal statutes. In *Wyeth v. Levine*,[179] the Court essentially conceded that it has been noncommittal with respect to agencies' authority to interpret ambiguous federal statutes in a way that preempts state law.[180] In attempting to address this hole in its jurisprudence, the Court limited itself to those cases in which Congress has declined to clearly delegate preemptive decision-making power to agencies. Observing in dicta that "agencies have no special authority to pronounce on pre-emption,"[181] the Court nevertheless concluded that agencies "do have a unique understanding of the statues 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 Con-

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174 *Id.* at 871.

175 *Geier*, 529 U.S. at 871.

176 *Id.* ("[T]he saving clause reflects a congressional determination that occasional nonuniformity is a small price to pay for a system in which juries not only create, but also enforce, safety standards, while simultaneously providing necessary compensation to victims.").

177 *See id.* (stating that Congress likely included the NMVTSA saving clause in part to "provid[e] necessary compensation to victims").

178 *See id.* at 871-72.

179 129 S. Ct. 1187 (2009).

180 *Id.* at 1201 ("In prior cases, we have given 'some weight' to an agency's views about the impact of tort law on federal objectives when 'the subject matter is technica[l] and the relevant history and background are complex and extensive.'" (alteration in original) (quoting *Geier*, 529 U.S. at 883)).

181 *Id.*

gress.'"[182] Despite the agencies' otherwise apparent institutional competency, which would seem to warrant judicial deference to agency preemption determinations, the Court concluded that agency interpretations of potentially preemptive statutory language warranted only *Skidmore*-level deference.[183] In other words, agency views on whether and to what extent state laws must yield to congressional purposes are meaningful only to the extent the Court finds them "thorough[], consisten[t], and persuasive[]."[184] Thus, while the Court refuses to explicitly acknowledge its role in making preemption policy decisions, it has also been reluctant, and in *Wyeth* explicitly refused, to acknowledge that agencies may be well positioned to undertake a primary role in all but a handful of cases.[185]

In any event, the pattern of dissociation seen in the Court's express and field preemption cases is also evident in *Geier* and other implied preemption decisions. In the face of vague and internally conflicted statutory language, the Court reconstructs what it views as a plausible account of congressional deliberations based on a host of textual and extratextual evidence.[186] It then attributes the conclusions and compromises reached in these deliberations to Congress, while disavowing any substantive involvement.

C. *The Practice of the Court's Preemption Cases*

The Court's express and implied preemption jurisprudence outwardly gives effect to the meaning of Congress's preemptive intentions and in so doing purports to eschew the temptation to interject its own preferences regarding "the desirability of displacing state law in any given area."[187] State laws and actions falling within the ambit of federal regulatory control will be preempted or saved solely according to Congress's purposes. However, this task is immediately complicated by the three inescapable realities previously alluded to. First, preemption decisions turn largely on policy choices involving federalism, corrective justice, and regulatory efficiency, for which there are no universally accepted rules or principles.[188] Second, Congress rarely employs statutory language to conclusively identify the

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182 *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

183 For a discussion of "*Skidmore* deference," see generally Jamie A. Yavelberg, *The Revival of* Skidmore v. Swift*: Judicial Deference to Agency Interpretations After* EEOC v. ARAMCO, Note, 42 DUKE L.J. 166 (1992).

184 *Wyeth*, 129 S. Ct. at 1201.

185 The Court did concede that administrative agencies' pronouncements preempting state law may be accorded *Chevron* deference where Congress has explicitly delegated that authority to the agencies. *See id.* at 1200-01.

186 *See Geier*, 529 U.S. at 872, 874.

187 Merrill, *supra* note 5, at 741.

188 *See supra* Part I.A.

preemption policy choices it makes.[189] Rather, the key terms and concepts used in these clauses are often vague, ambiguous, or omitted.[190] This frequently forces the Court to rely on a host of extratextual interpretive tools that include intuition, judicially developed interpretive canons, administrative regulations and interpretive materials, surrounding text or analogous statutory schemes, legislative histories, or prevailing understandings of the statutory scheme's regulatory scope.[191] Third, and perhaps due in large measure to the second complication, the vagueness, ambiguity, or omission of critical terms and concepts in preemption and saving clauses has led Justices to approach the question of congressional intent quite differently.[192] These varying approaches have resulted, in turn, in sharp disagreements as to which interpretive tools are most appropriate, when they are best invoked, and the weight they should be accorded in different situations.[193] Despite these persistent obstacles to determining Congress's preemptive intent, the Court still insists that it is implementing Congress's policy choices rather than its own when it engages with the semantic surface of a

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189 *See* O'REILLY, *supra* note 1, § 8.1 (noting that "[p]art of the blame" for vague statements of congressional intent must be borne by "congressional subcommittees who mark up bills, and which could have adopted express preemptive terms—but . . . let the legislation pass through to adoption with knowingly ambiguous terms"); *see also* Fisk, *supra* note 3, at 43 ("Congress often does not attempt to expressly articulate its intent regarding preemption.").

190 *See* CHEMERINSKY, *supra* note 123, § 5.2.1 ("Congress rarely is clear about the scope of what is preempted or how particular situations should be handled.").

191 *See, e.g.*, Sprietsma v. Mercury Marine, 537 U.S. 51, 62-63 (2002) (relying on the canon of *noscitur a sociis* and the statute's saving clause language); Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228-33 (1995) (relying on statement of purpose, NAAG implementing guidelines, the text of the Airlines Deregulation Act of 1978 as a whole, and contrasting language in ERISA); Freightliner Corp. v. Myrick, 514 U.S. 280, 287-89 (1995) (relying on statement of purposes, administrative agency implementing regulations, and the canon of *expressio unius est exclusio alterius*); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 517-19 (1992) (construing express preemption clause in the Federal Cigarette Labeling and Advertising Act of 1965 by relying on the canon of *expressio unius est exclusio alterius*, language in sections of the Act preceding the preemption clause, the presumably analogous Tobacco Health Education Act of 1986, the Act's statement of purpose, the "backdrop of regulatory activity" preceding passage of the Act, and a House committee report connected with the Act's preemption clause).

192 *See* O'REILLY, *supra* note 1, § 8.1 ("Justices of the Supreme Court and federal appellate judges on the circuit courts create . . . preemption out of their subjective choices regarding silent congressional intent . . . ."); *see also* Grey, *supra* note 43, at 569 ("Largely because of its changing attitude toward the deference due to states' interests, the Supreme Court's approach toward preemption has fluctuated significantly—a situation that has produced considerable comment.").

193 As a general matter, proponents of faithful agent theories of statutory interpretation disagree broadly on what evidence should be adduced to determine textual meaning. *Compare* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 529-30 (1989) (Scalia, J., concurring) (arguing that nontextual approaches to statutory interpretation relying on committee reports and debates may mislead judges regarding Congress's understanding of the enacted law), *with* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (arguing that courts should attempt to implement the enacting legislature's intentions by referencing nontextual materials when interpreting statutory language).

preemption or saving clause or with legislative text that contains neither one.[194]

Take, for example, the Court's handling of the corrective-justice/regulatory-efficiency conflict in *Riegel*. As previously described, Justices Scalia, Stevens, and Ginsburg disagreed sharply on the key question of whether Congress prioritized regulatory-efficiency concerns or corrective-justice concerns when it enacted the MDA's express preemption clause.[195] This disagreement was fueled in large measure by their different views regarding the evidence on which to rely for reconstructing Congress's policy deliberations. Whereas Justice Scalia adopted a textualist approach that attempted to restrict intent evidence to the text of the MDA itself, Justices Stevens and Ginsburg adopted a purposivist approach that relied on legislative history and other extratextual materials.[196] Of course, both approaches have their advantages and drawbacks,[197] and that is precisely the point. Neither approach can claim greater interpretive accuracy than the other if the value for which they are solving (i.e., Congress's preemptive intent) is unknown and unknowable. If the text of the MDA provided all of the information the Court needed to answer the preemption question, there would be little need to resort to extratextual sources—treatises, dictionaries, regulatory history, committee reports, or statements made by members of Congress—to decipher it. Stated differently, the statutory text is inconclusive, and the information needed to make it conclusive did not come from legislative majorities in Congress. Thus, as a matter of logic, "a judge applying a law containing vague terms is not and cannot claim to be constrained by the law."[198]

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194 *See* CHEMERINKSY, *supra* note 123, § 5.2.1 ("[A]lthough the Court purports to be finding congressional intent, it often is left to make guesses about purpose based on fragments of statutory language, random statements in the legislative history, and the degree of detail of the federal regulation.").

195 *See supra* Part I.B.1.

196 *See* Riegel v. Medtronic, Inc., 552 U.S. 312, 326 (2008) (noting Justice Scalia's disapproval of Justices Stevens and Ginsburg's use of texts other than the MDA statute itself to determine Congress's intent).

197 There is a voluminous literature comparing textualism to purposivism. *E.g.*, Manning, *supra* note 138, at *passim*.

198 Christopher L. Kutz, Note, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997, 1006 (1994); *see also id.* at 1006 n.33 ("In logic, an argument is sound only if its premises are true and its conclusions follow as a matter of logical consequence; a legal argument admitting vague terms will have premises without truth-values, and hence will fail to meet the logical standard of soundness."); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 428 (2008) ("Just as judges did not 'discover' the common law, they do not 'discover' the answers to difficult questions of statutory interpretation. One need not subscribe to an extreme version of legal realism to recognize that judges make policy when they interpret vague, ambiguous, or gap-filled statutes . . . .").

The MDA is equally silent, however, on which sources of evidence are best employed to reconstruct its deliberations.[199] As a result, the rules the Court applied in choosing evidence of congressional intent did not come from Congress. The selection criteria apparently originated instead from the Court's background assumptions regarding corrective justice and regulatory efficiency.[200] In determining that Congress would not have wanted a conflict between common law tort duties and the safety requirements promulgated by the FDA, Justice Scalia noted that "in the context of this legislation[,] excluding common-law duties from the scope of preemption would make little sense."[201] The basis for this conclusion was not that Congress had given it explicit expression or that Congress had even considered it. Rather, the process Congress or the FDA presumably employed to reach the decision to preempt New York's tort law—a centralized cost-benefit analysis which uniformly weighed both the harms and benefits of a particular device design—was superior to that employed by state juries.[202] In other words, Justice Scalia's conclusion flowed from the following syllogism: centralized cost-benefit analysis produces safer medical devices; preemption leads to centralized cost-benefit analysis; therefore, Congress intended to preempt state tort law.

Justices Stevens and Ginsburg, by contrast, based their conclusions on a different assumption regarding congressional decision making. Though they ultimately differed on whether the MDA preempted the plaintiff's tort action, neither assumed that Congress would have done so without some clear indication.[203] With respect to the MDA's legislative history, Justice Stevens described as persuasive Justice Ginsburg's argument that the MDA was enacted to increase consumer protections, not to decrease them.[204] He nevertheless found that the legislative history was overwhelmed by the text of the MDA itself.[205] Justice Ginsburg did not.[206] Neither Justice, however, provided an empirical basis (anecdotal or otherwise) to substantiate the

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199 *See Riegel*, 552 U.S. at 331 (Stevens, J., concurring) (noting that "[t]here is nothing in the preenactment history of the MDA" relating to what state laws were taken into consideration during its drafting).

200 Justice Ginsburg also took issue with the fact that the Court did not mention federalism concerns or the presumption against preemption in its ruling. *See id.* at 333-34 (Ginsburg, J., dissenting).

201 *Id*. at 324-25 (majority opinion).

202 *Id*. at 325.

203 *See id.* at 331 (Stevens, J., concurring); *id*. at 336-44 (Ginsburg, J., dissenting) (discussing the history and purpose of the MDA preemption clause).

204 *Id*. at 331 (Stevens, J., concurring) ("As Justice Ginsburg persuasively explains, the overriding purpose of the legislation was to provide additional protection to consumers, not to withdraw existing protections.").

205 *Id*. at 331-32.

206 *Riegel*, 552 U.S. at 333-35 (Ginsburg, J., dissenting).

notion that Congress, as a general matter, chooses to preserve private remedies instead of eliminating them.[207]

When the Court refers to such outcomes as indicative of congressional intent, the necessary implication is that Congress must have wanted such a result. But the only apparent reason that Congress would want such a result is because it is desirable (however one measures desirability). As Congress has made no explicit statements regarding the desirability of that outcome,[208] one can only conclude that the Court has singled it out because the Court thought the outcome desirable and Congress would have agreed with the Court in that assessment. This is a textbook example of the Court imputing its policy choices to Congress. Even if one agreed with aspects of Justice Scalia's implicit assessment that federal preemption would lead to safer products,[209] or with Justices Stevens and Ginsburg's assertion that Congress would not eliminate private remedies solely by implication,[210] it does not automatically follow that Congress shared that preference, could have reached an agreement to embody it in legislation, or would have done so at the time the Court rendered its decision.

These conflicts regarding the most appropriate and effective evidence of congressional intent have led to further conflicts between the Court's express and implied preemption doctrines. In *Cipollone*, a seminal express preemption case that has been described as the first salvo in the modern "preemption war,"[211] the Court stated that Congress's inclusion of a preemption clause in a statutory scheme should serve as the sole evidence of its preemptive intent.[212] The apparent corollary of this edict was that fed-

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207 *See id.* at 334.

