
PREEMPTION AS PURPOSIVISM'S LAST REFUGE

INTRODUCTION

Textualism has come to be the dominant theory of statutory interpretation in United States courts. As the primary academic proponent of textualism, Professor John Manning, has written, “the Court in the last two decades has mostly treated as uncontroversial its duty to adhere strictly to the terms of a clear statutory text, even when doing so produces results that fit poorly with the apparent purposes that inspired the enactment.”¹ Textualism “ask[s] how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context.”² This theory has “produc[ed] a major transformation in the way the Supreme Court approaches statutory interpretation cases.”³ The majority of Justices now seem to agree at least that statutory interpretation “starts with [the statute’s] text.”⁴ Even if some Justices may not otherwise choose to use textualism, the presence of committed textualists on the bench means that all of the Justices tend toward textualism in opinion writing to garner a majority.⁵ Further, nontextualist Justices tend to be adherents of what Manning calls “the new purposivism”: they take seriously the level of generality at which a statute is framed, but because of their “textually-structured approach to purposivism,” the only real difference between these new purposivists and textualists is the former’s “willingness to invoke legislative history in cases of genuine semantic ambiguity.”⁶

Yet preemption doctrine has been left behind from this Textualist Revolution.⁷ Professor Daniel Meltzer has pointed out that “one of the most striking features of the [Supreme Court’s] preemption decisions is that all of the Justices appear to accept as common ground a broad judicial role in formulating rules of decision that are not tied to statutory text,”⁸ though Justice Thomas now rejects this approach as “inherently flawed.”⁹ This fundamental difference in interpretive approach is not

¹ John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 114.

² John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392–93 (2003).

³ Thomas W. Merrill, Essay, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 351 (1994).

⁴ *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259, 1264 (2011); see Manning, *supra* note 1, at 129 (“[A]ll but two of the Court’s nontextualist Justices seem to have gone along with this change in approach without much hesitation.”).

⁵ See Merrill, *supra* note 3, at 365–66.

⁶ Manning, *supra* note 1, at 116–17.

⁷ See *id.* at 114 n.5 (noting that preemption is a “systemic . . . exception” to “the Court’s movement away from atextual purposivism”).

⁸ Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 376.

⁹ *Wyeth v. Levine*, 129 S. Ct. 1187, 1211 (2009) (Thomas, J., concurring in the judgment).

justified by any difference between a statute's preemption command and its policy commands. After all, preemption represents a policy judgment. A statute's preemption command determines which policy demands obedience from citizens, that of the national government or that of state or local governments. Although preemption is a foundational policy choice, the Court often throws out its ordinary statutory approach when confronted with a decision on a statute's preemption policy. In particular, the Court's obstacle and field preemption doctrines encourage courts to exalt extratextual purpose above statutory text,¹⁰ which violates the textualist command of giving effect to the text of laws enacted pursuant to Article I, Section 7 of the Constitution.

This Note argues that approaching preemption cases from a textualist perspective would be more consistent with the Court's general method of interpretation and that there is no reason to depart from this method in preemption cases. Part I shows that the Court presently deviates in preemption cases from its broadly textualist approach to interpretation generally. Defending textualism as its own doctrine is beyond the scope of this Note, but Part II demonstrates that the various rationales for textualism apply with equal force in the preemption context. Part III argues that there is no justification for departing from textualism in preemption cases by responding to defenses of current doctrine.

I. PREEMPTION LEFT BEHIND

"A fundamental principle of the Constitution is that Congress has the power to preempt state law."¹¹ Congress can include an express preemption provision to address directly a statute's preemptive effect.¹² But an express preemption provision need not be included for the statute to have preemptive effect, and indeed, the Court has held that even an express provision or a saving clause does not bar the statute from implicitly preempting state law.¹³ The Supreme Court commonly articulates two types of implied preemption. The first, conflict preemption, itself involves two different varieties: a state action may either make it "impossible for a private party to comply with both state and federal requirements"¹⁴ or "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."¹⁵ The second type of implied preemption, field preemption,

¹⁰ See *infra* Part I, pp. 1057–64.

¹¹ *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

¹² *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

¹³ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000).

¹⁴ *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

¹⁵ *Geier*, 529 U.S. at 873 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (internal quotation mark omitted).

involves state action in a field that Congress “intended federal law to occupy . . . exclusively.”¹⁶ The Court has explained that “the purpose of Congress is the ultimate touchstone in every pre-emption case.”¹⁷

It is immediately apparent that the second variety of conflict preemption — obstacle preemption — is related to field preemption. The Court itself has explained that the categories are not “rigidly distinct”: “field pre-emption may be understood as a species of conflict pre-emption” because “[a] state law that falls within a pre-empted field conflicts with Congress’ intent . . . to exclude state regulation.”¹⁸ If Congress’s purpose was to occupy some field of regulation, then a state action that regulates in that field will be invalid under either obstacle preemption or field preemption. In short, one could “recharacterize[]” all field preemption cases as obstacle preemption cases.¹⁹ But one could not characterize all cases of obstacle preemption as field preemption cases: Congress may intend to preempt a given state action without preempting all state actions in the relevant field of regulation. Therefore, this Note will first address obstacle preemption’s general problems before moving on to a discussion of the specific issues raised by the subdoctrine of field preemption. The Court’s current tests for obstacle and field preemption appear to deviate from the textualist approach applied in other statutory interpretation cases by elevating extratextual purposes over textual commands.

