

CONGRESS HATCHES THE EGG: JUSTICE THOMAS’S TEXTUAL MANDATE TEST FOR PREEMPTION

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In the American federal system, the national and individual state governments are cosovereign, with limited powers delegated to the national government and residual power remaining with the states.¹ The relationship between these sovereigns is governed by the Supremacy Clause, which provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.²

Thus, when Congress legislates within its constitutional bounds, federal law is supreme and, therefore, potentially preempts³ state law.⁴

1. See *Gonzales v. Raich*, 545 U.S. 1, 57 (2005) (O’Connor, J., dissenting) (citing THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961)); see also *Wyeth v. Levine*, 129 S. Ct. 1187, 1205–06 (2009).

2. U.S. CONST. art. VI, § 2.

3. The Court has spelled the term both as “pre-empt” and as “preempt.” I have elected to use “preempt” and “preemption” to designate the mechanism by which federal law overrides state law. I have retained “pre-empt” in all quotes from the Court that contain this spelling.

4. See *Wyeth*, 129 S. Ct. at 1205 (“As long as it is acting within the powers granted it under the

The Supreme Court recognizes three situations that can trigger preemption. First, state law is preempted where the express language of a federal statute or regulation overrides or preempts state law.⁵ Second, state law is preempted where it conflicts with federal law, either by making it impossible to comply with both⁶ or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁷ Finally, state law is preempted where the federal government’s regulation of a field is so pervasive there is no room for coordinate state regulation.⁸

Preemption represents an intersection of three primary areas of contention for the Court: (1) Statutory Interpretation, (2) Federalism, and (3) Separation of Powers.⁹ Preemption cases necessarily involve a conflict between federal and state law, typically due to an overarching federal statute, regulatory regime, or both.¹⁰ Because preemption cases so often turn on interpretation of a statute or regulation, disputes over the proper scope of preemption can turn on what methodology a particular Justice applies in interpreting the statute or regulation.¹¹

Further, any issue that deals directly with the conflicting spheres of authority of both the national and state governments inherently deals with issues of federalism.¹² The Justices’ views on the proper relationship between the cosovereigns must, therefore, inform the Court’s decisions on preemption.¹³ The disagreement on the application of the presumption against preemption (discussed *infra*) is an example of how views of the proper state–federal balance of power affect preemption analysis.¹⁴

The Supreme Court’s methodology for determining when federal law preempts state law has been far from clear.¹⁵ This confusing area of the

Constitution, Congress may impose its will on the States.”) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

5. See, e.g., ALAN E. UNTEREINER, *THE PREEMPTION DEFENSE IN TORT ACTIONS: LAW, STRATEGY AND PRACTICE* 22 (Linda Kelly ed., U.S. Chamber Institute for Legal Reform 2008) (citing 49 U.S.C. § 30103(b)(1) (2006)) (“When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.”).

6. UNTEREINER, *supra* note 5 (citing *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)).

7. UNTEREINER, *supra* note 5 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

8. UNTEREINER, *supra* note 5 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

9. See UNTEREINER, *supra* note 5, at 2.

10. See JAMES T. O’REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION AND LITIGATION* 1 (Am. Bar Ass’n Publ’g 2006).

11. *Id.*

12. UNTEREINER, *supra* note 5.

13. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 229 (2000).

14. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

15. Mason A. Barney, *Not as Bad as We Thought: The Legacy of Geier v. American Honda Motor Company in Product Liability Preemption*, 70 BROOK. L. REV. 949, 949 (2005) (“[P]reemption

law has often yielded interesting voting outcomes; some of these appear to support the perceived ideological divisions of the court,¹⁶ while others do not.¹⁷ It has been suggested that preemption just makes for “strange bed-fellows.”¹⁸ Nevertheless, an area of the law in which Justice Ginsburg sometimes supports a more narrow, textual interpretation of a federal statute than does Justice Scalia, or in which former Justice Stevens sides with states in a federalism issue while former Chief Justice Rehnquist argues for federal supremacy, seems to defy logic and judicial consistency.¹⁹

Those pursuing or defending claims in which a preemption defense will play a role are left with little guidance as to the arguments the Justices will individually find persuasive.²⁰ The dominant view of the Court as consisting of conservative and liberal wings turning on Justice Kennedy as an axis is overly simplistic and insufficient to explain the voting outcomes on preemption issues.²¹ Even reliance on the manner in which Justices have previously treated issues of statutory construction, federalism, and separation of powers does not provide a functional predictive model for how a particular Justice will vote on a preemption issue.²²

Justice Clarence Thomas may be a good candidate from which to enunciate a cohesive and coherent doctrine on preemption, whether or not his view is ultimately correct. Justice Thomas possesses a reputation for ideological rigidity to the point that he may, perhaps, “even be willing to sacrifice an occasional imperfect victory in order” to maintain ideological purity.²³ While these characteristics are often attributed to Justice Scalia as well,²⁴ Scalia’s willingness to embrace an extra-textual “obstacle to purposes and objectives” preemption in cases such as *Geier v. American Honda Motor Co.* and *Wyeth v. Levine*²⁵ seems inconsistent with his typical dedication to principles of federalism and textualism.

is such a powerful, confusing and controversial area of federal law.”).

16. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 509 (1996) (O’Connor, J., concurring in part) (joined by Rehnquist, Scalia, and Thomas).

17. See, e.g., *Geier*, 529 U.S. at 886 (Stevens, J., dissenting) (joined by Souter, Thomas, and Ginsburg).

18. See Jeffrey A. Berger, *Phoenix Grounded: The Impact of The Supreme Court's Changing Preemption Doctrine on State and Local Impediments to Airport Expansion*, 97 NW. U. L. REV. 941, 961–62 (2003).