208 *See, e.g.*, *id.* at 326 (majority opinion) ("It is not [the Court's] job to speculate upon congressional motives. If [the Court] were to do so, however, the only indication available [is the] text of the statute . . . .").

209 *See id.* at 315, 318, 323.

210 *See id.* at 331 (Stevens, J., concurring); *id.* at 337 (Ginsburg, J., dissenting).

211 MCGARITY, *supra* note 136, at 49, 51, 92-93, 101 (noting the rarity of invoking preemption as a defense to state common law tort claims prior to *Cipollone* and the subsequent widespread use of the decision by corporate defendants in such disparate areas of federal regulation as pesticide control, consumer products protection, and personal credit reporting). Manufacturers sued in state courts have used the Court's decision in *Cipollone* to raise preemption as a defense against tort liability in a variety of areas regulated by federal administrative agencies. *See* Bates v. Dow Agrosciences LLC, 544 U.S. 431, 441 (2005) (recognizing "a groundswell of federal and state [preemption] decisions" after the holding in *Cipollone* that certain common law tort claims were preempted by a federal express preemption clause); *see also* O'REILLY, *supra* note 1, § 7.5 (observing that the *Cipollone* decision "set the stage for dozens of claims by product-liability defendants that preemption was not just for state rules, but now swept away liabilities as well").

212 *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 517 (1992) ("When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation." (citations omitted) (quoting Cal. Fed. Sav. & Loan Ass'n v. Guerra,

eral courts should not—and indeed *need* not—resort to extratextual methods of statutory interpretation to infer the existence or extent of Congress's preemptive intent. Those methods are more appropriately reserved for when Congress's intent cannot be inferred from the text due to its vagueness, ambiguities, or omissions.

However, as Professor Thomas Merrill has observed, the Court's attempts to "constrain judicial discretion" in *Cipollone* "collapsed in subsequent cases."[213] In *Freightliner Corp. v. Myrick*,[214] petitioners argued that respondents' state law claims were preempted by the express preemption clause included in the NTMVSA."[215] Recall that *Cipollone* emphasized that "there is no need to infer congressional intent to pre-empt" where Congress's preemptive intent is clear from the language of the preemption clause itself.[216] Despite holding that the parameters specified by the NTMVSA's express preemption clause had not been met,[217] and presumably that Congress had not intended to preempt state laws falling outside of them, the Court nevertheless proceeded to conduct an implied preemption analysis.[218] Apparently aware of the oddity of conducting an implied preemption analysis where Congress had enacted an express preemption clause, the Court summarily dismissed as "without merit" the contention that "implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute."[219] The Court then diminished the importance of express preemption clauses in general: "[t]he fact that an express definition of the pre-emptive reach of a statute 'implies' . . . that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption."[220] As a result, where Congress has specifically and expressly spoken to the issue of preemption and the Court has acknowledged the import of that expression, the Court may still expand, contract, or otherwise alter a statute's preemptive scope.

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479 U.S. 272, 282 (1987); Malone v. White Motor Corp., 435 U.S. 497, 505 (1978)) (internal quotation marks omitted)).

213 *See* Merrill, *supra* note 5, at 738-39.

214 514 U.S. 280 (1995).

215 *Id.* at 286.

216 *See Cipollone*, 505 U.S. at 517 (quoting *Cal. Fed. Sav. & Loan Ass'n*, 479 U.S. at 282) (internal quotation marks omitted).

217 Under the terms of the NTMVSA's preemption clause, states were permitted to establish or enforce vehicle and vehicle equipment safety standards that differed from federal standards, but only when "a Federal motor vehicle safety standard . . . is in effect." *Myrick*, 514 U.S. at 284 (quoting 15 U.S.C. § 1392(d) (1988) (current version at 49 U.S.C. § 30103(b)(1) (2006)) (internal quotation marks omitted)). The Ninth Circuit had previously invalidated the NHTSA regulation establishing minimum stopping distances for trucks and tractor-trailers. *Id.* As the pertinent regulation had been invalidated, the Court concluded that the preemption clause was inapplicable. *Id.* at 286.

218 *Id.* at 288-90.

219 *Id.* at 287.

220 *Id.* at 288.

Similarly, the Court in *Geier* not only dismissed as without merit the assertion that there can be no implied preemption when Congress enacts an express preemption clause, it went even further by also rejecting the notion that a saving clause specifically *preserving* state law precludes a judicial finding of implied preemption.[221] It is difficult not to agree with Justice Stevens who, writing in dissent, asserted that the Court's decision promulgated a "judge-made rule[]" privileging implied preemption over express preemption, a rule which was "not enacted by Congress and is not to be found in the text of any Executive Order or regulation."[222]

It is difficult to agree, however, with Justice Stevens's assertion that the Court should be criticized for reaching its conclusions through "rejection of the presumption against pre-emption, and its reliance on history and regulatory commentary rather than either statutory or regulatory text."[223] Assume that Justice Breyer was correct that the District of Columbia tort law required automakers to install airbags and that it did so in direct contradiction of the safety design freedoms provided by the NTMVSA and FMVSS 208.[224] Further assume that Justice Breyer was correct when he stated that "[s]ome such principle is needed" to resolve this contradiction.[225] Resorting to statutory text to provide the governing principle proves problematic. On the one hand, the NTMVSA contains an express preemption clause that would prevent suit under the District of Columbia law.[226] On the other hand, the NTMVSA contains a saving clause that would preserve suit under the District of Columbia law.[227] The statute is therefore ambiguous; it is susceptible to multiple logical interpretations.[228] One logical interpretation would be to permit the suit to proceed, while the other logical interpretation would be to end the suit. That Justice Breyer chose the latter option is

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221 *Geier*, 529 U.S. at 884-86; *see also* Wyeth v. Levine, 129 S. Ct. 1187, 1214 (2009) (Thomas, J., concurring) (describing the Court's decision in *Geier* as "flawed" because "it conflicted with the plain statutory text of the saving clause within the Safety Act, which explicitly preserved state common-law actions"); Merrill, *supra* note 5, at 739 n.47 (describing *Geier* as "finding implied preemption in the face of an express preemption clause that the majority construed as not calling for preemption").

222 *Geier*, 529 U.S. at 887 (Stevens, J., dissenting).

223 *Id.* at 888.

224 *See id.* at 881 (majority opinion) ("Such a state law . . . would have required manufacturers of all similar cars to install airbags . . . . It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought.").

225 *Id.* at 871.

226 *Id.* at 867 (citing 15 U.S.C. § 1392(d) (1988) (current version at 49 U.S.C. § 30103(b)(1) (2006))).

227 *Id.* at 868 (citing 15 U.S.C. § 1397(k) (1988) (current version at 49 U.S.C. § 30103(e))).

228 *See* BLACK'S LAW DICTIONARY 79-80 (7th ed. 1999) (defining "ambiguity" as "a different range of meanings derived from, not fanciful speculations or mistakes about linguistic usage, but from true knowledge about the use of words" (quoting RUPERT CROSS, STATUTORY INTERPRETATION 76-77 (1976)) (internal quotation marks omitted)).

not the issue;[229] rather, it is that he imputed that choice to Congress when there was no logical way to infer what Congress actually chose (if it chose anything). Justice Stevens is therefore only half right. Justice Breyer did rely on a judge-made rule to decide the case, but given the statute with which he was working, he had no other choice.

Not all of Justice Breyer's assertions in *Geier* are so readily explainable, however. He came to a somewhat curious conclusion when describing the differences between express and implied preemption.[230] Here, his conclusion further indicates the Court's willingness to impute preemptive intent to Congress absent clear and comprehensive statutory language to the contrary:

> The dissent would require a formal agency statement of pre-emptive intent as a prerequisite to concluding that a conflict exists. It relies on cases, or portions thereof, that did not involve conflict pre-emption. And conflict pre-emption is different in that it turns on the identification of "actual conflict," and not on an express statement of pre-emptive intent. While "[p]re-emption fundamentally is a question of congressional intent," this Court traditionally distinguishes between "express" and "implied" pre-emptive intent, and treats "conflict" pre-emption as an instance of the latter.[231]

Absent further qualifications placed on the distinctions drawn here between express and implied preemption—qualifications not made in the opinion itself—Justice Breyer's analysis left open the possibility that congressional intent is not needed to preempt state law. The presence of an actual conflict is alone sufficient, regardless of what Congress intended. Nevertheless, Justice Breyer did not appear to propose the abandonment of congressional intent as the touchstone of preemption analysis or the abandonment of the presumption against preemption.[232] Instead, he regarded the presence of an actual conflict between federal and state law as proof of Congress's intent to preempt, not proof that such intent is irrelevant. In any event, regulatory-efficiency considerations seemed to trump federalism and corrective-justice considerations in Justice Breyer's analysis, though the Court provided no explanation for why this should be the case.[233]

The difficulties of determining Congress's preemptive intent based on vague, ambiguous, or omitted terms and concepts is perhaps more proble-

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229 *See Geier*, 529 U.S. at 884-85. Justice Breyer's choice comports with Professor Nelson's "logical-contradiction" test, which instructs courts to "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." Nelson, *supra* note 14, at 234.

230 *See Geier*, 529 U.S. at 884-85.

231 *Id.* at 884 (alteration in original) (citations omitted) (quoting English v. Gen. Elec. Co., 496 U.S. 72, 78 (1990)).

232 *See, e.g.*, Wyeth v. Levine, 129 S. Ct. 1187, 1228 (2009) (Alito, J., dissenting) (arguing that the traditional presumption against preempting state law should not be applied in conflict preemption cases).

233 *See Geier*, 529 U.S. at 871-72 (suggesting that a federal law that tolerates state law actions that conflict with its principles would "permit[] that law to defeat its own objectives").

matic in implied preemption cases which, by definition, provide no preemptive text at all. In his *Wyeth* concurrence, Justice Thomas singled out the Court's seminal decision in *Hines* as emblematic of the problems endemic to the Court's implied preemption jurisprudence.[234] First noting that the Court in that case "looked far beyond the relevant federal statutory text and instead embarked on its own freeranging speculation about what the purposes of the federal law must have been,"[235] Justice Thomas detailed the evidence on which the Court ultimately relied in reaching its conclusion:

> In addition to the meaning of the relevant federal text, the Court attempted to discern "[t]he nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law." To do so, the Court looked in part to public sentiment, noting that "[o]pposition to laws . . . singling out aliens as particularly dangerous and undesirable groups, is deep-seated in this country." The Court also relied on statements by particular Members of Congress and on congressional inaction, finding it pertinent that numerous bills with requirements similar to Pennsylvania's law had failed to garner enough votes in Congress to become law. Concluding that these sources revealed a federal purpose to "protect the personal liberties of law-abiding aliens through one uniform national registration system," the Court held that the Pennsylvania law was pre-empted.[236]

Justice Thomas concluded with some consternation that in its implied preemption decisions, "the Court has pre-empted state law based on its interpretation of broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law."[237]

Justice Thomas agreed with the portion of Justice Stevens's *Geier* dissent in which he criticized the Court for its failure to search for Congress's intent.[238] His solution to the problem, however, is far more radical. He is inherently suspicious of implied preemption because, in his view, it "encourages an overly expansive reading of statutory text."[239] In other words, implied preemption analysis leads the Court to impute to Congress purposes and objectives it may not have had, or may have had in addition to several others it considered to be more important. Deciding whether to preempt state law by picking and choosing which purposes and objectives Congress may have had is tantamount to assuming that "every policy seemingly consistent with federal statutory text has necessarily been authorized by Con-

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234 *Wyeth*, 129 S. Ct. at 1211-12 (Thomas, J., concurring).

235 *Id*. at 1212.

236 *Id.* (alterations in original) (citations omitted) (quoting Hines v. Davidowitz, 312 U.S. 52, 70, 74 (1941)).

237 *Id.* at 1207; *see also id.* at 1211 ("This Court's entire body of 'purposes and objectives' preemption jurisprudence is inherently flawed. The cases improperly rely on legislative history, broad atextual notions of congressional purpose, and even congressional inaction in order to pre-empt state law.").

238 *See id.* at 1215 (citing *Geier*, 529 U.S. at 904 (Stevens, J., dissenting)).

239 *Id.*

gress and warrants pre-emptive effect."[240] According to Justice Thomas, this is policymaking, not judging.