Illustrative is *International Paper Co. v. Ouellette*,²⁰ in which the Court held that the Clean Water Act²¹ (CWA) preempted Vermont nuisance law with regard to certain effluent discharges into Lake Champlain.²² In *Ouellette*, property owners on Lake Champlain filed suit in Vermont under Vermont common law, claiming that a New York company’s effluent discharges were nuisances and diminished the value of their property.²³ The company claimed that the CWA preempted Vermont nuisance law.²⁴

The CWA and its amendments created a federal permit system administered by the Environmental Protection Agency (EPA) to regulate effluent discharges into navigable bodies of water.²⁵ The relevant

¹⁶ *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

¹⁷ *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (internal quotation marks omitted).

¹⁸ *English*, 496 U.S. at 79 n.5.

¹⁹ RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 646 (6th ed. 2009).

²⁰ 479 U.S. 481 (1987).

²¹ 33 U.S.C. §§ 1251–1387 (2006).

²² *Ouellette*, 479 U.S. at 496.

²³ *Id.* at 483–84.

²⁴ *Id.* at 484.

²⁵ *Id.* at 489.

statute contains two provisions dealing with independent state regulation. First, the statute preserves states' existing rights and jurisdiction over their waters, including their right to adopt stricter limitations on discharges:

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State . . . to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; . . . or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.²⁶

Second, the statute explains in its citizen-suit section: "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)."²⁷

Taken together, these two provisions constitute the statute's "saving clause."²⁸ The district court in *Ouellette* held that this saving clause preserved Vermont's ability to apply its common law of nuisance, even as against discharge sources in a bordering state.²⁹ The Second Circuit affirmed,³⁰ but the Supreme Court affirmed in part, reversed in part, and remanded.³¹ The Court held that the CWA "pre-empts state law to the extent that the state law is applied to an out-of-state point source."³² The Court considered whether the CWA occupied the field of pollution regulation but found that "the saving clause negates the inference that Congress 'left no room' for state causes of action."³³

To assess whether the application of Vermont law would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"³⁴ the Court looked at the language and goals of the CWA. The Court explained that the "plain language" of the saving clause did not compel any particular result: According to the Court, the citizen-suit provision of the saving clause applied only to the citizen-suit section of the CWA.³⁵ Further, the statute's reference to the "waters (including boundary waters) of such State[]"³⁶ "ar-

²⁶ 33 U.S.C. § 1370.

²⁷ *Id.* § 1365(e).

²⁸ *Ouellette*, 479 U.S. at 485.

²⁹ *Ouellette v. Int'l Paper Co.*, 602 F. Supp. 264, 269 (D. Vt. 1985).

³⁰ *Ouellette v. Int'l Paper Co.*, 776 F.2d 55, 56 (2d Cir. 1985).

³¹ *Ouellette*, 479 U.S. at 500.

³² *Id.*

³³ *Id.* at 492.

³⁴ *Id.* (quoting *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)) (internal quotation marks omitted).

³⁵ *Id.* at 493.

³⁶ 33 U.S.C. § 1370 (2006).

guably limits the effect of the clause to discharges flowing *directly* into a State's own waters, *i.e.*, discharges from within the State."³⁷ Because the CWA "does not speak directly to the issue," the Court looked to its "goals and policies" to determine whether to preempt Vermont law.³⁸

The Court emphasized that Congress "carefully dr[ew]" the CWA, which made it unlikely that it "intended to undermine" the "statute through a general saving clause."³⁹ For support, the Court quoted an earlier environmental regulation case:

The fact that the language of [the saving clause] is repeated *in haec verba* in the citizen-suit provisions of a vast array of environmental legislation . . . indicates that it does not reflect any considered judgment about what other remedies were previously available or continue to be available under any particular statute.⁴⁰

Further, even if the "ultimate goal of both federal and state law is to eliminate water pollution," the application of Vermont law would "interfere[] with the methods by which the federal statute was designed to reach this goal," meaning the state law was preempted.⁴¹ Any other interpretation of the saving clause would upset the CWA's balance of power between the federal and state governments, because an affected state could force the source of the pollution to "adopt different control standards . . . from those approved by the EPA."⁴² Applying the affected state's common law "also would undermine the important goals of efficiency and predictability in the permit system" because nuisance standards are often "vague."⁴³ Thus, according to the Court, the CWA preempted the affected state's law.⁴⁴ But the saving clause does preserve the right to "bring[] a nuisance claim pursuant to the law of the *source* State"⁴⁵ because application of source state law would not upset the statutory scheme.⁴⁶

Ouellette provides a good illustration of how the Court's current approach to preemption cases deviates from its approach to statutory interpretation otherwise. The statutory language at issue was clear: the phrase "the waters (including boundary waters) of such States"⁴⁷

³⁷ *Ouellette*, 479 U.S. at 493.