19. See, e.g., *Geier*, 529 U.S. 861 (Breyer’s majority opinion finding preemption joined by Rehnquist, O’Connor, Scalia, and Kennedy); *id.* at 886 (Stevens, J., dissenting) (opinion finding no preemption due to broad savings clause and presumption against preemption joined by Thomas, Souter, and Ginsburg).

20. See Nelson, *supra* note 13.

21. See *id.* at 232–33.

22. See *id.*

23. Paul H. Edelman & Jim Chen, *The Most Dangerous Justice Rides Again: Revisiting the Power Pageant of the Justices*, 86 MINN. L. REV. 131, 212 (2001).

24. *Id.*

25. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000); *Wyeth v. Levine*, 129 S. Ct 1187 (2009).

In addition, there is substantially greater need to understand Justice Thomas's position on implied preemption in light of his concurring opinion in *Wyeth*. In this opinion, he rejected the Court's current bifurcated doctrine of conflict preemption (obstacle and impossibility) in favor of a single "direct conflict" test for implied preemption.²⁶ This uncertainty in Thomas's stance on preemption issues is of particular importance in product liability cases.²⁷

This paper will seek to delineate the "Thomas Doctrine" on preemption through examination of the several tort-law preemption cases decided by the Supreme Court since Justice Thomas joined the Court in 1991.²⁸ In each of these cases there was a claim for liability against a manufacturer of a product, with claims of, among others: negligent design, failure to warn, unfair or deceptive trade practices, breach of warranty, and fraud. In these cases, Justice Thomas has written an opinion six times;²⁹ he has joined another Justice's opinion six times.³⁰ Obviously, the opinions written by Justice Thomas himself should be given greater weight when attempting to determine the ideological bases for his view of preemption; however, maintenance of ideological consistency requires he only join opinions that do not conflict with his preemption methodology.

Part I of the Note will discuss the various types of preemption and the doctrinal stance Justice Thomas has taken on each. Part II will discuss three pressing issues in preemption law: Do "requirements" include duties imposed by state tort decisions? How should the Court properly reconcile preemption and savings clauses? And, under what circumstances may a federal agency preempt state law? Part III will examine Justice Thomas's repudiation of obstacle preemption in light of other scholarship criticizing the doctrine. Part IV will discuss likely impacts of adoption of Justice Thomas's views on obstacle preemption. Finally, Part V will summarize Justice Thomas's textual mandate test for preemption and conclude. This

26. *Wyeth*, 129 S. Ct. at 1205, 1210–11 (Thomas, J., concurring in the judgment).

27. UNTEREINER, *supra* note 5, at 4–10 (noting the substantial correlation between the rise of the preemption defense and the changes in products liability law beginning with § 402A of the RESTATEMENT (SECOND) OF TORTS).

28. See *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011); *Bruesewitz v. Wyeth L.L.C.*, 131 S. Ct. 1068 (2011); *Wyeth*, 129 S. Ct. 1187; *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431 (2005); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Buckman Co. v. Plaintiff's Legal Comm.* 531 U.S. 341 (2001); *Geier*, 529 U.S. 861; *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

29. See *Williamson*, 131 S. Ct. 1131 (2011) (Thomas, J., concurring in the judgment); *Wyeth*, 129 S. Ct. 1187 (Thomas, J., concurring in the judgment); *Altria Group*, 129 S. Ct. 538 (Thomas, J., dissenting); *Bates*, 544 U.S. 431 (Thomas, J., concurring in the judgment in part and dissenting in part); *Lorillard Tobacco*, 533 U.S. 525 (Thomas, J., concurring); *Freightliner*, 514 U.S. 280.

30. See *Riegel*, 552 U.S. 312 (Scalia, J.); *Bruesewitz*, 131 S. Ct. 1068 (Scalia, J.); *Buckman Co.*, 531 U.S. 341 (Stevens, J., concurring); *Geier*, 529 U.S. 861 (Stevens, J., dissenting); *Lohr*, 518 U.S. 470 (O'Connor, J., concurring in part); *Cipollone*, 505 U.S. 504 (Scalia, J., concurring in part).

Note will not discuss other issues such as “labeling” clauses and whether courts constitute political subdivisions of a state. Those issues lie beyond its scope.

I. TYPES OF PREEMPTION

A. *Express Preemption*

Justice Thomas’s views on express preemption are strongly rooted in a commitment to textualism and a literal interpretation of the Supremacy Clause. His opinions can be reduced into three primary maxims. First, preemption and savings clauses are to be subjected to ordinary principles of statutory construction, not the narrow interpretation suggested in *Cipollone*.³¹ Second, there is no presumption against preemption where Congress expressly states its preemptive intent.³² Finally, an express preemption clause does not turn off implied preemption.³³

The plurality in *Cipollone* found that the “presumption against . . . pre-emption,” when applied to an express preemption clause, required the clause to be construed narrowly.³⁴ Thomas repeatedly rejects this narrow construction rule, finding that the Court’s obligation is to enforce the preemption provisions according to their plain meaning (i.e., to apply the normal rules of statutory construction).³⁵ While Thomas agrees that the touchstone for preemption is congressional intent, the clearest indication of that intent is the actual language of the statute itself.³⁶ Therefore, express preemption requires that preemption and savings clauses be interpreted according to normal rules of statutory construction and given effects according to their plain meaning.

Additionally, Thomas finds there is no presumption against preemption when Congress includes an express preemption clause within a statute.³⁷ He acknowledges that “[c]ongressional purpose is the ‘ultimate

31. *Cipollone*, 505 U.S. at 545.

32. *Bates*, 544 U.S. at 457.

33. *Freightliner*, 514 U.S. at 288.