However, Justice Thomas still has faith that unclear or tangentially related statutory text can provide the answers sought by the preemption inquiry. The basis for this appears to be his prioritization of federalism concerns and states' rights over the corrective-justice concerns driving Justice Stevens's majority opinion (joined by Justices Kennedy, Souter, Ginsburg, and Breyer)[241] and the regulatory-efficiency considerations driving Justice Alito's dissent (joined by Chief Justice Roberts and Justice Scalia).[242] To Justice Thomas, limiting the evidence of congressional intent to statutory text cabins the Court's authority vis-à-vis both Congress and the states. Congress can only act constitutionally pursuant to the Constitution's bicameralism and presentment clauses.[243] The legislation produced pursuant to those clauses is the only product of congressional effort to which the Constitution gives the force of law, thus limiting Congress to its enumerated powers under Article I.[244] Extratextual interpretation of the type invited by implied preemption analysis generally, and obstacle preemption analysis specifically, allows courts to expand the legislative authority of Congress beyond its constitutional limits.[245] The necessary result, according to Justice Thomas, is an unconstitutional diminution in state sovereign authority.[246] Adhering to the federalism judgments made by Congress—which to Justice Thomas should be the primary concern of the preemption inquiry—therefore requires a strictly textualist approach to statutory interpretation.[247]

As already described, however, it is implausible to impute to Congress a preemptive intent gleaned from ambiguous statutory pronouncements.[248] It is that much more implausible to do so when those statutory pronouncements do not directly address preemption. Justice Thomas appears to recognize that the problem can be avoided altogether by foregoing any attempts to determine congressional intent. If framed narrowly, the preemption question that Justice Thomas would have the Court ask is not what Congress intended, but whether there is in fact a conflict between the re-

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240 *Wyeth*, 129 S. Ct. at 1216 (Thomas, J., concurring).

241 *See id.* at 1194 (majority opinion) (framing the core issue in the case as whether Wyeth had a duty to provide "an adequate warning about the risks of the IV-push method" to administer Phenergan).

242 *See id.* at 1218 (Alito, J., dissenting) (framing the core issue in the case as "whether a state tort jury can countermand the FDA's considered judgment that Phenergan's FDA-mandated warning label renders its intravenous (IV) use 'safe.'").

243 *Id.* at 1206-07 (Thomas, J., concurring) (citing INS v. Chadha, 462 U.S. 919, 945-46 (1983)).

244 *Id.* at 1207.

245 *Id.*

246 *Wyeth*, 129 S. Ct. at 1217.

247 For an insightful discussion of Justice Thomas's preemption jurisprudence, see generally Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 N.Y.U. J. L. & LIBERTY 63 (2010).

248 *See supra* Part I.

quirements of federal and state law. This inquiry focuses on whether state and federal authorities give contradictory commands, "[f]or example, if federal law gives an individual the right to engage in certain behavior that state law prohibits."[249] Under such an understanding of the conflict preemption test, it makes little difference what Congress may have actually intended; either state and federal laws conflict, or they do not.

As indicated by the fact that no other Justice signed on to his opinion, however, it seems unlikely that Justice Thomas's colleagues will soon follow the path he has suggested. It therefore appears that the Court's preemption jurisprudence will continue to represent itself as the search for congressional intent, while in reality, such a search is futile in the lion's share of preemption cases. Indeed, even if the Court were to adopt Justice Thomas's framework, there remains a substantial likelihood that the expansion of congressional purposes and the concomitant diminution of state sovereign authority that he rejects would continue. Under either the existing analytical framework or the one Justice Thomas proposes, the Court would remain in the position of policing its own interpretations of statutory text. As explained in the following Part, this leaves the Court to both create and implement federal preemption policy.

II. MODELING THE INSTITUTIONAL CONTROL OF PREEMPTION POLICY

The institutional implications of separating the Court's rhetoric from its practices are largely overlooked in the expanding preemption literature. In its rhetoric, the Court insistently disavows any role in formulating federal preemption policy. In practice, the Court is heavily involved in formulating those policies. This schism indicates that there is a critical step that the Court neglects to discuss when analyzing preemption problems. That step is the act of translating the evidence of Congress's preemption policy choices (assuming that it has actually made any) into workable rules to be applied to the facts of particular cases. By deemphasizing its role in preemption policy formation, the Court also glosses over the fact that the power to formulate rules is axiomatic to the power to choose policies.[250] Stated diffe-

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249 *Wyeth*, 129 S. Ct. at 1209 (Thomas, J., concurring). What Justice Thomas suggests is in essence identical to the proposition advanced by Professor Nelson, at which Justice Breyer hinted in *Geier* and Justice Scalia hinted in *Riegel*. *See supra* notes 95, 229-32 and accompanying text. As already indicated, Justice Breyer does not seem as willing to abandon the pursuit of congressional intent as Justice Thomas, which may explain why he does not join Justice Thomas's concurrence.

250 *See* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 74 (1983) (describing the related concept of "congruence" in the administrative regulations context); Jamelle C. Sharpe, *Beyond Borders: Disassembling the State-Based Model of Federal Forum Fairness*, 30 CARDOZO L. REV. 2897, 2921 (2009) (describing the concept of rule "conformity," which measures whether rules "lead to the [protections] desired by the rule-maker *ex ante*," and "whether they fit with underlying norms" held by the rule-maker).

rently, it matters which institution controls both the means and the ends of preemption policy. Were Congress to have control of the latter but not the former, the judiciary could fashion rules that do not conform to congressional intent. The Court could extrapolate away from the specific means chosen by Congress, however clear or comprehensive, and in so doing create and implement ends to which Congress never agreed.[251] Alternatively, the Court could be forced to guess at Congress's policy choices and craft implementing rules where Congress has left operative statutory preemption terms vague, ambiguous, or omitted.

Several instances of the problem have already been described. A congressional directive to preserve state law—like the saving clauses at issue in *Geier* and *Myrick*—can be nullified if the Court formulates implementing rules that prioritize different policy choices.[252] A congressional directive to preempt state law—like the express preemption clause at issue in *Cipollone*—can also be nullified in the same manner.[253] The absence of clear congressional directives—the situation in implied preemption cases—furnishes additional opportunities for the Court to identify congressional policy choices and to formulate rules for their implementation.[254] In the end, ignoring the effect that policy implementation has on policy formation perpetuates the misleading notion of institutional singularity: the idea that Congress is capable of being solely responsible for the shape that its preemption policies ultimately take.

The institutional singularity propagated by the Court's preemption rhetoric is belied by the institutional singularity propagated by its preemption practices. The Court's preemption decisions reveal a propensity to control both the means and the ends of preemption policymaking.[255] As previously described, the Court's assertions of control sometimes appear to be a product of necessity; in the absence of clear guidance from Congress, the Court

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251 Professor Manning has stated the point succinctly in describing the Supreme Court's recent shift away from purposivism and toward textualism:

> [S]hifting the level of generality of a statute from its implemental details to its purpose disregards the reality that enacted laws, by and large, represent the end-product of compromises which may not fully capture the background purpose that motivated the enactment.

See Manning, *supra* note 39, at 2014.

252 *Compare* Geier v. Am. Honda Motor Co., 529 U.S. 861, 886 (2000) (holding that a common law claim was preempted despite the presence of a saving clause), *with* Freightliner Corp. v. Myrick, 514 U.S. 280, 289-90 (1995) (holding that a common law claim was not preempted).

253 *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 505, 530-31 (1992) (declining to preempt all state common law claims against cigarette maker despite the conclusion that the express preemption clause in the Public Health Cigarette Act of 1969 "easily encompasses obligations that take the form of common-law rules").

254 *See Wyeth*, 129 S. Ct. at 1207 (Thomas, J., concurring) ("[T]he Court has pre-empted state law based on its interpretation of broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not contained within the text of federal law.").

255 *See supra* Part I.A.

is left essentially to its own devices.[256] At other times, the Court appears to be overreaching; even when Congress provides specific textual indications of its chosen means and ends in the form of express preemption and saving clauses, the Court nevertheless conducts implied preemption analyses with clearly contradictory results.[257] As a more general matter, the Court routinely positions itself to identify both the means and the ends of preemption policy, while simultaneously denying that it is responsible for either.

This Part divides the Court's duality of institutional control over preemption policy into two descriptive models—the Legislative Primacy Model and the Judicial Primacy Model. Each model describes a different level of institutional control over preemption policy exercised by the Court. Moreover, there is a temporal aspect to the models that is critical in accurately describing which institution shapes preemption policy. An institution with initial policy control can formulate preemption policy without securing the permission of a coordinate branch of government, but another institution can later supersede such formulations. By contrast, final policy control involves the authority to supersede the judgments of a coordinate branch of government in the event of disagreements regarding the substance of the policy, where no other branch is in a position to supersede that authority. Under the Legislative Primacy Model, Congress possesses final policy control, though the Court can exercise initial control. Under the Judicial Primacy Model, Congress will frequently exercise initial control, but the Court will exercise final control.

To illustrate the distinctions posed by the Legislative Primacy and Judicial Primacy Models, this Part assumes that the judicial-rulemaking tools employed by the Court to decide preemption cases differ depending on which model of preemption policy control it adopts. Tools of statutory interpretation would accordingly be employed where the Court adopts the Legislative Primacy Model and actually defers to Congress's policy preferences. By contrast, one would expect to see the Court engage in federal common lawmaking where it is implementing its own policy judgments under the Judicial Primacy Model.

A. *Common Lawmaking Versus Statutory Interpretation as Tools of Judicial Lawmaking*

The intent of the primary preemption-policymaking institution should in large measure drive the formation of the legal rules that the Court uses to implement the chosen policy. One would therefore expect the method of rule creation chosen by the Court to match the institution that controls the formation of the underlying policies. Whether the Court employs tools of

256 *See supra* Part I.A.

257 *See supra* Part I.C.

common lawmaking or tools of statutory interpretation is important in this regard because each assumes the policy-forming primacy of a different institutional actor.[258] Analyzing the tools of judicial rulemaking employed by the Court when resolving preemption questions therefore provides evidence of whether the Court has assumed a passive or dominant role in fashioning preemption policy.

Using the Court's primary tools of judicial lawmaking—common lawmaking and statutory interpretation—as evidence of its operative decisional model first requires some understanding of what differentiates them. Legal theorists have largely accepted the difficulty of setting clear lines of demarcation between the two in close cases;[259] determining where legislative rulemaking ends and judicial rulemaking begins often involves more art than science. For that reason, the Court's methods of rulemaking are frequently conceptualized as a continuum that estimates the interpretive distance between judicially created rules and the intent underlying touchstone statutory language.[260] At one end of the continuum are statutory mandates where congressional intent is clear and the salient definitions are stable—little interpretive effort need be expended by the Court in applying them.[261] By logical or experiential force, the intent behind these rules and the meaning of their constitutive terms are accepted as settled and as necessarily emanating from expressly stated statutory directives.[262] The interpreting court has little hand in construing them and hence little opportunity to influence or alter the policy choices underlying them.

Interpretive proximity to baseline statutory text need not be based solely on the substantive similarities between congressionally and judicially created rules. A specific delegation of lawmaking authority from Congress to the Court can also be considered an instance of statutory interpretation, though at first blush, it would otherwise appear to be common lawmak-

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258 *See* discussion *infra* Part II.B-C.

259 *See, e.g.*, RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 705 (5th ed. 2003) (observing that the distinction between statutory interpretation and federal common lawmaking "is not a clear-cut one").

260 *See, e.g.*, Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 411-13 (1989) (discussing a range of theories that describe the Court's methods of statutory interpretation).

261 One can conceive of a variety of methods for measuring the stability of statutory meaning: low rates of litigation over particular interpretive questions; low appellate reversal rates of trial court interpretations; judicial citations to treatise descriptions ("black letter law"); citations of a stable set of cases for statutory meaning by numerous judicial jurisdictions; similar results in factually similar cases; or the number of certiorari petitions requesting Supreme Court settlement of an interpretive question. *See, e.g.*, Lee Petherbridge & R. Polk Wagner, *The Federal Circuit and Patentability: An Empirical Assessment of the Law of Obviousness*, 85 TEX. L. REV. 2051, 2076-91 (2007) (assessing stability and clarity of the obviousness doctrine in patent law by measuring frequency of Federal Circuit reversals of lower court decisions).

262 *Cf.* Sharpe, *supra* note 250, at 2921 (observing that "uniformity [of a rule] is reduced by significant potential disagreement over the meaning of [its] language" among those who are affected by it).

ing.[263] Again, the salient factor is whether the policy choice underlying the rule can confidently be traced to Congress or to the Court. A commonly cited example in this regard is Rule 501 of the Federal Rules of Evidence, which explicitly provides that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[264] While such rules exist by virtue of judicial decision-making processes, the greater institutional authority that makes the rules binding—which would presumably also encompass the lesser power to create the rules—rests squarely with federal legislative processes. Even though the rules of privilege adopted by Rule 501 come from the common law, their binding effect in the federal courts comes from their indirect ratification by Congress.[265]

Further along the continuum are so-called "gap-filling" rules and sources, where courts, by necessity, fill the interstices left in otherwise comprehensive legislative schemes.[266] Examples include "construing and applying vague statutory terms, supplying procedural rules that have been omitted from [a] statute, or determining the viability and characteristics of claims and defenses that may be asserted when the elements of a federal statutory cause of action have been set out in general terms by Congress."[267] The Court employs several well-known interpretive tools for dealing with such issues, including reliance on canons of statutory interpretation, legislative history, dictionaries, or judicial understandings of what constituted the plain meaning of the statute at the time it was enacted.[268]

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263 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4516 (2d ed. 1996).

264 FED. R. EVID. 501; *see also* Merrill, *supra* note 10, at 42 & n.183 (observing that Congress enacted the existing rule "in lieu of a provision, proposed by the Advisory Committee and approved by the Supreme Court, enumerating specific privileges"); Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1642 n.15 (2008) (noting that Rule 501 "goes on to *forbid* federal common lawmaking . . . 'in civil actions and proceedings, with respect to an element of a claim or defense as to which State law provides the rule of decision'" (quoting FED. R. EVID. 501)).