³⁸ *Id.*

³⁹ *Id.* at 494.

⁴⁰ *Id.* at 494 n.14 (alterations in original) (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 329 n.22 (1981)).

⁴¹ *Id.* at 494.

⁴² *Id.* at 495.

⁴³ *Id.* at 496.

⁴⁴ *Id.* at 500.

⁴⁵ *Id.* at 497.

⁴⁶ *See id.* at 498–99.

⁴⁷ 33 U.S.C. § 1370 (2006).

does not differentiate between sources of the discharges into those waters.⁴⁸ Lake Champlain is a boundary water of the state of Vermont and should therefore have been governed by the saving clause, yet the Court found the statute ambiguous and so moved on to discuss its general purpose. The Court felt unconstrained by the saving clause in part because many environmental statutes contain similar clauses, leading it to dismiss the clause as not reflective of Congress's "considered judgment."⁴⁹ This argument would have been unnecessary if the saving clause were actually ambiguous, which suggests that the Court's preemption doctrine encouraged the Court to consider extra-textual "purposes and objectives" regardless of the clarity of the statutory text. The Court's reasoning oddly suggests that the more often Congress uses particular statutory language, the more often the Court can disregard that language. Moreover, if the Court disregards the text of laws passed by Congress, Congress has little incentive to "consider" carefully how it writes those laws to begin with.⁵⁰ It is difficult to imagine how Congress could have provided a more direct indication of its intent to preserve state actions, whether under affected-state or source-state law, than the saving clause at issue in *Ouellette*.

Given that textualism "ask[s] how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context,"⁵¹ it seems clear that under a textualist interpretation, the saving clause in *Ouellette* would have preserved state law. Yet despite the rising prominence of textualism in the Court's jurisprudence, the Court's preemption doctrine has not changed a whit since *Ouelette*. In preemption case after preemption case, the Court has deviated from a textualist approach. For example, in *Geier v. American Honda Motor Co.*,⁵² the Court disregarded an explicit saving clause because the Court "divined" a contrary preemptive purpose "based on agency comments, regulatory history, and agency litigating positions."⁵³ To find preemption in *Williamson v. Mazda Motor of America, Inc.*,⁵⁴ the Court again relied on agency documents and litigating positions to

⁴⁸ See *Ouellette*, 479 U.S. at 503 (Brennan, J., concurring in part and dissenting in part) (noting that "the [CWA] draws no distinction between interstate and intrastate disputes").

⁴⁹ *Id.* at 494 n.14 (majority opinion) (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 329 n.22 (1981)).

⁵⁰ Cf. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 111 (2006) ("If the Court feels free to adjust the semantic meaning of statutes when the rules embedded in the text seem awkward in relation to the statute's apparent goals, then legislators cannot reliably use words to articulate the boundaries of the frequently awkward compromises that are necessary to secure a bill's enactment.").

⁵¹ Manning, *supra* note 2, at 2392–93.

⁵² 529 U.S. 861 (2000).

⁵³ *Wyeth v. Levine*, 129 S. Ct. 1187, 1214 (2009) (Thomas, J., concurring in the judgment).

⁵⁴ 131 S. Ct. 1131 (2011).

overcome the text of the relevant statute's saving clause.⁵⁵ Even Justice Scalia committed a "[t]extual misstep[]"⁵⁶ by allowing extratextual purpose to overcome a saving clause in *AT&T Mobility LLC v. Concepcion*.⁵⁷ In all of these cases, what began as an attempt to determine whether a state action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"⁵⁸ ended as a "freewheeling,"⁵⁹ "extratextual,"⁶⁰ "potentially boundless"⁶¹ judicial inquiry that imposed as law the Court's "own conceptions of a policy which Congress has not expressed."⁶²

Case outcomes confirm the proposition that the Court approaches implied preemption cases differently from other cases. Since 2002, the Court has decided thirteen cases in which at least one point of disagreement involved obstacle or field preemption.⁶³ Of course, the Court has decided more preemption cases over that time frame, but many of them are irrelevant to this analysis. Express and direct-conflict preemption cases are unhelpful in determining whether the Justices behave differently in obstacle preemption cases.⁶⁴ As discussed previously, field preemption is analytically indistinguishable from obstacle preemption, which is why cases involving field preemption are also relevant. In three cases, the Court decided multiple issues regarding obstacle or field preemption, and those issues were counted separately to reflect votes accurately.⁶⁵

⁵⁵ See *id.* at 1142–43 (Thomas, J., concurring in the judgment).

⁵⁶ Manning, *supra* note 1, at 129 n.80.

⁵⁷ 131 S. Ct. 1740, 1748–53 (2011).