34. *Cipollone*, 505 U.S. at 518 (“We must construe these provisions in light of the presumption against the pre-emption This presumption reinforces the appropriateness of a narrow reading of [the preemption clause].”).

35. *See, e.g., id.* at 544 (Scalia, J., concurring in part and dissenting in part) (“[O]ur job is to interpret Congress’s decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning.”); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001) (“Our analysis begins with the language of the statute.”) (citation omitted); *Bates*, 544 U.S. at 457 (“The ordinary meaning of [the preemption clause] makes plain that some of petitioners’ state-law causes of action may be pre-empted.”).

36. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326 n.5 (2008).

37. *Bates*, 544 U.S. at 457; *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 558 (2008) (“In light of *Riegel*, there is no authority for invoking the presumption against pre-emption in express pre-emption cases.”).

touchstone’³⁸ of preemption theory, and that absent a “clear and manifest” congressional intent to preempt the “historic police powers of the States [a]re not to be superseded by [a] Federal Act.”³⁹ But, where Congress has provided an express preemption provision, Thomas finds any inquiry beyond the four corners of the statute to determine congressional intent to preempt unnecessary.⁴⁰ An extensive discussion of the presumption against preemption occurs in the *Altria Group* dissent, in which Thomas finds that the Court has doctrinally shifted away from the presumption against preemption (in express preemption cases) and that after *Altria Group* there no longer remained good authority for invoking the presumption in express preemption cases.⁴¹

Further, Thomas specifically rejects the idea that an express preemption clause necessarily precludes application of implied preemption. Writing for the court in *Freightliner*, Thomas categorizes that idea as “without merit” and disavows it as ever having been the holding of *Cipollone*.⁴² Instead, while acknowledging that express preemption clauses can imply a lack of intent to preempt beyond the express clause, express preemption clauses do not categorically eliminate the possibility of both express and implied preemption existing side by side.⁴³ While in *Freightliner* the Court found the state law claim was not preempted on either an express or implied theory, this second bite at the apple resulted in a finding of implied preemption in *Geier*.⁴⁴

Thus, Thomas embraces a broad and extensive view of express preemption. The role of the courts when determining whether the federal statute preempts is simple: the court simply gives effect to the plain meaning of the express language of the statute “without slanting the inquiry in favor of either the Federal Government or the States.”⁴⁵ Further, while a court may infer that the express preemption provision indicates Congress does not intend to preempt beyond the statutory language, this is not a rule, and implied preemption doctrine may still apply.⁴⁶ This view of preemption permits preemption to the furthest extent of the exercise of consti-

38. *Lorillard Tobacco*, 533 U.S. at 541 (quoting *Cipollone*, 505 U.S. at 516).

39. *Lorillard Tobacco*, 533 U.S. at 542 (quoting Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N. Am., Inc., 519 U.S. 316, 325 (1997) (internal quotations omitted)).

40. *Altria Group, Inc.*, 129 S. Ct at 556; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 509 (1996).

41. *Altria Group*, 129 S. Ct. at 556–58 (“In light of *Riegel*, there is no authority for invoking the presumption against pre-emption in express pre-emption cases.”).

42. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288–89 (1995).

43. *Id.* (“At best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule.”).

44. *Geier*, 529 U.S. at 869. The dissent, which Thomas joined, found no preemption of the state law claims, but not on the ground that the express preemption clause barred the application of implied preemption theories.

45. *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431, 457 (2005).

46. *See, e.g., Geier*, 529 U.S. at 869.

tutionally permitted authority by the Congress.⁴⁷ It also avoids the “novel regime” created by the Court in *Cipollone*, where the required narrow construction of express preemption existed alongside the Court’s permissive application of implied preemption.⁴⁸ Indeed, under a Thomas Doctrine, with the exception of the definition of “requirements,” it is difficult to see what, if any, of the holding of the plurality opinion in *Cipollone* remains.

B. Implied Preemption: Conflict

Thomas embraces a narrower view of implied preemption than does the majority of the Court. First, the intent of Congress in enacting a statute is to be determined *only* from the language of the statute itself; other methods of determining congressional intent are illegitimate methods of determining the preemptive effect of the federal statute.⁴⁹ Further, only actual conflict leads to preemption. Imposing an obstacle to achievement of federal purposes or objectives does not create preemption unless those purposes are based in the statutory language.⁵⁰ Conflict preemption, however, applies whenever state law is in direct conflict with federal law.⁵¹ Notably, this does not require it be impossible to comply with both state and federal law to trigger conflict preemption, but instead seems to require the state law actually thwart the intent of Congress in enacting the statute.⁵²

For example, Thomas joined the Stevens dissent in *Geier*, which expressed some hostility to preempting implicitly, applying the presumption against preemption.⁵³ The dissenting opinion embraced a resultantly limited form of implied preemption as a function of federalism,⁵⁴ separation of powers,⁵⁵ and textualism.⁵⁶ Additional application of the presumption

47. *Wyeth v. Levine*, 129 S. Ct. 1187, 1205 (2009) (“As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States.”) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

48. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 546–47 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (“[Under the ‘novel regime,’] the same result so prophylactically protected from careless explicit provision can be achieved by *sheer implication*”).

49. *Wyeth*, 129 S. Ct. at 1207–08.

50. *Id.*

51. *See id.* at 1210–11.

52. *Id.* at 1209.

53. *Geier*, 529 U.S. at 906 (“Under ‘ordinary . . . principles of conflict pre-emption,’ therefore, the presumption against pre-emption should control.”) (internal citation omitted).

54. *Id.* at 907 (“Our presumption against pre-emption is rooted in the concept of federalism [W]e 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.”) (internal quotation marks omitted).

55. *Id.* (“[T]he presumption serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes”).