265 Trammel v. United States, 445 U.S. 40, 47 (1980) (noting that Congress designed Rule 501 to be flexible, thereby permitting the courts, not the legislature, to develop an appropriate rule for each case).

266 If some institution did not perform this role, the federal government would likely be crippled with dysfunction. *See* D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 470 (1942) (Jackson, J., concurring) ("Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes . . . ."), *superseded by statute*, 12 U.S.C. § 1823(e) (1950); *see also* Lemos, *supra* note 198**,** at 428 ("When Congress enacts a statute, it inevitably resolves some policy disputes and leaves others open. All legislation leaves some residuum of policymaking power to the institution—court or agency—charged with administering it." (footnote omitted)).

267 *See* WRIGHT, MILLER & COOPER, *supra* note 263 (footnotes omitted).

268 *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739-48 (1989) (considering first the plain language of the statute, then judicial understanding of the statute's interpretation, and then the

Gap-filling rules and sources are perhaps the most difficult to categorize, as it is often arguable whether the intent that animates them originates with Congress or with the Court.[269] On the one hand, such rules are clearly tied to statutory text; the Court creates rules that are supposed to meld with and advance the policy choices already given the force of law by legislative processes.[270] On the other hand, there are presumably multiple ways in which the policy ends underlying congressional legislation can be supported and advanced, and it is the Court that chooses from among those alternatives.[271] Ultimately, however, the Court does not necessarily have its choice of policy options; the range of alternatives is (or at least should be) shaped by congressional decisions. For example, even when the form of the gap-filling rule crafted by the Court is governed by a judicially created canon of statutory interpretation, the stated purpose of relying on that canon is to ensure fidelity to congressional will.[272]

Clearly counterpoised to statutory interpretation on the judicial-rulemaking continuum is federal common law. To be sure, federal common law is a notoriously difficult concept to define with anything approaching mathematical precision.[273] At a minimum, it includes wholesale judicial lawmaking, where the Court fashions a substantive rule in an area of regulation based on, for instance, tradition, necessity, or constitutional implication.[274] For present purposes, it can be usefully understood in reference to

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statute's legislative history); Watt v. Alaska, 451 U.S. 259, 265-67 (1981) (considering first the language of the statute, then statutory canons); *see also* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 323-28 (1994) (listing canons of statutory interpretation frequently employed by the Rehnquist Court).

269 *See* WRIGHT, MILLER & COOPER, *supra* note 263.

270 *See Reid*, 490 U.S. at 748 (giving deference to a statute's legislative history, which indicated that Congress compromised between opposing sides' policy concerns).

271 ESKRIDGE, *supra* note 268, at 49.

272 To be clear, this is a descriptive assertion based on judicial accounts of what courts try to accomplish when filling the gaps left in Congress's statutory schemes. As asserted by this Article, one should question whether courts actually follow Congress's intent even when employing canons of statutory interpretation. *Cf.* Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203, 1205 (1990) (arguing that canons of statutory interpretation are based on values that may significantly deviate from or flatly contradict legislative intent). One could also reasonably question whether following the intent of the enacting Congress (either alone or at all) is normatively desirable, though doing so is largely outside the scope of the current discussion. *See, e.g.*, ESKRIDGE, *supra* note 268, at 57 (advocating statutory interpretation that takes account of evolving social norms and current legislative understandings).

273 "Categorization always is a risky business, and this is particularly true in the domain of federal common law. There is no platonic essence of federal common law with concomitantly obvious conceptual categories that are easy to apply." WRIGHT, MILLER & COOPER, *supra* note 263, § 4514.

274 *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 504-06, 512 (1988) (fashioning common law "military contractor defense" to claims brought under Virginia products liability law); Carlson v. Green, 446 U.S. 14, 18-23 (1980) (concluding that a court may award damages arising from violations of the Eighth Amendment's Cruel and Unusual Punishment Clause); Davis v. Passman, 442 U.S. 228, 244-48 (1979) (finding damages an appropriate remedy for violations of the Fifth Amendment's Due

federal statutory language and thus described as "rules of decision adopted and applied by federal courts that have the force and effect of positive federal law, but 'whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional command.'"[275] Other formulations of the definition similarly focus on this separation between the judicially created rules and congressional policy choices.[276]

Whatever the specific formulation one adopts, most definitions of federal common law accept the premise that the Court has some measure of initial policymaking authority because, under certain circumstances, it can fashion positive rules governing primary conduct absent any explicit input from Congress.[277] However, none of them would grant the Court final authority with respect to either the policy judgments that inform legal rules or the ultimate shape of those rules.[278] In fact, the Court itself has concluded that Congress may have the authority to displace federal common law even in areas where the Constitution has granted the Court original jurisdiction over the subject matter.[279] Whatever the inherent difficulties in setting de-

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Process Clause); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395-97 (1971) (inferring directly from the language of the Fourth Amendment a private cause of action for money damages against federal law enforcement officials who violate individual constitutional rights under color of federal authority). Although the Court has more recently refused to imply new federal causes of action where Congress has seen fit not to provide them and has indicated that the instances in which it will do so in the future will be exceedingly rare, it has by no means disavowed its authority to create such remedies. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001) (describing the narrow circumstances in which the creation of implied federal common law damages actions is appropriate and stating that "[o]ur authority to imply a new constitutional tort, not expressly authorized by statute, is anchored in our general jurisdiction to decide all cases 'arising under the Constitution, laws, or treaties of the United States.'" (quoting 28 U.S.C. § 1331 (2000))).

275 Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1247 (1996) (quoting PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 863 (3d ed. 1988)).

276 *See, e.g.*, Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986) (defining federal common law as "any rule of federal law created by a court . . . *when the substance of that rule is not clearly suggested by federal enactments*—constitutional or congressional"); *cf.* Merrill, *supra* note 10, at 5 (defining federal common law more broadly as "*any* federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of 'interpretation' in either a conventional or an unconventional sense").

277 *See Boyle*, 487 U.S. at 504; Dinh, *supra* note 4, at 2108 (observing that federal courts are empowered to create common law where state law conflicts with federal interests); Young, *supra* note 264, at 1641 (asserting that the authority to create federal common law can "depend[] on a conflict between state law and federal policy").

278 *See* City of Milwaukee v. Illinois, 451 U.S. 304, 312-13 (1981); Young, *supra* note 264, at 1645.

279 *See City of Milwaukee*, 451 U.S. at 314 ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."); WRIGHT, MILLER & COOPER, *supra* note 263, § 4514 ("Congress can override . . . federal common law.").

finitive lines of demarcation, it is clear that the absence of congressional intent in a judicially created rule denotes an instance of federal common lawmaking. The salient characteristic distinguishing federal common law from statutory interpretation is its grounding in judicially identified or originated factors, values, or preferences.[280]

Accordingly, where the Court assumes final policymaking authority, it would employ common lawmaking techniques and thus wield a measure of final policymaking authority that it currently lacks under the plain letter of any of its preemption formulations. The Court has described all of these as exercises in statutory interpretation. Federal common lawmaking of preemption policy would be forbidden were the Court consciously deferring to congressional policy choices; doing otherwise would violate the lodestar principle that congressional purposes are the touchstone of all preemption inquiries.

B. *The Legislative Primacy Model*

Under the Legislative Primacy Model, Congress is singularly and exclusively responsible for the ultimate policy choices that inform decisions to preempt state law. The Court has no authority to function as the ultimate authority for preemption policymaking. Thus, the model would predict that the decision to prioritize corrective justice over regulatory efficiency in *Wyeth* and *Sprietsma*, to do the opposite in *Geier* and *Riegel*, or to prioritize federalism over either of those considerations in *Bates v. Dow Agrosciences LLC*[281] is directly traceable to Congress through tools of statutory interpretation. That being said, the Court does have a first-mover opportunity to create rules reflecting its own policy preferences that are later subject to legislative ratification or rejection. Examples include Justice Scalia's definition of the term "requirement" in *Riegel*[282] or Justice Breyer's intimation in *Geier* that some principle is needed to resolve actual conflicts between federal and state regulatory requirements.[283] While the Court in both instances made an independent interpretive decision without explicit guidance from Congress, neither decision would stand under the Legislative Primacy Model were Congress to pass legislation overriding them.

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280 *See* D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) ("Within [the limits of the federal Constitution and statutes], federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present."), *superseded by statute*, 12 U.S.C. § 1823(e) (1950).

281 544 U.S. 431 (2005). While prioritizing either corrective-justice or federalism considerations under the facts in *Bates* would have resulted in the preservation of state tort law, Justice Stevens specifically subordinated corrective justice. *Id.* at 449-50 ("The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against pre-emption.").

282 *See supra* Part I.B.1.

283 *See supra* Part I.B.2.

The twin principles developed by the Court to guide its preemption analysis further illustrate the essentially unitary role that the Legislative Primacy Model ascribes to Congress in determining when state tort laws should yield to federal interests. The Court almost invariably begins its preemption analysis by reminding us that "the purpose of Congress is the ultimate touchstone in every pre-emption case."[284] It also observes (though less frequently) that "[i]n all pre-emption cases, . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[285] While this second principle refers to state police powers, it operates as little more than a choice-of-law rule when Congress has intimated no superseding federal interest; it instructs those who are affected by Congress's preemption power (e.g., litigants, lawyers, administrative agencies, and the courts tasked with resolving their disputes) to look to state law for the rule of decision.[286] As a matter of institutional selection, however, it clearly privileges the decisions made by Congress. State law is effective unless Congress has said otherwise. Moreover, no explicit provision is made for the Court to interrogate or assess the soundness of that intent, let alone substitute its own views regarding optimal preemption policy for those of Congress.[287]

Other evidence of the Court's outward adoption of the Legislative Primacy Model is littered throughout its preemption decisions. The Court in *Riegel* insistently disavowed any judicially originated policy judgments in concluding that the petitioner's New York state products liability claim was preempted by the MDA's express preemption clause.[288] The Court also declared that it based its understanding of Congress's purposes entirely on the text of the preemption clause itself, and not on any external sources which, if relied upon, would presumably raise suspicions of judicial policymaking.[289] Even though the Court in actuality relied on both the text of the MDA and on extratextual interpretive tools,[290] these tools purported to be neutral with respect to policy choices. Since the tools originated from neither the Court nor Congress, the apparent implication to be drawn from their use was that they were objective sources of information.

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284 Wyeth v. Levine, 129 S. Ct. 1187, 1194 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted).

285 *Id.* at 1194-95 (first alteration in original) (quoting *Lohr*, 518 U.S. at 485).

286 *Cf.* BATOR ET AL., *supra* note 275, at 790-92 (noting that applying state law in federal courts might lead to conflict, but concluding that state law is nonetheless controlling because a single rule of law should be imposed on a litigant in a federal diversity suit, as is imposed on a litigant in state court).

287 *Cf.* Merrill, *supra* note 5, at 742 ("[N]owhere does the Court's [preemption] doctrine invite litigants or judges to consider pragmatic arguments for or against federal uniformity or state diversity, which many commentators believe are of paramount importance in resolving displacement decisions.").

288 *See supra* Part I.B.1.

289 *See supra* Part I.B.1.

290 *See supra* note 103 and accompanying text.

One can imagine a host of compelling reasons for the Court's adoption of the Legislative Primacy Model. These signals of judicial policymaking passivity may be calculated to avoid the unwanted attention of legislators or of interested parties who would bring the Court's perceived interpretive transgressions to the legislature's attention.[291] An opinion based on questionable interpretive evidence—"questionable" in this narrow context meaning extralegislative—could be regarded as unusual, thereby increasing the likelihood that it will be subjected to legislative scrutiny and overturned.[292] The underlying intuition here is that Congress would be less likely to scrutinize the Court's work product if the Court makes clear that it is scrupulously trying to follow Congress's lead. This intuition may, of course, be wrong; the perception that a substantive result is deviant or politically unpopular may overshadow any contrary signaling effects generated by the Court's rhetorical framing.[293] Nevertheless, it appears that the Court has settled on this essentially procedural signaling mechanism, given the fact that it must decide the cases before it and that it must make some policy judgments to render those decisions.

Indeed, both the "liberal" and "conservative" elements on the Court[294] cloak their decisions in judicial passivity. One means of doing so is to ascribe to Congress a policy choice that, stated bluntly, simply makes sense.[295] In *Geier*, Justice Breyer framed his decision to preempt state tort law because of a perceived conflict with the NTMVSA and FMVSS 208 as "necessary" and clearly the result that Congress would have wanted.[296] Justice Scalia in *Riegel* framed his definition of "requirement" in the MDA as necessary to informing Congress of how the Court will construe the terms it uses.[297] Justice Stevens in *Sprietsma* concluded, without elaboration, that it would be "perfectly rational" for Congress to care more about the corrective-justice function of state tort law than the centralized regulatory-efficiency function of uniform federal boat safety regulations.[298] The underlying assumption in each instance is that Congress always has the last word; it can reject at its leisure these nonempirical guesses at its true motives.