⁵⁸ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

⁵⁹ *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

⁶⁰ *Wyeth v. Levine*, 129 S. Ct. 1187, 1217 (2009) (Thomas, J., concurring in the judgment).

⁶¹ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting).

⁶² *Hines*, 312 U.S. at 75 (Stone, J., dissenting).

⁶³ See *Arizona v. United States*, 132 S. Ct. 2492 (2012); *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261 (2012); *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011); *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011); *Wyeth*, 129 S. Ct. 1187; *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008); *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003); *Spietsma v. Mercury Marine*, 537 U.S. 51 (2002); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002). This list was obtained by beginning with a Westlaw search for all Supreme Court cases between 2002 and 2012 using any variation of the word "preempt" in the synopsis or digest fields. The author then examined each case individually to determine whether it was centered on an issue involving obstacle or field preemption. The reader who disagrees with the choice of cases can discount the results of the analysis accordingly.

⁶⁴ In some cases, one side of the Court decided an issue only on express preemption or other grounds and did not reach the implied preemption grounds. Because those cases did not involve an actual dispute over an obstacle or field preemption issue, they were not included in this analysis.

⁶⁵ See *Arizona*, 132 S. Ct. 2492; *Kurns*, 132 S. Ct. 1261; *Whiting*, 131 S. Ct. 1968.

The evidence shows that obstacle and field preemption cases tend to be more divisive than the Court's overall caseload. Over roughly the past decade, the Court was unanimous in about 44% of all cases.⁶⁶ By comparison, over the same period, the Court was unanimous on an obstacle or field preemption issue in only 28% of issues decided.⁶⁷ The difference is even starker when compared to federal statutory interpretation cases: in such cases, the Court was unanimous about 49% of the time.⁶⁸ No obstacle or field preemption issues were decided with only one minority vote, while the average is 8% for all cases.⁶⁹ On average, 35% of all cases and 30% of federal statute cases had three or four minority votes, whereas 61% of obstacle or field preemption issues had three or four minority votes.⁷⁰

	Unanimous	1 Minority Vote	2 Minority Votes	3 Minority Votes	4 Minority Votes
All Cases	44%	8%	13%	14%	21%
Federal Statute Cases	49%	8%	13%	13%	17%
Obstacle/ Field Preemption Issues	28%	0%	11%	44%	17%

⁶⁶ See THE SUPREME COURT DATABASE, <http://scdb.wustl.edu/analysis.php> (last visited Dec. 1, 2012). This result was computed by analyzing all cases from October Term 2001 through October Term 2011, then using "Frequency Distributions" for the variable "Minority Votes," which provides the percentage of cases having zero, one, two, three, or four minority votes.

⁶⁷ This percentage was calculated by analyzing each obstacle or field preemption issue in the cases cited *supra* note 63. While a more precise comparison would remove these obstacle and field preemption cases from the total case figure, given that there are 899 total cases in the relevant timespan, *see supra* note 66, and only 13 of them involve obstacle or field preemption, any statistical distortion will be minimal.

⁶⁸ This calculation was performed by narrowing the search of *The Supreme Court Database* to its "Federal Statute" cases in "Legal Provisions." *See supra* note 66.

⁶⁹ *See supra* notes 66–67. In some cases involving disagreement about obstacle preemption, some Justices would have ruled on other grounds. Those Justices were included with the side on which they voted. For instance, Justice Thomas refuses to use obstacle preemption, *see Wyeth v. Levine*, 129 S. Ct. 1187, 1217 (2009) (Thomas, J., concurring in the judgment), and Justice Sotomayor based her dissent on one issue in *Whiting* on grounds other than obstacle preemption, *see Whiting*, 131 S. Ct. at 1998–2005 (Sotomayor, J., dissenting).

⁷⁰ *See supra* notes 66–68. It is true that obstacle or field preemption issues actually have a slightly lower percentage of four minority votes than overall cases do, but this result is probably because nearly half of the cases in the obstacle or field preemption set had only eight members of the Court voting. *See cases cited supra* note 63.

If the Court approached obstacle and field preemption cases like other statutory interpretation cases, such large differences in voting trends would be unlikely.⁷¹ While it is possible that greater division results from some other characteristic of these cases, implied preemption cases do not seem to be particularly unique apart from the Court's interpretive approach.⁷² Both the Court's approach to preemption cases and the results in those cases suggest that the Supreme Court indeed uses a different method of interpretation in implied preemption cases.