56. *Id.* at 911 (“[P]reemption analysis is, or at least should be, a matter of precise statutory [or

results in a rule that implied regulatory preemption requires a specific declaration of preemptive intent by the agency.⁵⁷

Thomas goes a step further in *Wyeth*. He engages in a substantial discussion of federalism and the joint sovereignty shared by the national government and the governments of the individual states.⁵⁸ Under this system of joint sovereignty, only federal laws made “in Pursuance” of the Constitution have supremacy under Article VI, Section 2.⁵⁹ Thomas then describes two structural limitations that must be met for a federal law to be made pursuant to the Constitution: (1) it must be within the enumerated powers conferred upon Congress, and (2) it must be subject to the procedural requirements for enactment stated in the Constitution.⁶⁰ Thus, Thomas limits preemptive effect to “only those to [sic] federal standards and polices that are set forth in, or necessarily follow from, the *statutory text* that was produced through the constitutionally required bicameral and presentment procedures.”⁶¹

Acceptance of the premise—only the text of a constitutionally enacted statute or the text of regulations that flow from such a statute can be used to determine intent—leads directly to the remainder of Thomas’s view of implied preemption, consisting of necessary corollaries to maintain ideological consistency. Since “obstacle” preemption so often engages in examinations of legislative history, agency statements, and congressional silence to determine what the policies and objectives of Congress are—what Congress’s intent is—it is constitutionally illegitimate.⁶² Justice Thomas has reiterated his objection to obstacle preemption as extra-textual and constitutionally illegitimate as recently as February of 2011.⁶³

Thomas also engages in a redefinition of what constitutes conflict such that it requires preemption. Effectively, Justice Thomas suggests that the overly broad scope of preemption available to the court under the errone-

regulatory] construction rather than an exercise in free-form judicial policymaking.”) (quoting 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1177 (3d ed. 2000).

57. *Geier*, 529 U.S. at 908.

58. *Wyeth v. Levine*, 129 S. Ct. 1187, 1205–06 (2009).

59. *Id.* at 1206.

60. *Id.* at 1206–07.

61. *Id.* at 1207 (emphasis added); see *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1142 (2011) (Thomas, J., concurring in the judgment); see also *Bruesewitz v. Wyeth L.L.C.*, 131 S. Ct. 1068 (2011) (Justice Thomas joined the majority opinion written by Scalia that resolves the preemption question entirely based upon the text of the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa–22(b)(1) (2006)).

62. *Wyeth*, 129 S. Ct. at 1205; see *Williamson*, 131 S. Ct. at 1141–43 (2011) (Thomas, J., concurring in the judgment); see also *Haywood v. Drown*, 129 S. Ct. 2108, 2132–33 (2009) (Thomas, J., dissenting).

63. *Williamson*, 131 S. Ct. 1131, 1143 (2011) (Thomas, J., concurring in the judgment) (“[F]reeranging speculation about what the purposes of the [regulation] must have been’ is not constitutionally proper in any case. The Supremacy Clause commands that the ‘[l]aws of the United States,’ not the unenacted hopes and dreams of the Department of Transportation, ‘shall be the supreme Law of the Land.’” (citations omitted)).

ous “obstacle” prevention doctrine derived from *Hines* has resulted in a truncated and overly narrow standard for “direct conflict” preemption: physical impossibility.⁶⁴ While not suggesting a replacement test—other than “direct conflict”—Justice Thomas suggests the physical impossibility standard is not the best test to determine whether there is direct conflict between the federal and state schemes.⁶⁵

This expanded “direct conflict” doctrine to replace the defunct “obstacle” preemption doctrine does yield different results in some cases. First, under the “direct conflict” doctrine, *Geier* is wrongly decided as the stated purpose of the statute authorizing the regulation was to increase highway safety.⁶⁶ Because the “requirement” imposed by state tort liability would have actually served the stated statutory purpose, and compliance with both state and federal guidelines was possible, the action should not have been preempted.⁶⁷

Hypothetical situations can also illustrate the different outcomes. Suppose Congress enacts the Good Brakes Act, requiring all automobiles manufactured in the United States to be equipped with anti-lock disc brakes on the front two wheels of the car until 2015, at which time all cars will be required to be equipped with anti-lock disc brakes on all four wheels. The Good Brakes Act lacks a preemption provision or savings clause. In 2012, a man in Texas files suit claiming his new Toyota Camry (constructed in Georgetown, Kentucky) was negligently designed because it only possessed two-wheel disc and two-wheel anti-lock braking systems. The court imposes tort liability by a jury verdict for the plaintiff.

It is clear that under the narrow “impossibility” preemption doctrine, there can be no implied preemption, because Toyota clearly could have equipped the Camry with anti-lock disc braking systems on all four wheels (Toyota actually offers these as standard equipment on the 2011 model).⁶⁸ However, the outcome could very likely change if obstacle preemption or Justice Thomas’s expanded direct conflict model were applied. Hypothetically, the fact that Congress provided a phase-in provision could be interpreted to express congressional purpose to permit manufacturers to gradually upgrade their models so as to avoid a rapid increase in cost. Under “obstacle” preemption, should the verdict be determined to prevent implementation of the statute’s purpose, such a determination could result in preemption of the Texas common-law tort claim.

64. *Wyeth*, 129 S. Ct. at 1209.

65. *Id.*

66. *Id.* at 1214–15.

67. *See id.* Presented with an opportunity to put his expanded direct conflict test to work in *Williamson v. Mazda Motor of America, Inc.*, Justice Thomas instead resolved the question on the text of the savings clause. 131 S. Ct. 1131 (2011) (Thomas, J., concurring in the judgment).

68. *See* Toyota Camry Performance & Specs, <http://www.toyota.com/camry/specs.html> (last visited June 17, 2011).