Accordingly, the Legislative Primacy Model aligns with how the Court describes its role in its preemption decisions. In the absence of a clear intent on the part of Congress to preempt state tort law, the Legislative Primacy Model predicts that the Court will only accept those federal interests

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291 *See* Volokh, *supra* note 66, at 783.

292 *See id.* ("Anything marking an opinion as unusual may increase the chance that it will come to someone's attention, a necessary condition for its reversal or override.").

293 *Cf. id.* (describing the argument that textualist approaches to statutory interpretation may result in more congressional overrides than nontextualist approaches).

294 To the extent that those categorizations are meaningful.

295 *See* Volokh, *supra* note 66, at 784.

296 *See supra* Part I.B.1.

297 *See supra* Part I.B.1.

298 *See supra* Part I.B.1.

expressly or impliedly identified by Congress when assessing preemptive conflicts with state laws. Thus, the only task left to the Court under the Legislative Primacy Model is to determine whether the state laws or actions in question fall within the ambit of Congress's preemptive purposes. Fundamental policy choices relating to federalism, corrective justice, or regulatory efficiency have presumably been made prior to any judicial involvement in the matter. Moreover, the Court is in no position to ratify or reject those choices.

The issue on which the justices appear to disagree most is not whether to write their opinions in such a way as to convey the Court's institutional subservience to Congress. Rather, their central point of disagreement is on which tools of judicial lawmaking signal that passivity most convincingly.[299] For Justices Scalia, Thomas, and the other textualists on the Court, those tools seem to be largely limited to the text, as well as the purportedly neutral (i.e., nongovernmental) sources and rules of thumb that purport to propound that text.[300] For the purposivists on the Court such as Justices Stevens, Ginsburg, and Breyer, the tools of textualism are at most a starting point; extratextual materials, including legislative sources not found in enacted statutes, must be consulted in order to understand the preemptive effect that Congress intended its laws to have.[301]

It is in this argument over rhetorical tools that the core problem of the Legislative Primacy Model becomes clearest. The Model conflates policy creation with policy implementation. Stated slightly differently, it fails to distinguish between the ends of putatively preemptive legislation and the means adopted to meet those ends. It assumes that simply identifying a particular policy goal adopted by Congress—promotion of federalism, for example—is tantamount to giving real-world effect to that goal. This is not the case. In focusing so intently on what Congress intended to accomplish, the Legislative Primacy Model overlooks the operational consequences of the ambiguities, vagaries, and omissions that riddle putatively preemptive legislation. The Court must *translate* the laws enacted by Congress into workable rules governing primary conduct because in many (though not all) cases Congress has failed to do so. That act of translation frequently shapes the policy choices that prompted it. In addition, the Court sometimes oversteps its bounds and ignores the clear preemptive intent of Congress as expressed in statutory text, as evidenced by its conclusions in *Geier* and *Myrick*.[302]

As a consequence, simply pointing to congressional purposes as the "touchstone" of the preemption analysis and emphasizing that Congress—and not the Court—controls preemption policymaking misses at least half

299 *See supra* Part I.C.

300 *See supra* Part II.C.

301 *See supra* Part II.C.

302 *See supra* Part I.B.2.

of the equation. Without some means for controlling the Court's methods of translation—either substantively through more complete and explicit statutory commands or procedurally through different allocations of institutional responsibility—the Legislative Primacy Model cannot provide a compelling description of what the Court is actually doing in its preemption jurisprudence. In sum, it is descriptively false.

C. *The Judicial Primacy Model*

Whereas the Legislative Primacy Model is descriptively false, the Judicial Primacy Model is descriptively accurate but operationally problematic. Under the Judicial Primacy Model, the Court may cede initial policymaking control to Congress, but it takes final control for itself. In other words, the preemption decision-making process is defined by judicial selection of policy prerogatives through judicial creation and application of the legal rules implementing those prerogatives. The Judicial Primacy Model accordingly invests the judiciary with significant latitude in formulating the criteria for preemption, which is essentially the power to determine what primary conduct (e.g., the creation of tort law by state legislatures and common law courts) will be subject to regulation through preemption. Congress's preemptive intent, whether express or implied, would be meaningful only to the extent that it persuades the judiciary as to the wisdom of a particular regulatory choice. Any disagreements on that score would ultimately be resolved in favor of judicial policy preferences. Under the Judicial Primacy Model, the establishment of Article III jurisdiction, as opposed to the legitimate enactment of a federal statute, is sufficient for the Court to identify the federal interest with which state laws and actions conflict and to displace those state laws and actions to whatever extent the Court deems necessary. Moreover, the judiciary would not need clear congressional action as a basis for preemptive decision making.[303]

The Court's decision in *Boyle v. United Technologies Corp.*[304] provides one of the clearest and more recent examples of the Court's adoption of the Judicial Primacy Model. *Boyle* involved the death of a United States Marine pilot whose helicopter crashed during a routine training exercise off of the Virginia coast.[305] While Boyle survived the impact, he drowned when

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303 The Judicial Primacy Model is consistent with Professor Louise Weinberg's expansive take on the power of federal courts to create law. *See* Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 833 (1989) ("The power and duty to make pure federal common law, as the national interest may require, are ultimately lodged in the Supreme Court of the United States."). *But see* FALLON ET AL., *supra* note 259, at 697 (asserting that "[f]ew decisions or commentators support Weinberg's very broad view" of federal judicial power to independently create rules governing primary conduct).

304 487 U.S. 500 (1988).

305 *Id.* at 502.

he was unable to open the helicopter escape hatch.[306] Invoking Virginia products liability law, Boyle's father sued United Technologies, which built the helicopter according to the federal government's specifications.[307] The Court vacated and remanded the case with instructions for the lower court to determine if any reasonable jury could find that the company was not immune from state tort suits, essentially dismissing the case.[308] Writing for the five-member majority, Justice Scalia openly acknowledged that "the absence of legislation specifically immunizing Government contractors from liability for design defects."[309] He nevertheless identified the procurement of military equipment as an area of "uniquely federal interest[]."[310] The obligations accepted by United Technologies under its government contract reflected this interest and "significant[ly] conflict[ed]" with the duties underlying Virginia products liability law.[311]

Three aspects of the *Boyle* decision are notable for present purposes. First, and as already noted, Congress had taken no legislative action to provide government contractors with the immunity created by the Court.[312] In fact, Justice Brennan noted in his dissent that Congress had previously declined to do so on several occasions.[313] Second, the Court independently determined the factors indicating the presence or absence of a uniquely federal interest.[314] It also independently determined whether that interest created a sufficiently troublesome conflict to warrant the displacement of state law, though the Court was silent as to how it actually determined the significance of that conflict.[315] Third, the Court looked to indications of congressional intent only to support the conclusion it had already reached regarding the significance of the conflict between Virginia tort law and United Technologies's contractual obligations.[316] Taken together, these fea-

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306 *Id*.

307 *Id*.

308 *Id*. at 514.

309 *Id*. at 504.

310 *Boyle*, 487 U.S. at 504 (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)) (internal quotation marks omitted).

311 *Id*. at 507 (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 69 (1966)) (internal quotation marks omitted).

312 *See* Dinh, *supra* note 4, at 2108 (observing that *Boyle* illustrates that "state law can be displaced even without any legislative action whatsoever").

313 *Boyle*, 437 U.S. at 515 & n.1 (Brennan, J., dissenting) (asserting that "Congress, however, has remained silent—and conspicuously so, having resisted a sustained campaign by Government contractors to legislate for them some defense").

314 "[W]e have held that a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'" *Id*. at 504 (citation omitted) (quoting *Tex. Indus.*, 451 U.S. at 640).

315 *See id*. at 509.

316 *Id*. at 511.

tures exhibit core hallmarks of the independent policy judgments that define federal common lawmaking: sua sponte policy identification, independent selection of the factual triggers implicating that policy, and an assertion that alternative institutional views on the policy are at most persuasive, but not binding.

Several of the Court's more recent preemption decisions share these characteristics. In *Riegel*, it is difficult to separate Justice Scalia's selection of a definition for the term "requirement" in the MDA's express preemption clause from his conclusion that state tort law is preempted.[317] There was no discernable legislative action that necessarily counted state common law tort actions as requirements, which is why Justice Scalia relied on extratextual sources to do that work.[318] Similarly, the only justification that Justice Scalia appeared to provide for prioritizing regulatory-efficiency concerns over corrective-justice or federalism concerns was that doing otherwise would, in his judgment "make little sense."[319] Finally, Justice Scalia's majority opinion states that "[i]t is not our job to speculate upon congressional motives," though if the Court were to do so, those motives would support the conclusion that the Court had already reached.[320] The dissents authored by Justices Stevens and Ginsburg also exhibit features of federal common lawmaking. Each essentially began with an a priori prioritization of corrective-justice concerns and reasoned its way backwards from there.[321]

In *Myrick* and *Geier*, the Court resolved to independently assess whether state law should be preempted or preserved, despite its acknowledgement that Congress had already specifically expressed its preferences through duly enacted legislative text, as well as the fact that it had previously branded such analysis unnecessary in *Cipollone*.[322] These were not instances requiring an exposition of the statutory text in order to understand the scope of congressional intent. Instead, the Court in these cases independently gave priority to what it perceived as the conflict between state law and federal prerogatives, despite the fact that Congress had said nothing about the significance of such conflicts to its regulatory agenda.[323] The point is made almost explicitly when Justice Breyer, writing for the majority in *Geier*, responded with unveiled incredulity to the argument that Congress

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317 *See* Riegel v. Medtronic, Inc., 552 U.S. 312, 329 (2008) (internal quotation marks omitted); *see also supra* notes 195-202 and accompanying text.

318 In fact, Justice Scalia does not conclude that state tort actions are requirements under the MDA because that conclusion is clearly right. Rather, he reaches that conclusion in large part because, in his estimation, it is not clearly wrong. *Riegel*, 552 U.S. at 324 ("In the present case, there is nothing to contradict this normal meaning [that common-law duties are requirements].").

319 *Id.* at 324-25.

320 *Id.* at 326.

321 *See id.* at 330-31 (Stevens, J., dissenting); *id.* at 333-35 (Ginsburg, J., dissenting).

322 *See supra* notes 211-13 and accompanying text.

323 Geier v. Am. Honda Motor Co., 529 U.S. 861, 868 (2000); Freightliner Corp. v Myrick, 514 U.S. 280, 287 (1995).

may choose not to preempt state law where it conflicts with federal law: "Why, in any event, would Congress *not* have wanted ordinary pre-emption principles to apply where an actual conflict with a federal objective is at stake? Some such principle is *needed*."[324] There are, of course, several reasons that Congress may have chosen to delay legislation on the matter or to forgo it entirely.[325] As the Court apparently did not consider or agree with any of these reasons, it stepped in to make the decision itself. Again, the critique is not that Justice Breyer's resolution of the problem was groundless or unprincipled.[326] Rather, the critique is that Congress did not provide his reasons.

In its implied preemption cases, the Court invokes its federal common lawmaking powers based entirely on its independent assessment of what would most effectively promote federal interests.[327] In conflict or obstacle preemption cases, this assessment involves whether state laws and actions undermine the efficacy of existing federal regulatory prerogatives.[328] In field preemption cases, it revolves around whether the form and the timing of substantive regulations should be solely a matter of federal decision making without interference from the states.[329] In neither instance does Congress give the Court explicit guidance on its policy preferences. Additionally, Congress does not provide any indication of how to infer its preference. The Court, entirely on its own initiative, nevertheless undertakes to identify when state laws and actions are candidates for preemption (i.e., by identifying a conflict between them) and to identify the factors that determine whether those conflicts are so problematic that state law should be displaced (i.e., by creating the rules governing the legal sufficiency of the perceived conflicts). Thus, the *Hines* Court came up with its own means of gauging the federal government's interest in regulating the presence of foreign nations within the country.[330] Similarly in *Geier*, *Myrick*, and *Wyeth*, the Court created and applied rules to determine whether and to what extent state laws conflicted with federal regulations.[331]

In addition to the independent, substantive policy decisions the Court makes in its preemption decisions, there are procedural and institutional conditions that allow it operate under the Judicial Primacy Model. The Court, as a whole, has become increasingly receptive to preemption defenses over the past two decades,[332] and the increasing frequency with which preemption is pled gives the Court more opportunities to shape

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324 *Geier*, 529 U.S. at 871 (emphases added).

325 *See* notes 60-62 and accompanying text.

326 *See supra* note 229 and accompanying text.

327 *See supra* Part I.B.2.

328 *See supra* Part I.B.1.

329 *See supra* Part I.B.2.

330 *See supra* note 236 and accompanying text.

331 *See supra* Part I.C.

332 *See supra* note 211.

preemption policy. Additionally, the Court enjoys almost complete control over its own docket through certiorari,[333] allowing it the institutional discretion to choose which preemption problems it wants to address. Finally, and most critically, "Congress almost never overrules the Supreme Court's preemption decisions."[334] Granted, one cannot conclusively infer that Congress has wanted to overturn the Court's preemption decisions in every instance where it has not done so. It would similarly be unreasonable, however, to assume that Congress has approved each of the Court's preemption decisions on which it has not acted.[335] Such a conclusion would be further undermined by the fact that "the broad trend in Congress since 1960 has been toward massive federal preemption of state law."[336] In any event, the Court's receptiveness to preemption defenses, its discretion in choosing the cases it hears, and the fact that Congress almost never overturns its preemption decisions all support the descriptive power of Judicial Primacy Model and its assumption of the Court's institutional singularity in the preemption context.