II. RATIONALES FOR TEXTUALISM APPLY IN THE PREEMPTION CONTEXT

If the Court deviates from its normal approach to interpretation in preemption cases, a logical follow-up question is whether the rationales for textualism apply in the preemption context. The arguments for textualism are by now well known. Textualists argue that the text provides the only legitimate evidence of Congress's purposes, for only the text represents the final product of Congress passed through bicameralism and presentment.⁷³ Textualism thus gives effect to the legislative compromises necessary to pass laws.⁷⁴ Both obstacle and field preemption essentially imply additional statutory clauses beyond the statute's text, clauses that mandate preemption when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"⁷⁵ or when Congress creates a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."⁷⁶ The

⁷¹ Formally, one can calculate the hypergeometric probability of this observed outcome. This probability reveals the odds that a certain number of successes will occur in a given sample drawn from a population where the probability of a success occurring in the population is known. See INTRODUCTION TO PROBABILITY AND STATISTICS 191-92 (William Mendenhall et al. eds., 11th ed. 2003). In this case, the "Federal Statute" population contains 303 cases, of which 91 (30%) were decided with three or four minority votes, and the obstacle/field preemption sample contains 13 cases, of which 8 were decided with three or four minority votes. (Because the issues in those preemption cases were counted individually, it is difficult to arrive at an equivalent *case* number, but 61%, *see supra* p. 1063, of the 13 cases with three or four minority votes would lead to 8 cases if normal rounding rules are followed.) The cumulative hypergeometric probability is about 1.6%, which means that if one randomly sampled any 13 cases from the "Federal Statute" set for this time period, there would be only a 1.6% chance that a sample of cases from the broader group would prove at least as divisive as the cases dealing specifically with obstacle or field preemption.

⁷² Cf. Meltzer, *supra* note 8, at 371 ("[T]he questions at issue in the preemption cases are [not] necessarily more important than those in . . . [other] cases.").

⁷³ See, e.g., *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991).

⁷⁴ See Manning, *supra* note 1, at 114; Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 279-80 (2000); *see also* *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998) (Easterbrook, J.).

⁷⁵ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

⁷⁶ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Court then relies on these tests to search for evidence of “clear, but implicit, pre-emptive intent.”⁷⁷ The rationales for using textualism counsel against these sorts of implied additions to the statute’s text.⁷⁸ Indeed, the usual arguments in favor of textualism seem to apply with equal force to obstacle and field preemption doctrine.

A. Obstacle Preemption

The doctrine of obstacle preemption encourages courts to disregard text in favor of extratextual notions of Congress’s “true” purpose. This departure from standard interpretive practice has inspired Justice Thomas to refuse to apply the doctrine at all.⁷⁹ Determining Congress’s “true” purpose is one weakness of obstacle preemption. Textualists argue that any reliance on Congress’s broad intent “greatly increases the discretion, and therefore the power, of the court.”⁸⁰ They also emphasize that lawmaking is a process of compromise.⁸¹ As the Court has explained in other interpretive contexts, “it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.”⁸² In *Ouellette*, the Court identified a number of goals embodied by the CWA, including “eliminat[ing] water pollution,”⁸³ “balanc[ing] of interests,”⁸⁴ “efficiency,”⁸⁵ “predictability,”⁸⁶ and “serving the public interest.”⁸⁷ Even assuming courts could somehow accurately infer the complete set of legislative purposes, they would still have to decide which purposes Congress wanted to advance with respect to the preemption question. This judicial choice, untethered to any statutory command, transfers Congress’s exclusive power to preempt to the courts.⁸⁸

The level of generality is important in this choice: the courts could consider Congress’s general purposes across all statutes, the general

⁷⁷ *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 31 (1996).

⁷⁸ As discussed in Part III, *infra* pp. 1069–77, Congress may speak at a high level of generality and give courts discretion to fashion preemption rules, but the automatic judicial inclusion of obstacle and field preemption clauses violates textualist norms.

⁷⁹ See *Wyeth v. Levine*, 129 S. Ct. 1187, 1216–17 (2009) (Thomas, J., concurring in the judgment).

⁸⁰ Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 62 (1988).

⁸¹ *Id.* at 63; Manning, *supra* note 50, at 103–09.

⁸² *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam).

⁸³ *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

⁸⁴ *Id.* at 495.

⁸⁵ *Id.* at 496.

⁸⁶ *Id.*

⁸⁷ *Id.* at 497.

⁸⁸ See *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (“[I]t is Congress rather than the courts that pre-empt state law.”).

purposes of the relevant statute, or the specific purpose of the statute regarding its preemption rule. The appropriate level of generality is low, focusing on the narrow issue of whether Congress wanted to preempt state law. According to textualists, the best and only legitimate evidence bearing on that issue is the text of the statute enacted pursuant to Article I, Section 7 of the Constitution.

In *Ouellette*, for example, the Court read out of the statute Congress's explicit instruction to preserve state law. Instead, it decided that of the universe of possible purposes for the CWA, the Court's particular "delineation of authority" between states and the EPA stated Congress's "actual" intent; therefore, the CWA preempted Vermont law.⁸⁹ The Court then called this "delineation of authority" Congress's "considered judgment,"⁹⁰ when only three U.S. Reports pages earlier it dismissed the actual saving clause passed by Congress as "not reflect[ive of Congress's] . . . considered judgment."⁹¹ Such interpretation suggests that Justice Scalia and Professor Bryan Garner ought to add a proposition to their book⁹²: "Congress meant what it did not say and said what it did not mean."⁹³ And because of the inherently vague basis of the atextual "purpose" input, judges may subconsciously read purpose to align with their personal policy preferences.⁹⁴ Given this subconscious tendency and the Court's ideological division in recent years, it is no surprise that the Court's current preemption doctrine has led to the closely divided outcomes described in Part I.