Yet, under Justice Thomas's suggested model of direct conflict preemption, unless it directly conflicted with the statutory language of the Good Brakes Act, or if the Act contained only a general purpose statement to the effect of improving highway safety, the Texas common law claim would not be preempted. However, if the *statutory language* contained the purpose of providing manufacturers with the ability to phase in the newly required braking systems, the Texas common law claim would likely be preempted, because it would conflict with the intent of Congress *as stated in the plain language of the statute itself*. Thus, under the Thomas Doctrine, the preemption of the state common law action would turn entirely on the language of the statute.

Thomas also postulates a second construction of "direct conflict," the situation in which a federal statute grants an absolute entitlement to do something, which is then taken away by a state statute, regulation, or common law action.⁶⁹ In such an instance, the holder of the federal entitlement could comply with both state and federal requirements by simply doing nothing.⁷⁰ Nevertheless, the state and federal laws would be in direct conflict with one another, and would, under Justice Thomas's view, result in preemption of the state law.

This second construction of "direct conflict" is substantially similar to the first. There are, however, minor differences that may or may not be of great consequence. Imagine that our hypothetical Congress enacts a Marijuana Distributor Licensing Act (MDLA), establishing a bureaucratic mechanism whereby a person might become a licensed distributor of cannabis and other products derived from marijuana. This statute contains language that a licensed distributor "shall be entitled to buy, sell, trade, or otherwise distribute such products in the United States." After passage, any state that maintains statutes making the distribution of marijuana or its by-products illegal has removed this licensed dealers' entitlement to engage in business in that state. The fact the licensee can comply with both by simply not engaging in distribution in the given state is irrelevant.

The difference between this entitlement-removal construction and Justice Thomas's first construction is that nothing in the state statute in any way interferes with the ability of the person to comply with the federal statute. In fact, compliance with the federal statute is completely irrelevant to the legality of marijuana distribution under state law; it is illegal whether engaged in by a licensed or unlicensed distributor. Again, the analysis will turn on the language of the statute. Because the MDLA "entitled" a licensed distributor to engage in the business of distributing, a state law that made this distribution illegal would strip the licensed person of

69. *Wyeth*, 129 S. Ct. at 1211 ("In sum, the relevant federal law did not give Wyeth a right that the state-law judgment took away . . .").

70. *Id.* at 1209.

his or her affirmative entitlement. This constitutes direct conflict, and would be preempted.

C. Implied Preemption: Field

Field preemption occurs “where the nature of Congress’s regulation, or its scope, convinces us that ‘Congress left no room for the States to supplement it.’”⁷¹ Justice Thomas has apparently had no occasion to engage in a direct analysis of field preemption in the area of tort liability. However, citing Justice Stone’s opinion that in *Hines* the majority’s analysis looked more like a field preemption analysis, Thomas wrote: “Regardless of whether *Hines* involved field or conflict pre-emption, the dissent accurately observed that in assessing the boundaries of the federal law—i.e., the scope of its pre-emptive effect—the Court should look to the federal statute itself, rather than speculate about Congress’ unstated intentions.”⁷² Citing to his own dissent in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, Thomas concluded with a parenthetical, quoting, “field pre-emption is itself suspect, at least as applied in the absence of a congressional command that a particular field be pre-empted.”⁷³

Nevertheless, Thomas has been willing to give a “field preemption” effect to broad preemption clauses. ERISA preemption is a wonderful example, preempting state laws “insofar as they . . . relate to any employee benefit plan.”⁷⁴ Thomas’s opinions in the area of ERISA preemption have given the clause wide latitude, preempting an array of state laws.⁷⁵ Examples in this area include preemption of a state health care liability act,⁷⁶ a state divorce statute,⁷⁷ state community property laws,⁷⁸ and requirements to provide health insurance to those on workers’ compensation.⁷⁹ But, ERISA’s preemption clause has not been interpreted to be boundless.⁸⁰ Thomas’s opinions make clear the breadth of ERISA preemption derives from and is defined by the broad language in the preemption clause, evincing Congress’s intent for the scope to be “expansive.”⁸¹

71. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545 (1992) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

72. *Wyeth*, 129 S. Ct. at 1213 n.4.

73. *Id.* (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 616–17 (1997) (Thomas, J., dissenting)).

74. *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 (1995) (citing 29 U.S.C. § 1144(a) (2006)).

75. *Id.* (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 87 (1983)).

76. *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004).

77. *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001).

78. *Boggs v. Boggs*, 520 U.S. 833 (1997).

79. *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992).

80. *See, e.g., Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997) (holding California prevailing wage law not preempted).

81. *See, e.g., Egelhoff*, 532 U.S. at 146.

Thus, once again, Thomas appears to be resolving the issue on textual grounds. Where Congress gives a broad “field-like” preemption clause, Thomas will grant it the intended effect. However, where field preemption would rely on a theory of implication—that the “federal regulatory scheme . . . [is] ‘so pervasive’ as to imply ‘that Congress left no room for the States to supplement it’”⁸²—Thomas is reluctant to override traditional state regulation. It appears, therefore, Thomas would apply the presumption against preemption to all areas of implied preemption, “field” as well as “conflict.”

II. ISSUES IN PREEMPTION

A. Defining “Requirements”

The Court has periodically debated the meaning of the term “requirements” when dealing with preemption issues.⁸³ In *Riegel*, the Court discussed whether the express preemption provision of the Medical Devices Act was intended to include common law tort actions when it preempted any “requirement” imposed by a state or a political subdivision of a state.⁸⁴ The preemption clause provides:

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—

(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.⁸⁵

The court in *Riegel*—with Justice Thomas joining Justice Scalia’s majority opinion—concluded that common law tort claims do impose “requirements.”⁸⁶ This corresponded to a finding of a majority of the Justices in *Lohr*; the Court’s opinion in *Bates*; and the Court’s holding in *Cipollone*.⁸⁷

82. Nelson, *supra* note 13, at 227 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

83. See, e.g., *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

84. *Id.* at 321–22.