The limitations on the Court's decision-making prowess make the Judicial Primacy Model a poor choice for controlling preemption policy. As an initial matter, the values that substantially inform the preemption calculus—federalism, corrective justice, and regulatory efficiency—are incommensurate; there is no universal standard for weighing the importance of one against the others. From a federalism perspective, it is true that the Court has substantial experience in deciding cases that turn on the balance between federal and state authority.[337] In particular, the Court has far more

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333 *See* FALLON ET AL., *supra* note 259, at 53-54 (explaining that mandatory review by the Supreme Court has virtually been eliminated by congressional legislation). Despite its almost complete control over its docket, the Court must still manage the issues faced by the federal appellate and district courts, whose jurisdiction is mandatory rather than discretionary. In this managerial capacity, the Court may be compelled to address many questions that it would, in theory, be able to avoid through certiorari.

334 *See* Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604, 1612-13 (2007) (finding that only two of the Supreme Court's 127 preemption decisions over a twenty-year period were overturned by Congress). There are presumably some instances in which Congress was perfectly willing to allow the Court's decision to stand. However, the overall point is still valid even if instances in which the Court's and Congress's views on preemption do not coincide are substantially fewer than 127. The fact of the matter is that Congress does not currently provide a meaningful check on the Court's interpretive power.

335 *See* Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1 (1989) ("It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." (quoting Johnson v. Trans. Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting))), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008).

336 Note, *supra* note 334, at 1611.

337 *See generally* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 6-50 (2004) (detailing the Supreme Court's federalism jurisprudence in the forms of "strong sovereignty" and "weak autonomy" models (internal quotation marks omitted)).

expertise than Congress (or administrative agencies) in interpreting the requirements of constitutional text. As detailed earlier, however, it is debatable whether the Constitution provides the type of clear federalism maxims that aid judicial application.[338] Moreover, it is debatable whether the Constitution's text or history offers enough guidance to convincingly frame spheres of federal and state authority in close cases.[339] To the extent that the Constitution provides any clear lessons regarding federalism, it is that federalism is an ongoing process, which emphasizes the participation of state and federal interest groups.[340] It is not a set of formalistic principles definitively demarcating constitutionally mandated and stable fiefdoms of federal and state authority. This may partially explain why the presumption against preemption, which should give an express nod to the federal/state relationship, is so infrequently applied in the Court's preemption cases. In any case, conceding the Court's comparative advantage in solving the federalism part of the preemption equation does not also concede the normative superiority of the Judicial Primacy Model. At most, it indicates that there may be aspects of the preemption-policymaking decision over which Congress does not possess primary control and hence has no power to delegate. Congress may have unfettered authority to define the factors of corrective justice and regulatory efficiency, but the Court has unfettered authority to define federalism. Once the Court has done so, however, it does not necessarily follow that it must also have the final say as to whether federalism considerations outweigh competing preemption policy concerns. That judgment, it seems, remains a matter of congressional compromise.

From a regulatory-efficiency perspective, the Court is particularly poorly suited to undertake the type of social welfare calculus for which preemption analysis often calls. The Court's shortcomings here are well documented.[341] The Court lacks the capacity to collect or evaluate all of the information necessary to determine whether a federal regulatory plan is adequately or inadequately designed. Such a decision frequently involves a critical assessment of various modes of statistical and scientific analysis with which the justices have no expertise whatsoever.[342] It also requires the consideration of various points of view—in particular, those of the states and the state-based groups that may be dramatically affected by a preemp-

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338 *See supra* Part I.A.

339 The Court's repeated adoption and abandonment of dual federalism provides evidence of this difficulty. *See generally* Schapiro, *supra* note 37, at 46-52 (describing the Court's adoption of exclusive spheres of state and federal authority prior to 1937, discussing its abandonment of dual federalism thereafter, and criticizing the Court's readoption of it since the 1990s).

340 Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1941-48 (2008).

341 *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 153-55 (2006) (describing the Court's limitations with regard to collecting and analyzing empirical data).

342 *Id.* at 155.

tion decision—that the Court is under no obligation to consider when such views are not offered by the parties who appear before it. Finally, policy decisions regarding regulatory efficiency require more consistent involvement than the Court is institutionally capable of providing. Because the Court's power in most preemption cases is invoked only through the episodic and somewhat idiosyncratic exercise of private rights held by private individuals (i.e., through standing doctrine), the Court can, at best, get only a snapshot of the regulatory environment in which its preemption policies would operate. Certiorari would not cure the underlying selection bias that comes from private decisions to bring suit. This further narrows the information that the Court will consider before choosing a balance between regulatory uniformity and dispersion.

Whatever the institutional competencies of the Court with regard to federalism and regulatory efficiency, it is well positioned to implement, if not to formulate, policy considerations relating to corrective justice. Given that the Court's (and the federal judiciary's) power to act is predicated on claims of individual injury, there is a natural match between its constitutional charge and the claims raised in cases that involve preemption questions. Furthermore, its form of information gathering is necessarily episodic and limited, focusing ideally on those facts that are relevant to the harms alleged.[343] The judiciary is also specifically charged with providing remedies when rights are violated and has more experience in fashioning these remedies than other organs of the federal government. As with federalism and regulatory efficiency considerations, however, it remains unclear how the Court would balance the need for corrective justice against other preemption policy concerns.

In any event, courts have substantial experience and expertise in fashioning and evaluating procedures for decision making, even if they lack the resources to make those decisions themselves.[344] It therefore follows that the Court's role should be focused on what it does well, and not on what it does poorly. As the next Part sets out, an Agency Delegation Model will engage the Court in its best uses, while minimizing the difficulties it experiences with other aspects of the preemption analysis.

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343 *See* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1308-09 (2006) (discussing judicial expertise in designing procedural systems).

344 *Id.*

III. THE AGENCY DELEGATION MODEL AS AN ALTERNATIVE DECISIONAL PROCESS

A. *Challenges in Changing Current Policymaking Procedures*

The primary lesson to be learned from the Legislative Primacy and Judicial Primacy Models is that the disconnect between the Court's words and deeds cannot be bridged without discarding the institutional framework each has adopted. The singular institutional control imposed by the Legislative Primacy Model is simply unrealistic. As already described, Congress, as a whole, has neither the institutional will nor the institutional capacity to provide the granular preemption policy management that the Court's rhetoric ascribes to it.[345] Framing decisions in individual cases as though Congress had prescribed the result is therefore misleading, even if the Court's reasons for doing so are understandable. The singular institutional control imposed by the Judicial Primacy Model is equally problematic. Aside from being hidden behind the Court's rhetoric, the Judicial Primacy Model can be criticized for its numerous practical failings.

If one accepts the proposition that the policy considerations underlying the preemption questions are arbitrary (or at least highly elusive),[346] an appropriate response should focus on procedural, as opposed to substantive, prescriptions. Where policy choices must be made from competing, at times incommensurate, and frequently subjective considerations—as is frequently the case in preemption situations—legislatures are the governmental institutions best positioned to make them. Indeed, the Court itself has often conceded as much.[347] Moreover, the Constitution seems to commit such decisions not to the Court, but to Congress.[348] That said, the Legislative Primacy and Judicial Primacy Models also show that those policy choices can be modified, nullified, or otherwise supplanted if one fails to account for the importance of implementation once they have been made. Based on the foregoing, the singular institutional policy control at the heart of both the Legislative Primacy and Judicial Primacy Models is a decidedly poor procedural design choice.

Rearranging the preemption policy decision-making process so as to cure the defects of institutional singularity requires more than altering preemption doctrine. Stated differently, simply focusing on how the Court does business would fail to address the underlying problem. While doctrine is generally offered as a blueprint for institutional decision making, it rarely

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345 *See supra* notes 58-62 and accompanying text.

346 *See supra* Part I.A.

347 *See supra* note 57 and accompanying text.

348 *See supra* note 56.

lives up to its billing.[349] Assume, for example, that the Court increased the strength of the presumption against preemption by requiring a clear and specific statement of Congress's preemptive intent in the text of enacted legislation. The likely effect of this change would be a decrease in the number of cases in which the Court finds state law preempted. Such a one-size-fits-all approach might be completely divorced from what Congress actually wishes to accomplish in differing regulatory contexts. There is no reason to believe a priori that Congress would approach the balance between federal and state power the same way in the ERISA context that it does in the medical devices context. Additionally, such a strengthened presumption would not take into account the relative capacities or willingness of the several states to provide meaningful remedies for the injuries alleged by plaintiffs in preemption cases. A case preserving state tort law might be beneficial to those plaintiffs whose claims are governed by the liberal tort standards of State A, but would do little for those plaintiffs whose claims are governed by the conservative standards of State B. Of course, all of this assumes that the strengthened presumption gets applied at all. For instance, if the Court were to define "clear and specific statement" as including anything other than a previously specified and limited list of verbal formulas, it could find ways to bypass the presumption altogether.

For similar reasons, imposing a "plain statement" or other such limitation on Congress that requires it to expressly state its preemptive intentions[350] would, on its own, fail to adequately address the problem. Such a limitation would still force the Court to use traditional tools of statutory interpretation to fill in gaps in Congress's preemptive schemes and to determine the scope of what Congress has intended. Even if the Court were to construe its legislative powers, competence, and intentions narrowly so as to avoid the temptation or appearance of substituting its own judgments for those of Congress, there is no guarantee that Congress would or could respond to a plain statement requirement.[351] Additionally, it is not clear that the frequency of erroneous interpretations would decrease where the Court retains broad and largely final powers of interpretation and application. In other words, a plain statement requirement, without more, would adopt the Legislative Primacy Model while ignoring its deficiencies.[352]

Reformulating the preemption doctrines to employ better heuristics—to identify factual proxies that more closely track the underlying pragmatic policy concerns at issue in preemption cases—would be similarly incom-

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349 *See* VERMEULE, *supra* note 341, at 266-67; *cf.* Sharpe, *supra* note 250, at 2926 (discussing the inability of the "minimum contacts doctrine" to protect certain defendants).

350 *See, e.g.*, Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 565 (1997) (arguing that courts should not preempt state law absent "unmistakably clear" congressional intent).

351 *See* notes 60-62 and accompanying text.

352 *See supra* Part II.B.

plete. The irony of this approach—and the ultimate source of its inadequacy—is that it would encourage courts to function more like legislatures. Broadening the range of factors courts are explicitly empowered to consider, particularly when assessing those factors lies outside the core competencies of judicial decision making, would be tantamount to fully embracing the demonstrably flawed Judicial Primacy Model.[353] Asking the Court to police its own interpretive endeavors through self-imposed doctrinal restraints creates an infinite regression problem; the Court fashions a doctrine that restricts its interpretive discretion, but that doctrine must itself be interpreted (and perhaps later restricted) by the Court, and so on ad infinitum.[354] Empowering any other governmental institution (such as an administrative agency) with this authority would merely duplicate the problem.

A responsive solution to the problems inherent in the Legislative Primacy and Judicial Primacy Models cannot rest solely on improving or restricting the information the Court uses in its preemption analysis. It must also address the procedural deficiencies that are caused by the models' reliance on institutional singularity. Moreover, the monitoring and legislative costs that currently hinder robust congressional involvement in preemption policymaking would have to be lowered, given Congress's current lack of focus on the issue and the rarity of congressional overrides of the Court's preemption decisions. Specifically, Congress would have to be able to communicate its approbation or disapprobation regarding the implementation of its preemption policies in a way that avoids the substantial coordination difficulties of full bicameralism and presentment. In addition, members must also be able to address preemption concerns in a way that does not cost them as much individual political capital. In sum, the constitutive elements of the preemption-policymaking process—policy formation, policy application, and application review—must be separated among different institutions to avoid the problems caused by institutional singularity.

B. *A Blueprint for Preemption-Policymaking Procedure*

The Agency Delegation Model divides the responsibility for formulating preemption policy among Congress, the Court, and federal administrative agencies according to their institutional competencies. In essence, the Agency Delegation Model would explicitly separate procedural control from decisional control. Congress would have ultimate decisional control over preemption policy, agencies would be primarily responsible for im-

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353 *See supra* Part II.C.

354 *Cf.* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 560 (arguing that courts narrowly construe legislative overrides and rely heavily on supposedly overridden precedents to interpret statutory language).

plementing that policy, and the Court would have the authority to ensure that the agencies' implementation conforms to previously established procedural and evidentiary standards. No single institution would possess the power to create preemption policy, formulate and apply its operative rules, and review for accuracy or abuse the powers to formulate and implement.