In short, a textualist would argue that obstacle preemption takes away the legislature's power to preempt and ability to write statutes that achieve its desired goals. As a result, judicial attempts to determine extratextual congressional purpose in preemption cases actually result in a significant judicial *intrusion* on congressional intent. The states lose in this game, for their laws are rendered void "based on nothing more than assumptions and goals that were untethered from

⁸⁹ *Ouellette*, 479 U.S. at 497. The partial dissent in *Ouellette* complained that "there is no evidence that Congress ever made . . . a choice" to "value[] administrative efficiency more highly than effective elimination of water pollution." *Id.* at 504 (Brennan, J., concurring in part and dissenting in part).

⁹⁰ *Id.* at 497 (majority opinion).

⁹¹ *Id.* at 494 n.14 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 329 n.22 (1981)).

⁹² ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* (2012).

⁹³ Recent Case, 124 HARV. L. REV. 1813, 1820 (2011). This proposition would, of course, stand in direct opposition to the Court's "first canon": "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

⁹⁴ See Easterbrook, *supra* note 80, at 66; see also Dan M. Kahan, *The Supreme Court, 2010 Term — Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19 (2011) (discussing "[m]otivated [r]easoning," which is "the unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs").

the constitutionally enacted federal law.”⁹⁵ The federal system loses, for overly broad preemption disrupts the balance of power between the national and the state governments, a balance that the Founders considered essential to “secur[e] against invasions of the public liberty.”⁹⁶ The only winners are unelected judges, for they realize the power to make law based on their own notions of congressional intent — “‘intent’ that ultimately can be found only in the mind of the judge.”⁹⁷

B. Field Preemption

Field preemption as a distinct doctrine poses an additional theoretical problem. Defining the field at a certain level of generality becomes the entire game. On the one hand, a broad definition of the field would indicate preemption. For example, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,⁹⁸ the Court confronted a California statute that conditioned construction of nuclear power plants on approval by a state commission.⁹⁹ The issue in *Pacific Gas* was whether the federal Atomic Energy Act of 1954¹⁰⁰ preempted the state statute.¹⁰¹ If the Court had defined the field broadly as “all matters nuclear,” then the state statute would have “fall[en] within the scope of this impliedly pre-empted field.”¹⁰² On the other hand, if the Court defined the field narrowly, it would be much less likely that the federal field encompassed and thus preempted the state action. In *Pacific Gas*, the Court held that the relevant field was limited to “radiological safety aspects,” so the Atomic Energy Act did not preempt the state statute.¹⁰³ Underscoring the difficulty of choosing the correct field definition, the partial concurrence in *Pacific Gas* complained that the majority first “recognize[d] the limited nature of the federal role . . . but then describe[d] that role in more expansive terms” later in its opinion.¹⁰⁴ The doctrine of field preemption gives the courts power to affect the federal-state balance by choosing the level of generality at which to define the relevant field.

⁹⁵ *Wyeth v. Levine*, 129 S. Ct. 1187, 1215 (2009) (Thomas, J., concurring in the judgment); see also Ernest A. Young, “The Ordinary Diet of the Law”: The Presumption Against Preemption in the Roberts Court, 2011 SUP. CT. REV. 253, 280 (“[S]hifting preemptive authority away from Congress to judicial or executive institutions that do not represent the states . . . amounts to a significant threat to state autonomy.”).

⁹⁶ THE FEDERALIST NO. 28, at 177 (Alexander Hamilton) (Clinton Rossiter ed., 2003); see also *infra* Part III, pp. 1069–77.

⁹⁷ Easterbrook, *supra* note 80, at 66.

⁹⁸ 461 U.S. 190 (1983).

⁹⁹ *Id.* at 194.

¹⁰⁰ Ch. 1073, 68 Stat. 919 (codified as amended at 42 U.S.C. §§ 2011–2297h-13 (2006)).

¹⁰¹ *Pac. Gas*, 461 U.S. at 194–95.

¹⁰² *Id.* at 205.

¹⁰³ *Id.*; see *id.* at 216.

¹⁰⁴ *Id.* at 224 n.1 (Blackmun, J., concurring in part and concurring in the judgment).

Many of the theoretical problems with obstacle preemption generally also apply to field preemption specifically. Courts will use a field preemption analysis only in those instances where there is no express preemption and there is no federal statute that directly contradicts the state action. Otherwise, there would be no need to reach the field preemption question. Once a court has established that there is no express preemption or directly contradictory federal law, however, the question becomes whether Congress intended to occupy the field, or as the Court has sometimes phrased it, whether “the federal legislation is ‘sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation.’”¹⁰⁵

Yet at the outset of this analysis courts must confront a puzzler: how could Congress have “left no room for supplementary state regulation” when the statute left open the precise type of state regulation at issue? Once again, the level of generality matters. When a court analyzes the field preemption question at a high level of generality, it will often arrive at a different result than when it analyzes the preemption issue at the appropriate level of generality. To solve the frequent conflict between saving clauses and field preemption, the Court has explained: “We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.”¹⁰⁶ But this approach is not how normal textualism, which aims to give the text its plain meaning, operates.¹⁰⁷ The relevant question is whether Congress wanted to preempt state action, and resorting to extratextual generalizations about Congress’s purpose to overcome indisputable textual evidence that Congress quite obviously “left room” for state action upends traditional notions of separation of powers — and deviates from otherwise applicable rules of statutory interpretation.