85. *Id.* (quoting 21 U.S.C. § 360k(a) (2006)).

86. *Id.* at 324–25.

87. See *id.* at 323–24 (Scalia discusses the preceding cases).

This is consistent with other Justice Thomas opinions. Thomas joined the O'Connor concurrence that concluded common law causes of actions impose requirements in *Lohr*.⁸⁸ Justice Thomas's concurrence in *Bates* specifically concluded that the term "requirements" included common law duties.⁸⁹ Further, Thomas joined Justice Scalia's concurrence in *Cipollone* which concurred with the Court's finding that common law actions imposed "requirements."⁹⁰ In the Thomas model, it thus appears that duties imposed by common law tort actions constitute "requirements" for the purposes of preemption.

B. Reconciling Preemption and Savings Clauses

Statutes that include express preemption clauses often also include "savings" clauses, which usually state that compliance with the federal law does not prevent liability under common law causes of action.⁹¹ For example, the Motor Vehicle Safety Act at issue in *Geier* contained an express preemption provision:

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.⁹²

The Motor Vehicle Safety Act also included the following savings clause: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."⁹³ In *Geier*, both the majority opinion and the dissent by Justice Stevens (joined by Thomas) determined the common law cause of action was saved from express preemption.⁹⁴ The difference arose in consideration of implied preemption.⁹⁵

In some instances, however, Justice Thomas has determined that savings clauses, which appear to have substantially the same function as the savings clause in the Motor Vehicle Safety Act, do not save common law

88. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 512 (1996).

89. *Bates v. Dow Agrosiences, L.L.C.*, 544 U.S. 431, 455 (2005).

90. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 549 (1992).

91. UNTEREINER, *supra* note 5, at 25.

92. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 895 (2000) (Stevens, J., dissenting) (citing 49 U.S.C. § 30103(b)(1) (2006)).

93. *Id.* at 895 (citing 49 U.S.C. § 30103(e) (2006)).

94. *Id.* at 868; *id.* at 897–98 (Stevens, J., dissenting).

95. *Id.* at 874; *id.* at 912–13 (Stevens, J., dissenting).

tort claims.⁹⁶ In each instance, the apparent conflict between the two clauses was resolved through an examination of the express language of the statute. In *Geier*, the extremely broad language of the savings clause and consistent usage of the term “safety standard” in the statute resulted in a finding that the claim was not expressly preempted.⁹⁷ In *Cipollone*, *Lohr*, and *Riegel*, the finding that the claims were not saved largely turned on the definition given to “requirements”—the definition included common law tort duties.⁹⁸

Justice Thomas recently revisited the competing savings and preemption clauses in the Motor Vehicle Safety Act in *Williamson v. Mazda Motor of America, Inc.*⁹⁹ Not unexpectedly, he resolved the issue using the language of the statute itself. While characterizing the majority’s reliance on *Hines* and obstacle preemption as illegitimate,¹⁰⁰ he agreed there was no preemption of Williamson’s tort claim.¹⁰¹ Instead, Thomas noted that the savings clause “explicitly preserve[s] state common-law actions.”¹⁰² Effectively, he rejected reading the two clauses as conflicting and instead read the savings clause as creating an exception to the express preemption clause. Further, the savings clause also saved the claim against implied preemption. Because “liability at common law” is expressly saved, the tort law claim cannot be expressly or impliedly preempted.

Thus, yet again, the Thomas Doctrine requires an issue of contention to be resolved through reference to the text. Consistently, Justice Thomas’s opinions and those in which he joins support the view that preemption does not require any special rules of construction, but instead only require application of the ordinary rules of statutory construction.¹⁰³ Therefore, conflicting preemption and savings clauses should be resolved through resort to the text of the statute itself, with the provisions being reconciled in the same manner as any other conflicting provisions: through application of the ordinary rules of statutory construction.

96. See, e.g., *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 509 (1996) (O’Connor, J., concurring in part and dissenting in part); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 544 (1992) (Scalia, J., concurring in part and dissenting in part).

97. *Geier*, 529 U.S. at 897–98.

98. *Cipollone*, 505 U.S. at 549; *Lohr*, 518 U.S. at 511; *Riegel*, 552 U.S. at 325 n.4.

99. *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1141 (Thomas, J., concurring in the judgment).

100. *Id.* at 1142–43.

101. *Id.* at 1141.

102. *Id.* (quoting *Wyeth v. Levine*, 129 S.Ct. 1187, 1214 (Thomas, J., concurring)).

103. See *Cipollone*, 505 U.S. at 545 (“[O]ur responsibility is to apply to the text ordinary principles of statutory construction”); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 895 (2009) (“When a federal statute contains an express pre-emption provision, ‘the task of statutory construction must in the first instance focus on the plain wording of [that provision], which necessarily contains the best evidence of Congress’ pre-emptive intent.’”) (citing *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)); *Geier*, 529 U.S. at 911 (“[P]reemption analysis is, or at least should be, a matter of precise statutory [or regulatory] construction rather than an exercise in free-form judicial policymaking.”) (citation omitted); *Lohr*, 518 U.S. at 512.