1. The Role of Congress: Formulation and Delegation

Under the Agency Delegation Model, Congress would undertake the primary and critical function of "coordinator-in-chief." Congress would thus define the scope of either preemption itself or the agency's preemption power. It would make the necessary preemption policy choices based on the constitutive federalism, corrective-justice, and regulatory-efficiency considerations described above.[355] These choices could fall into one of three categories. First, where Congress is able to reach agreement on whether particular sources of state law—common law, legislation, or regulations—are to be preempted or preserved, it would specifically reference those sources in the language of its statutory enactments. Preempting by source of state law instead of by its characterization would address many of the interpretive problems the Court has experienced when trying to translate Congress's preemption policy choices into workable rules.[356]

Second, where Congress cannot reach such an agreement (which would very likely be the vast majority of the time) but can nevertheless agree that some preemption questions may arise, it would make specific delegations of preemptive authority to the administrative agencies charged with implementing particular regulatory schemes.[357] Such delegations of rulemaking authority to federal administrative agencies would serve to update the policy decisions already made by Congress, given changes in relevant regulatory conditions. Moreover, such express and specific delegations would avoid many of the fretted judicial-deference questions that have plagued the Court's recent preemption jurisprudence.[358] To ensure that the

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355 *See supra* Part I.A.

356 *See supra* Part I.B-C (discussing the Court's difficulties in construing the terms "requirement" in the MDA, and the term "relate to" in the ERISA context).

357 A necessary component of any such delegation would be some indication of the factors that the agencies must consider prior to promulgating preemptive or saving regulations. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (requiring Congress to articulate an "intelligible principle" to guide delegations of legislative functions to administrative agencies). Some commentators have argued that the "intelligible principle" requirement has been watered down in recent years. *See* Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 357 n.64 ("The Court has consistently held that broad, ambiguous legislation that in reality provides little guidance to agencies nevertheless satisfies the intelligible principle requirement."); *see also* discussion *infra* Part III.C.

358 *See supra* text accompanying note 71.

agencies adhere to congressionally originated policy goals, Congress has a host of formal and informal monitoring and control mechanisms that it can use to ensure the continued accountability of agencies.[359] Such mechanisms are largely unavailable if courts are primarily responsible for implementing preemption policy.

From a more practical (or perhaps more cynical) perspective, delegation would allow reluctant legislators to avoid making many difficult decisions with respect to preemption policy. Instead of taking a clear stance, which might offend powerful interest groups and thereby promote congressional avoidance or obfuscation, legislators could shift the costs of decision to the administrative agencies through clear delegation rules.[360] Though reaching legislative bargains on clear delegation rules would not be entirely costless, there is reason to believe that it would be a lower cost option for the members of Congress than making preemption decisions themselves. If nothing else, avoiding a decision would allow the interest groups that members of Congress may be trying to please to live to fight another day and to focus their attention on the federal agencies with implementation authority.[361]

Third, failure by Congress either to expressly preempt or preserve state law, or to expressly delegate preemption authority to an administrative agency, should result in the preservation of state law. If one accepts that congressional intent must drive the preemption policy decision, some method for forcing congressional decisions on preemption must be adopted and implemented. Setting a pro-state law rule may be the most feasible option, assuming federal legislators' general susceptibility to state and state-based interest group pressures.[362] This default rule would not be motivated by some formalistic understanding of constitutional federalism. Rather, it would work as a penalty for congressional inaction; where Congress fails to make some decision regarding preemption, the result will be state nullifica-

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359 J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2235-36 (2005) ("Potential sanctions for an agency's failure to fulfill statutory mandates include political embarrassment at congressional hearings, vulnerability to auditing and investigation, the threat of losing appropriations, and even elimination of the agency."). Congress can, for example, legislate to overturn agency decisions or to narrow their discretion, reduce or expand agency funding, send letters or place calls questioning agency actions, hold or threaten to hold public hearings to interrogate agency officials, or structure the agency so that political appointees are placed at key positions of policy implementation. *See* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 24-26 (1999).

360 EPSTEIN & O'HALLORAN, *supra* note 359, at 237.

361 *Cf. id.* at 32 (observing that members of Congress may delegate policy authority to administrative agencies in order to shift blame for the inevitable failure of the underlying policies); Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 217, 218 (1992).

362 *See supra* note 62.

tion of federal legislation if the two conflict.[363] Given the foregoing assumption that members of Congress will delegate policymaking authority to agencies if doing so is in their best interest (i.e., resulting in the lowest political costs), it is reasonable to also assume that the default penalty mechanism suggested here would result in more delegations to agencies than clear preemption clauses or state nullifications.

2. The Role of Agencies: Implementation

Agencies would function as the primary implementers of congressional preemptive intent. This would involve two duties: identifying congressional intent through statutory interpretation and translating that intent into rules that govern primary conduct. From an institutional competence standpoint, agencies would be superior to both the Court and Congress in performing this function. Congress lacks the speed and flexibility needed to address the shifting overlaps in federal and state regulatory authority that characterizes modern preemption.[364] Moreover, as already described, Congress typically avoids or overlooks the details of preemption questions.[365] Agencies, by contrast, have far greater knowledge of the legal and factual details of the statutes they are charged with administering. They typically have substantial expertise in understanding and applying their respective enabling statutes and have more complete and current information on the prevailing factual conditions to which those statutes are addressed.[366]

The Court, for its part, is entirely passive with respect to preemption management; it can only act when litigants pursue preemption arguments in the federal courts. For the same reason, the Court's evaluation of preemption questions is episodic in that it sees those questions through the lens of particular cases without taking into account the full regulatory picture in

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363 Such a default rule would have to be self-imposed. Absent some expression of intent by Congress to defer to state law, the natural operation of the Supremacy Clause would require the preservation of federal law in the event of a conflict. This type of state-oriented default rule is not without precedent. *See* McCarran-Ferguson Act § 2(b), 15 U.S.C. § 1012(b) (2006) (generally providing that federal law does not preempt certain state laws regulating the insurance industry). As a practical matter, enactment of this default rule would likely burden future Congresses, and not the one enacting it.

364 Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 444-45 (1989) (noting that the procedural means by which Congress controls agency decision making are not applicable to judicial decision making).

365 *See supra* Part I.A.

366 *See* Merrill, *supra* note 5, at 755 ("Agencies know a great deal about one federal regulatory scheme, and they may know quite a bit about the pros and cons of making that particular scheme the exclusive source of legal obligation, as opposed to one that exists concurrently with state and local regulation.").

which they arise.[367] Agencies, by contrast, have the ability to be proactive managers of preemption issues, at least in part because their ability to initiate rulemaking proceedings is not constrained by the decisions of private actors. As importantly, and also unlike the Court, agencies have the resources and expertise to consider the statistical and scientific analyses that inform at least the regulatory-efficiency considerations that go into preemption policymaking.[368] Though it is an open question as to whether agencies have an advantage over the Court when it comes to interpreting state laws for the purpose of identifying problematic conflicts,[369] they likely do have an advantage in interpreting the laws they administer if for no reason other than sustained institutional exposure.

To ensure that they responsibly undertake their implementing function, agencies could be required to adopt rulemaking procedures that require consideration of corrective justice, federalism, and regulatory efficiency in a way that ensures transparency, widespread participation, and accountability. Notice and comment rulemaking procedures, with procedural mechanisms that ensure the meaningful participation by states, state-based interest groups, and others affected by the agency's preemption decisions, offer many of the necessary procedural safeguards.[370] In addition, judicial review of agency decisions would further ensure that agencies take all preemption policy considerations into account.[371]

Of course, no preemption-policymaking procedure that includes the agency implementation described here is immune to legitimate criticism. The most frequently expressed concerns involving agency preemption are federal agencies' perceived endemic biases toward federal regulation,[372]

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367 Galle & Seidenfeld, *supra* note 340, at 1968 ("A court's duty is to resolve a dispute between the parties, and the parties are unlikely to represent all the various backgrounds and perspectives that may be relevant to a determination."). The narrow focus of judicial review that is engendered by the adversarial system is not necessarily alleviated by amicus filings. *See id.* at 1969 ("[E]ven amicus briefs are limited by the fact that an entity must first learn of the issue on which it wishes to inform the courts of its view, and then must hire a lawyer to write a brief on the issue.").

368 Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U. PITT. L. REV. 607, 654-55 (1985) (asserting that "[t]he federal government obviously has an enormous comparative advantage with respect to the expertise required to make technologically complex regulatory decisions"); *cf.* Lars Noah, *Rewarding Regulatory Compliance: The Pursuit of Symmetry in Products Liability*, 88 GEO. L.J. 2147, 2150-51 (2000) (arguing that common law juries lack the technical expertise possessed by the FDA).

369 Merrill, *supra* note 5, at 755.

370 This procedure is similar to that proposed by Professors Brian Galle and Mark Seidenfeld, who would allow agencies to preempt state law through notice-and-comment rulemaking when Congress has expressly delegated the authority to preempt. *See* Galle & Seidenfeld, *supra* note 340, at 2011.

371 *See id.* (arguing that judicial oversight of agency preemption decisions would be necessary to ensure meaningful consideration of the effects that preemption would have on affected groups).

372 Merrill, *supra* note 5, at 755-76 ("[Agencies] are unlikely to have much knowledge—or even care—about larger questions concerning the division of authority between the federal government and

lack of due regard for corrective-justice considerations,[373] and lack of expertise in constitutional federalism.[374] With regard to viewpoint bias, the argument typically focuses on theories of agency capture,[375] assumptions about how agency officials systematically overestimate the usefulness of their knowledge and expertise,[376] or how agencies can be misled by the entities they regulate and on whom they may depend for information.[377] As Professors Jeffrey Rachlinski and Cynthia Farina have pointed out, if an agency's bias for or against preemption is motivated by the desire to serve particular interest groups, there is little that any process can do to remedy it.[378] If, however, such bias is caused by the myopia or overconfidence of otherwise well-meaning agency officials, public rulemaking procedures subject to searching judicial review "are excellent cures."[379]

The corrective-justice critique is an especially difficult one for agency implementation. Were Congress to consistently specify the common law tort remedies it wishes to preserve or to consistently provide alternative federal remedies, agencies would not have to address this consideration. Of course, if Congress were to make its preemptive intentions clear with sufficient regularity, the restructuring of preemption-policymaking procedures advocated here would hardly be necessary. Moreover, it is true that the Court has until now declined to recognize a constitutional right to a body of tort law,[380] and as a consequence, putative plaintiffs can assert no rights-based legal limit on congressional or agency authority to preempt common

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the states. . . . There are . . . reasons to worry about bias on the part of agencies in favor of exclusive federal regulation.").

373 *See* William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity*, 77 GEO. WASH. L. REV. 1521, 1568 (2009) ("[B]ecause so few federal regulatory regimes establish their own compensatory schemes, an agency preemption declaration threatens to leave any injured person remediless, unable to secure compensation for injuries.").

374 Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 706-25 (2008) (arguing that agencies lack the institutional competence and statutory guidance required to make informed choices on questions of state autonomy); *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000) (asserting that congressional resolution of preemption questions is "an important requirement in light of the various safeguards . . . created by the system of state representation in Congress").

375 The basic thrust of agency capture theory is that interest groups will offer members of congressional committees reelection support in exchange for favorable regulations. Committee members will, in turn, place pressure on regulators to ensure that those favorable regulations are delivered. *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1284-85 (2006).

376 *See* MCGARITY, *supra* note 136, at 179-84.

377 *Id.* at 190-93.

378 *See* Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 588 (2002).

379 *Id.*

380 *See generally* Goldberg, *supra* note 45, at 596-616.

law remedies. As Professors William Buzbee, Brian Galle, and Mark Seidenfeld have suggested, and as discussed in the next Subsection, this issue may be addressed by forcing agencies to clearly and specifically describe their reasons for disallowing common law claims and subjecting such descriptions to judicial review.[381] Additionally, the previously described formal and informal monitoring mechanisms employed by members of Congress can provide some measure of protection to constituents who would be negatively impacted by an agency's decision to preempt. Ultimately, however, the decision will be made in some instances that the perceived good of the many outweighs the good of the few.

If one assumes that the Constitution and the Supreme Court's decisions construing it have set clear lines of demarcation between federal and state authority and indicate a preference for certain federalism conclusions over others, then administrative agencies are certainly at a severe competence disadvantage relative to the judiciary. As many commentators have pointed out, agencies have no particular expertise in constitutional interpretation. There are at least two responses to this observation. First, if one assumes that the Constitution does not provide such substantive limits, but only requires a continuous dialogue between federal and state authorities, then meaningful state and state-based interest group participation in administrative rulemaking procedures would be sufficient.[382] Second, if one does assume that the Constitution places substantive limits on federal and state authority, then the Agency Delegation Model's emphasis on dividing preemption responsibility is especially efficacious. The Court, in its role of review, can scrutinize whether agencies have adequately understood and considered federalism arguments before promulgating final rules that have preemptive effect. As Professors Galle and Seidenfeld have recently observed, the specter of such judicial review "can create rather higher-powered incentives for agency deliberation."[383]

In any event, these criticisms would be more forceful if, in contradiction to the Agency Delegation Model, the agencies were largely left to their own devices and were subject to little or no meaningful oversight by Congress or the courts. As explained in the preceding Subsection, however, Congress has at its disposal a host of formal and informal review mechanisms to ensure that agencies remain responsive to the viewpoints of the polity. As explained in the next Subsection, meaningful judicial review can do much to ensure that agencies properly account for those areas of legal expertise with which they may be less familiar.

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381 *See* Buzbee, *supra* note 373, at 1574; *cf.* Galle & Seidenfeld, *supra* note 367, at 2009-10.