III. JUSTIFICATIONS FOR DEVIATING FROM TEXTUALISM

Given that the Court appears to disregard its otherwise applicable interpretive rules in preemption cases even though the rationales for those rules apply to such cases, the question becomes whether there is some justification for using different rules of interpretation when deciding whether a federal statute preempts a state action. This issue requires consideration of the Supremacy Clause, which could mandate

¹⁰⁵ *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987) (quoting *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)).

¹⁰⁶ *United States v. Locke*, 529 U.S. 89, 106 (2000).

¹⁰⁷ See *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 544 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (“[O]ur job is to interpret Congress’s decrees . . . neither narrowly nor broadly, but in accordance with their apparent meaning.”).

some alternative rule of statutory interpretation in preemption cases.¹⁰⁸ Further, some academics have made more pragmatic arguments in favor of an expansive court role in preemption cases because of the difficulty of passing legislation that adequately addresses preemption.¹⁰⁹ Both rationales for deviating from textualism, however, are ultimately unpersuasive. The original meaning of the Supremacy Clause offers no support for some alternative method of statutory interpretation, and preemption issues are no more difficult for Congress to resolve than any other issues.

A. *The Original Meaning of the Supremacy Clause*

The Supremacy Clause provides that:

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.¹¹⁰

The Supremacy Clause establishes three basic rules, as Professor Caleb Nelson has described.¹¹¹ The first is a rule of applicability: federal law applies in state courts.¹¹² The second is a rule of priority: federal law prevails over state law, regardless of when the state law was enacted in relation to the federal law.¹¹³ The third is a rule of construction: the substance of state law should be disregarded when interpreting the federal law.¹¹⁴ Of note, nothing in the Supremacy Clause suggests that any interpretation is necessary beyond interpretation of the relevant federal law (or Constitution or treaty). There is no obvious reason why statutory interpretation in the Supremacy Clause context would differ at all from statutory interpretation in any other context.

Indeed, Alexander Hamilton's view that the Supremacy Clause was redundant supports the position that the method of statutory interpretation should not change in preemption cases. According to Hamilton, the Supremacy Clause was primarily introduced out of caution to emphasize the "legitimate authorit[y] of the Union," and he acknowledged that its text is "tautolog[ical]" and "redundan[t]."¹¹⁵ That the clause

¹⁰⁸ See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (stating that preemption doctrine is derived from the Supremacy Clause).

¹⁰⁹ See, e.g., Meltzer, *supra* note 8, at 376–78.

¹¹⁰ U.S. CONST. art. VI, cl. 2.

¹¹¹ See Nelson, *supra* note 74, at 245–60.

¹¹² *Id.* at 246.

¹¹³ *Id.* at 250.

¹¹⁴ *Id.* at 254. Nelson persuasively argues that, given these three rules, the only appropriate test in preemption cases is a "logical-contradiction test": "Courts are required to disregard state law if, but only if, it contradicts a rule validly established by federal law." *Id.* at 260.

¹¹⁵ THE FEDERALIST NO. 33 (Alexander Hamilton), *supra* note 96, at 199.

makes federal law the “supreme Law of the Land” does not change the nature of the law:

A LAW, by the very meaning of the term, includes supremacy. . . . If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed.¹¹⁶

In short, the Supremacy Clause “only declares a truth which flows immediately and necessarily from the institution of a federal government.”¹¹⁷ Hamilton’s argument implies that courts should treat federal law in a Supremacy Clause analysis no differently than federal law in other analyses. Federal law is federal law, and statutory interpretation is statutory interpretation. The Supremacy Clause changes nothing. If textualism is the correct method of statutory interpretation, then textualism must govern in preemption cases, too.

Further support for using textualism in preemption cases can be found in the prevailing method of treaty interpretation in the eighteenth century. Nelson shows that the last portion of the Supremacy Clause operated as a *non obstante* provision, which was used in statutes at the time of the Founding to tell courts to adhere to the natural interpretation of a new law rather than attempting to reconcile it with earlier, potentially contradictory laws.¹¹⁸ Of course, *non obstante* clauses in England and in early America were primarily used for statutes at the same level of government.¹¹⁹ England did not have a federal system of government, and American *non obstante* provisions were common mostly in state laws.¹²⁰ England did, however, enter into treaties, and those treaties could conflict with domestic law. Because the Supremacy Clause places treaties on the same level as federal law, Supremacy Clause analyses might require some alternate method of statutory interpretation if treaties at the time of the Founding were treated differently. The available evidence, however, indicates that treaties were treated the same as statutory law at the Founding.