C. Preemption by Federal Agencies

In *Wyeth*, Justice Thomas clearly expressed hostility toward preemption by federal agencies when the power to do so is not created by a direct statutory grant of authority:

[A]gency musings, however, do not satisfy the Art. I, § 7 requirements for enactment of federal law and, therefore, do not pre-empt state law under the Supremacy Clause. When analyzing the pre-emptive effect of federal statutes or regulations validly promulgated thereunder, “[e]vidence of pre-emptive purpose [must be] sought in the text and structure of the [provision] at issue” to comply with the Constitution.¹⁰⁴

Citing *New York v. Federal Energy Regulatory Commission*, he notes that a “federal agency may pre-empt state law only when and if it is acting within the scope of its congressional delegated authority”¹⁰⁵ and that “an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.”¹⁰⁶

He further seeks to tie the invalidity of “agency musings” to the invalidity of obstacle preemption.¹⁰⁷ In the end, Justice Thomas drives home the central theme of his views on preemption: the text of a statute must ultimately be the basis of preempting state law.¹⁰⁸ “Pre-emption must turn on whether state law conflicts with the text of the relevant federal statute or with the federal regulations authorized by that text.”¹⁰⁹ This is, effectively, a textual mandate test.

III. PROBLEMS WITH THE THOMAS DOCTRINE: WHAT IS DIRECT CONFLICT?

Scholars have identified a number of problems with obstacle preemption. Among them, primarily, is that the doctrine is simply constitutionally

104. *Wyeth v. Levine*, 129 S. Ct. 1187, 1207–08 (2009) (Thomas J., concurring in the judgment) (citations omitted).

105. *Id.* at 1208 (citing *New York v. Fed. Energy Regulatory Comm’n*, 535 U.S. 1, 18 (2002)).

106. *Id.* (citing *New York v. Fed. Energy Regulatory Comm’n*, 535 U.S. at 18).

107. *Id.* at 1207–08.

108. *Id.* at 1208 (citing *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting); *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 459 (2005) (Thomas, J., concurring in the judgment in part and dissenting in part); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting)).

109. *Wyeth*, 129 S. Ct. at 1208; *see also Williamson v. Mazda Motor of Am., Inc.*, 131 S.Ct. 1131, 1141 (2011) (Thomas, J., concurring in the judgment) (“In short, pre-emption must turn on the text of a federal statute or the regulations it authorizes.” (citing *Wyeth*, 129 S. Ct. at 1207)).

illegitimate.¹¹⁰ Justice Thomas's arguments in his concurrence in *Wyeth* echo the concerns of the academy that the current preemption scheme actually reverses the federalist scheme, creating a presumption in favor of preemption in many cases.¹¹¹ The view that obstacle preemption violates the constitutional scheme of "dual sovereignty" is pervasive in Thomas's writing on preemption. Thomas's preemption doctrine adequately addresses these concerns.

What Thomas fails to address, however, is what constitutes direct conflict. His two posited examples—direct conflict with the language of the federal requirement, and preventing exercise of a federally granted right—do not provide a great deal of guidance to the lower courts. The lack of guidance provided to lower courts under obstacle preemption has also been an area of great concern and criticism.

Obstacle preemption, consequently, requires a difficult and largely undefined inquiry into the policies underlying a statutory scheme, as well as the best method of implementing those policies in practice. That this inquiry requires a largely ad hoc policy analysis is evidenced by the Court's minimally helpful guidance on obstacle preemption:

'The key question is . . . at what point the state regulation sufficiently interferes with federal regulation that it should be deemed preempted under [federal law].' The inquiry into sufficient interference is value-laden and policy intensive. It lies at the nebulous core of obstacle preemption.¹¹²

This ad hoc policy analysis is one of the primary problems with obstacle preemption; it leaves federal judges with little choice but to make case-by-case decisions on the intended purpose of federal legislation. Further, policy analysis is particularly difficult for the courts.¹¹³ This difficulty is exacerbated when courts are called upon to determine the amorphous intent of an agency body,¹¹⁴ which is sometimes sufficient to preempt state law.¹¹⁵

110. See, e.g., Nelson, *supra* note 13, at 265–90.

111. See generally Erwin Chemerinsky, *Empowering States When It Matters A Different Approach To Preemption*, 69 BROOK. L. REV. 1313 (2004); see also Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967 (2002).

112. Paul E. McGreal, *Some Rice With Your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823, 833–34 (1995) (citing *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 107 (1992)).

113. James B. Staab, *Conservative Activism on the Rehnquist Court: Federal Preemption is No Longer a Liberal Issue*, 9 ROGER WILLIAMS U. L. REV. 129, 141 (2003) ("This last-mentioned implied preemption doctrine known as 'obstacle' preemption presents the most difficulty for the reviewing Court, because it must discern what Congress's objectives or purposes were when it passed the statute.").

114. *Id.* at 171.

115. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

It is difficult to see how Justice Thomas's analytical model will dramatically decrease the difficulty of lower courts in the near future. While, admittedly, limiting the application of implied preemption to direct conflicts with a federal statute and to removal of a federally granted privilege effectively limits questions to statutory resolutions, Thomas alludes to the potential existence of other instances which would constitute direct conflict.¹¹⁶ Until such time as there is some definition to direct conflict that is more specific than the muddled, inconsistent, and sometimes incoherent definitions supplied by the Court,¹¹⁷ lower courts will be left to their own devices to determine when direct conflict exists.

IV. LIKELY IMPACTS OF REPUDIATION OF OBSTACLE PREEMPTION

Ultimately, the effects of adopting a textual mandate test¹¹⁸ for preemption could be minimal. The most likely effect is simply that Congress would be forced to be more explicit when drafting statutory language. If Congress desires federal regulations to preempt state law, it will have to say so. Silence will be interpreted in light of the presumption against preemption. Further, if the courts refuse to preempt based on a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives,"¹¹⁹ it is possible Congress will be more apt to expressly state its desired purpose in the statute.