382 *See* Galle & Seidenfeld, *supra* note 367, at 2010 (arguing that agency preemption would facilitate an ongoing dialogue among all branches of federal and state governments).

383 *Id.* at 1978.

3. The Role of the Courts: Review

As a practical matter, the judiciary would encounter preemption questions much as it currently does, through standing doctrine and the decisions of largely private individuals and entities to seek judicial redress. The question the courts could be asked to answer, however, would be quite different. The judicial role in preemption policymaking would be focused on review of agency-rulemaking procedures, instead of on discovering congressional intent and making the substantive preemption decision.

The intuition behind limiting the courts to the role of procedural review is that "no form of bureaucratic organization can be self-policing."[384] The Court would therefore be tasked with helping to prevent implementing agencies from acting ultra vires: "as long as the bureaucracy operates within the limits of the law, its constituents and employees are free to function as they see fit."[385] However, to separate the policymaking and procedural review functions, the scope of the Court's review power would have to be limited.

As several legal theorists have suggested in varying contexts, the Court should subject agency preemption policymaking to the type of "hard look" review adopted by the Court in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*[386] As described by Justice White, writing for the majority:

> The scope of review under [this] standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[387]

While the ultimate policy decision is left to the agency, the information and processes by which that decision is reached are subject to judicial review to ensure that it is not "arbitrary and capricious."[388] This has the beneficial effect of separating the formulation of substantive policy decisions from the review of the procedures that produce those policies, while also ensuring that those decisions are well-reasoned and defensible.

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384 Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1284 (1984).

385 *Id.*

386 463 U.S. 29 (1983).

387 *Id.* at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

388 *Id.* (internal quotation marks omitted).

To be sure, hard look review is not a perfect method for separating the policymaking and review functions.[389] Nevertheless, it is structured to encourage agencies to engage in sustained deliberation of the key factors that go into preemption policymaking.[390] Moreover, such deliberation would subject agency preemption implementation not only to judicial scrutiny, but also to public scrutiny. A record of the factors the agencies have considered, a description of the relative weights they ascribed to those factors, and an explanation of the policy conclusions drawn from them give the press and members of Congress ample opportunity to criticize and to therefore chasten agencies' decisions.[391]

In addition to reviewing the preemption decisions reached by administrative agencies based on issues of fact and policy, the courts would play a particularly crucial role in evaluating the agencies' legal interpretations. Here, there are three separate questions. The first is whether courts should defer to agency interpretations of their own jurisdiction. The Supreme Court has never resolved this issue,[392] but the idea that agencies would have the power to interpret the scope of their own authority where congressional delegations are ambiguous has been met with derision in academia.[393] Under the assumptions of the Agency Delegation Model, however, Congress would have clearly delegated to agencies the authority to preempt state law

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389 Commentators have asserted, for example, that the invasiveness of hard look review encourages agencies to abandon rulemaking for alternative regulatory methods. *See, e.g.*, Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 308-13; Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 625-26 (1994).

390 Professors Galle and Seidenfeld have set out several of the salient benefits:

> [H]ard look review . . . can induce agencies to address such crucial issues as the impact of subjecting regulated entities to fifty different state standards, the efficacy of the agency's particular regulatory approach, the predictability of the continued efficiency of that approach, and the fluidity of regulatory circumstances and the concomitant need for a flexible regulatory system that allows for regulatory experimentation. . . . [S]uch review has seemed to encourage agencies to include in their decisionmaking processes members of different professions who are likely to entertain different perspectives about the various regulatory goals that are affected by the agency decision under review. Also, hard look review, buttressed by political oversight, seems to be well structured to induce the agency to take greater care in making the judgments about political preferences that would undergird any analysis of a decision to displace state law.

Galle & Seidenfeld, *supra* note 367, at 2011 (footnote omitted).

391 *See id.* at 1981-84.

392 Nathan Alexander Sales & Jonathan H. Adler, *The Rest is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1500.

393 *See, e.g.*, Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 867 (2001) ("If Congress describes the agency's mandate in a way that contains gaps or ambiguities (which is inevitable), and *Chevron* requires courts to defer to any reasonable interpretation of these gaps and ambiguities, then *Chevron* seems to offer an opening for agency aggrandizement (or abrogation), without any effective judicial check."); Sales & Adler, *supra* note 392, at 1529 (arguing that courts should not *Chevron*-defer to agencies' determinations of their own jurisdiction); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2099 (1990) ("Congress would be unlikely to want agencies to have the authority to decide on the extent of their own powers.").

so long as the agencies adhere to the prescribed procedural conditions. Faced with a questioning of an agency's preemptive authority, the Agency Delegation Model would have the courts *Chevron*-defer[394] to the agency's interpretation of the delegation. Doing so, while raising the possibility of agency overreach, would nonetheless further the Agency Delegation Model's goal of assigning the agency implementation authority within the sphere of its core competencies.

The second question is what level of deference courts should apply to agencies' application of preemption principles in their deliberations. The Agency Delegation Model would not require any changes in current agency deference doctrine. Since Congress would expressly delegate the preemption question to the agency charged with administering the relevant legislative scheme, courts would be required to *Chevron*-defer to how the agencies construe the (nonpreemption) requirements of that scheme.[395]

The third and final question is how courts should regard agency determinations of constitutional federalism issues, should they arise. Here, agency autonomy should be at its nadir. As already discussed, most federalism issues can be cured by permitting states, localities, and state and local interest groups an opportunity to meaningfully participate in the deliberative process before agencies promulgate preemption regulations. If, however, an issue of constitutional interpretation arises—such as whether the Tenth Amendment bars the action proposed by the agency—courts should apply only *Skidmore*-level deference[396] to the agencies' conclusions. Given the Agency Delegation Model's emphasis on agency implementation, the courts should at least consider the agencies' arguments on the matter (as opposed to simply reviewing such questions de novo). However, as agencies have no particular expertise in constitutional interpretation, and as the federal courts have exceptional expertise in that area, judicial views regarding constitutional meaning should trump the views of the agencies where the two do not coincide.

C. *The Agency Delegation Model Applied: Medical Device Preemption*

Application of the MDA's express preemption clause, at issue in *Riegel*, provides a useful context in which to apply the prescriptions of the Agency Delegation Model. By way of additional background, Congress did not expressly delegate to the FDA the authority to preempt state tort law through its regulations. Rather, it enacted an express preemption clause

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394 For a discussion of *Chevron* deference, see Darren H. Weiss, Note, *X Misses the Spot:* Fernandez v. Keisler *and the (Mis)Appropriation of* Brand X *by the Board of Immigration Appeals*, 17 GEO. MASON L. REV. 889, 897-900 (2010).

395 *See* Wyeth v. Levine, 129 S. Ct. 1187, 1201 (2009).

396 *Id.*

preempting state law "requirements" that differed from or added to the safety and effectiveness standards for medical devices established by the FDA.[397] Nor did Congress require the FDA to promulgate those standards via notice and comment rulemaking. Instead, the FDA set them on a device-by-device basis through what is known as the premarket approval process.[398] The preemption issue arose when a patient allegedly injured by a balloon catheter during heart surgery sued the manufacturer.[399] The manufacturer claimed that the MDA preempted common law tort claims alleging a design defect because such claims would have the effect of imposing safety and effectiveness standards that differed from those set by the FDA.[400] The Supreme Court concluded that the plaintiffs' claims were indeed expressly preempted, first by determining that the FDA had imposed requirements on the catheter, and then by determining that those requirements were different from those imposed by state tort law.[401]

As an initial matter, the Agency Delegation Model would have had the Court conclude that state common law claims were preserved under the MDA because Congress made no express delegation of preemptive authority to the FDA. The Court would not have needed to determine whether Congress intended the term "requirements" to include state common law, nor would it have had to determine whether state common law conflicted with the requirements imposed by the FDA. The result of the case would therefore have favored the plaintiffs instead of the defendant.

Assuming that Congress would have understood and responded to the Agency Delegation Model's penalty default mechanism, it is likely that it would have chosen to expressly delegate preemptive authority to the FDA. If the legislative history recounted by Justices Stevens and Ginsburg is correct, Congress intended to supplement the protections afforded by state tort law when it enacted the MDA; it did not intend to altogether eliminate the application of that law.[402] Additionally, the presence of the MDA's express preemption clause itself indicates that Congress foresaw future conflicts with state law, though it apparently made no attempt to produce an exhaustive list of what those conflicts might be. Together, this evidence suggests that Congress would have preferred to delegate preemption authority to the FDA rather than allow state tort law to nullify the MDA's requirements or allow complete elimination of state law as applied to all medical devices approved by the FDA.

In its delegation, Congress would have to provide some guidance for the FDA to determine whether and when to preempt state common law

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397 Riegel v. Medtronic, Inc., 552 U.S. 312, 321 (2008).

398 *Id.* at 317-18.

399 *Id.* at 320.

400 *See id.* at 321.

401 *Id.* at 321-30.

402 *See id.* at 331 (Stevens, J., concurring); *id.* at 333-41 (Ginsburg, J., dissenting).

claims. Congress would have to define the scope of the FDA's authority to preempt state law by enumerating specific factors the agency would have to take into account prior to promulgating a preemption rule.[403] Such statutory language would take into account definitional ambiguities addressed by the Court in its recent opinions—such as whether state tort law is a "requirement" for the purposes of establishing device safety and effectiveness—but it would do so only to guide the FDA's substantive policymaking judgments.

Finally, Congress would have to define the scope of each preemption decision, as well as the procedures by which they are raised, considered, and decided. Here, the HMTA provides a useful precedent. It permits persons—including "a State, political subdivision of a State, or an Indian tribe"—to apply to the Secretary of Transportation for an exemption to the Act's preemption clause.[404] The Secretary is then required to publish notice of the application in the Federal Register and to render a decision within 180 days or to publish an explanation for any delays.[405] Prior to promulgating regulations to carry out her decision on the application, the HMTA instructs the Secretary to "consult[] with States, political subdivisions of States, and Indian tribes."[406] In addition to these measures (or ones like them), the Agency Delegation Model would have the FDA hold public hearings and produce a record of the evidence it considers, so as to ensure adequate transparency and deliberation and to facilitate judicial review. Congress would also have to determine whether the preemption decision would have broad precedential effect or whether it would be limited to specific cases.[407]

In their review function, the courts would be limited under hard look review to ensuring that the FDA formulated its policies according to the standards and procedures prescribed by Congress and that it reached preemption determinations that rationally followed from those standards and procedures. Thus, the Court in *Riegel* would have been limited to determining whether the FDA exceeded its authority when formulating medical device preemption policy; it would not have had the power to determine whether particular claims were preempted. One could, of course, imagine a scenario in which the Court's scrutiny of the FDA's actions would be out-

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403 The Hazardous Materials Transportation Act ("HMTA") provides one such example of an express delegation of preemptive authority to an administrative agency. The HMTA provides specific instructions on which state and local activities, laws, and regulations are preempted. 49 U.S.C. § 5125(b)(1) (2006). It additionally limits preemption to conflict and obstacle preemption. *Id.* § 5125(a). Finally, the Secretary of Transportation is given discretion to exempt states and localities from the HMTA's preemption clause if she decides that state or local requirements provide as much protection as federal law and do not place "an unreasonable burden on commerce." *Id.* § 5152(e)(2).

404 *Id.* § 5125(a).

405 *Id.* § 5125(d).

406 *Id.* § 5125(d)(2).

407 Congress chose the latter route in the HMTA. *See id.* § 5125(g).

come determinative and thus sufficiently invasive to substantially limit the discretion Congress had otherwise delegated to it. Such instances of judicial nullification would likely be rare under the Agency Delegation Model, however, given that it systematically divests the courts of the decisional control over policy that they enjoy under the Judicial Primacy Model. Additionally, the Agency Delegation Model would have the courts *Chevron*-defer to agency interpretations of the preemption clause. Were Congress to disapprove of how the Court construed the FDA's exercise of its preemption authority, legislative override or targeted defunding would be available without asking Congress to micromanage the implementation of its preemption policies.

CONCLUSION

The Court is not always as good as its word when it comes to federal preemption of state tort law. While it says that Congress is the central force in formulating preemption policy, the fact of the matter is that the Court routinely formulates and implements preemption policy. In most cases, Congress does not provide sufficient guidance to allow the Court to determine its intentions. In other instances, the Court engages in federal common lawmaking, which gives effect to its own policy preferences, instead of engaging in statutory interpretation to effectuate congressional policy choices. In sum, the Court speaks as though Congress is entirely responsible for formulating federal preemption policy, but in actuality, the Court takes a dominant role in both its formulation and implementation.

Contrary to the approach typically taken by legal theorists, simply altering preemption doctrine would not resolve the problems identified in this Article. A comprehensive solution to the problem of the Court serving as Congress's "faithful agent" in preemption cases would be to share the preemption-policymaking function among Congress, the Court, and federal administrative agencies. Under such an Agency Delegation Model, the constitutive-preemption policy functions of formation, implementation, and review would be separated among the three branches of the federal government in a way that takes advantage of their core institutional competencies. This departure from the procedural status quo would give fuller effect to the Court's oft-repeated statement that congressional purposes are the touchstone in every preemption case.