Adoption of Justice Thomas's views would also likely, over time, increase clarity in what is a confusing and unpredictable area of constitutional law.¹²⁰ Ultimately, questions of preemption would turn on simpler questions of statutory interpretation instead of convoluted and unclear questions of divining congressional purpose. Presumably, time and the accumulation of precedent would better define what constitutes direct conflict. By limiting the analysis to the plain language of the federal requirement and the state requirement, Thomas eliminates the "fuzzier notions of 'obstacle' preemption, under which state law is preempted whenever its

116. *Wyeth v. Levine*, 129 S. Ct. 1187, 1209 (2009) (Thomas, J., concurring in the judgment).

117. *See id.* (citing *Geier*, 529 U.S. at 873 ("a case in which state law penalizes what federal law requires")); *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227 (1998) (when state-law claims "directly conflict" with federal law); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 ("where compliance with both federal and state regulations is a physical impossibility"). Justice Thomas did not discuss his definition of direct conflict further when the Court decided *Williamson v. Mazda Motor of America, Inc.*, 131 S.Ct. 1131 (2011) and *Bruesewitz v. Wyeth, L.L.C.*, 131 S. Ct. 1068 (2011). His failure to do so leaves us with the somewhat unsatisfactory definition provided in *Wyeth*.

118. Is preemption mandated by the text of the federal requirement, either because the federal requirement expressly preempts or because the state requirement directly conflicts with the text of the federal requirement?

119. *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431, 459 (2005) (Thomas J., concurring in the judgment in part and dissenting in part) (citation omitted).

120. *Nelson*, *supra* note 13, at 232-33.

practical effects would stand in the way of accomplishing the full purposes behind a valid federal statute.”¹²¹

A third likely outcome of adoption would be a bit of short-term chaos. Obstacle preemption has been a part of the Court’s jurisprudence since *Hines v. Davidowitz* in 1941.¹²² It is probably no exaggeration to say that the number of state requirements that would potentially become valid again upon invalidation of the Court’s obstacle preemption jurisprudence is in the hundreds. *Hines* has been cited literally thousands of times for its role as the basis of obstacle preemption.¹²³ Should the Court reverse field and hold obstacle preemption invalid, the lower courts could be swamped by efforts to breathe new life into previously dead state regulations. What chaos these ghouls might cause would certainly vary from case to case. Congress could quickly remedy any problems by simply legislatively granting preemptive effect to any federal requirements currently deemed to preempt. Congress actually doing so, however, is unlikely.¹²⁴

V. CONCLUSION

The Thomas Doctrine of preemption can be summarized fairly succinctly as a textual mandate test: the text of a statute must, ultimately, be the basis for preemption.

When acting within its constitutionally delegated authority, where Congress expressly preempts state law, the preemption is valid and absolute to the extent of the four corners of the language of the statute itself, construed by applying the plain meaning of its terms and giving effect to all of its provisions. However, where Congress does not expressly preempt state law, the presumption will be that the states retain their historic police powers to regulate as a joint sovereign unless their laws’ requirements are in direct conflict with the *plain language* of the federal requirement. State law requirements are in direct conflict with federal requirements, at a minimum, (1) where they render compliance with both the state and federal requirements impossible, and (2) where they remove an entitlement granted by a federal requirement, rendering compliance with both requirements possible only through nonperformance.

121. *Id.* at 231.

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

123. A KeyCite of *Hines* yields over 7,000 results, the majority of which cite to the discussion that forms the basis of obstacle preemption.

124. See Nelson, *supra* note 13, at 229.

Further, when a preemption clause refers to “requirements” (prohibiting imposition of non-identical requirements by a state for example), those “requirements” include duties imposed by common law tort actions. Therefore, they are also preempted. Additionally, conflicts between preemption and savings clauses should be resolved through application of the ordinary rules of statutory construction. Thus, they should be reconciled in the same manner as any potentially conflicting statutory provisions. However, where there is no conflict, such as in the Motor Vehicle Safety Act, the savings clause is an exception to the preemption clause and preserves the saved claim against both express and implied preemption.

Finally, federal agencies may only preempt state law when their authority to do so is granted in the language of a congressional enactment. The power to preempt lies with Congress alone, and agencies may only preempt when that congressional authority has been delegated to them expressly.

In his product liability preemption jurisprudence, Justice Thomas’s opinions combine to create a doctrinal position that can be described as a textual mandate test. Basically, Congress meant what it said, and it said what it meant.¹²⁵ Under this doctrine, all questions regarding preemption can be answered by examining a federal statute’s express preemption provision, examining whether a state requirement conflicts with the text of a federal statute, and examining whether a state requirement conflicts with the text of a federal regulation that is given preemptive effect by the text of a federal statute. If none of these mandate preemption, the state requirement remains effective.

Preemption doctrine is the “most frequently used doctrine of constitutional law.”¹²⁶ Thus, while Thomas’s view is clearly in the minority, it is one that it would benefit the Court to examine. It places preemptive power in the hands of Congress, acknowledging congressional authority to preempt under the Constitution, but also respecting the sovereignty of the States by not preempting where not required to do so.¹²⁷ By structuring preemption doctrine in this manner, preemption questions become simpler questions of statutory interpretation, removing much of the confusion from a confusing area of law. This simpler test could provide greater guidance to the lower courts and increase uniformity in preemption decisions across the federal courts.¹²⁸ However, a more detailed definition of direct conflict will be needed to give this guidance. Absent a better definition, judicial

125. An elephant’s (or donkey’s) faithful 100%.

126. Nelson, *supra* note 13, at 303 (citing Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994)).

127. An exercise of the presumption against preemption.

128. “Sometimes the questions are complicated and the answers are simple.” – Dr. Seuss

“psychoanalysis” will, more or less, remain the method for resolving pre-emption questions.¹²⁹

*E. Travis Ramey**

129. *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1141 (2011) (Thomas, J., concurring in the judgment) (citation omitted).

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