In England and early America, treaties were binding only to the extent that they were enacted into law by Parliament or the legislature.¹²¹ This treatment itself suggests that the term “treaties” in the

¹¹⁶ *Id.* at 200.

¹¹⁷ *Id.*

¹¹⁸ See Nelson, *supra* note 74, at 237–44.

¹¹⁹ See 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 639 (Dublin, Luke White 6th ed. 1793) (“Although two Acts of Parliament are *seemingly* repugnant, yet if there be no Clause of *non Obstante* in the latter, they shall if possible have such Construction, that the latter may not be a Repeal of the former by Implication.”).

¹²⁰ Nelson, *supra* note 74, at 239–40.

¹²¹ See Julian G. Ku, *Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 358, 363 (2005).

Supremacy Clause could not smuggle some alternate method of interpretation into the clause. After all, enactment by the legislature would give the treaty merely the status of any other law.¹²² Once the treaty assumed the same status as any other enacted law, there would be no reason to interpret it differently.

Further, even if treaties were treated differently than ordinary law, the prevailing view on treaty interpretation at the time of the Founding was very similar to modern textualism. The seminal statement comes from Emmerich de Vattel in his *Law of Nations*:

It is not allowable to interpret what has no need of interpretation. When a deed is worded in clear and precise terms, — when its meaning is evident, and leads to no absurd conclusion, — there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures in order to restrict or extend it, is but an attempt to elude it. If this dangerous method be once admitted, there will be no deed which it will not render useless. However luminous each clause may be, — however clear and precise the terms in which the deed is couched, — all this will be of no avail, if it be allowed to go in quest of extraneous arguments to prove that it is not to be understood in the sense which it naturally presents.¹²³

Vattel's work was "widely read in America" at the time of the Constitutional Convention.¹²⁴ On December 9, 1775, Benjamin Franklin thanked the publisher of Vattel's work by explaining, "It came to us in good season, when the circumstances of a rising state make it necessary frequently to consult the law of nations."¹²⁵ Franklin also wrote that Vattel's work "has been continually in the hands of the members of our Congress now sitting."¹²⁶ Vattel's approach to interpretation is very similar to modern textualism: the interpreter must focus on the text, and he should not go outside the text to discover some other purpose or meaning.¹²⁷ Thus, there is no reason to think that the original

¹²² See *id.* at 363.

¹²³ 2 EMMERICH DE VATTEL, *THE LAW OF NATIONS* § 263, at 244–45 (London, G.G. and J. Robinson new ed. 1797) (1758) (emphasis omitted).

¹²⁴ Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385, 412 (2010).

¹²⁵ 1 BENJAMIN FRANKLIN, *MEMOIRS OF BENJAMIN FRANKLIN* 297 (Philadelphia, McCarty & Davis 1834).

¹²⁶ 2 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 64 (Francis Wharton ed., Washington, Gov't Printing Office 1889), quoted in *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978).

¹²⁷ See, e.g., Manning, *supra* note 1, at 114 (defining textualism as "adher[ing] strictly to the terms of a clear statutory text, even when doing so produces results that fit poorly with the apparent purposes that inspired the enactment"). It is true that the quoted section provides only Vattel's first maxim, and he included various other maxims and propositions in his book. See RICHARD K. GARDINER, *TREATY INTERPRETATION* 162–63 (2008). But taken as a whole, even with the addition of various qualifiers — including a variation of the absurdity canon —

public meaning of the Supremacy Clause brings in any method of interpretation other than textualism.

While the Constitution itself does not explicitly prescribe a method of interpretation, the Supremacy Clause bears no license for departing from the ordinary method of statutory interpretation, especially given that treaties at the time of the Founding had to be enacted by the legislature to become positive law. The then-prevailing views on treaty interpretation demonstrate that, even if treaties did not have to be enacted by the legislature, the Supremacy Clause would still demand the same textual interpretation from the court seeking to determine the “supreme Law of the Land.” Of course, this evidence is only one piece of the puzzle of the Supremacy Clause’s original meaning, and there is much dispute about originalism as a methodology.¹²⁸ Defending originalism generally is beyond the scope of this Note, but if the original public meaning matters, this evidence indicates that the original meaning of the Supremacy Clause provides no support for deviating from textualism.

B. Pragmatic Justifications for Deviating from Textualism

Several academics have offered justifications for a more robust judicial role in preemption cases than in other statutory interpretation cases. Some commentators argue for a broad judicial role based on the benefits of preemption in ensuring national uniformity.¹²⁹ Professor Meltzer defends broad, purpose-based obstacle preemption on the ground that it would be too “difficult[] and burden[some]” for Congress to write laws that explicitly resolve preemption questions.¹³⁰ According to Meltzer, the Court deviates from its normal adherence to statutory text because “the Justices, when they recognize the importance of a particular federal objective, are alert to the need to assume a more common-law like role to ensure that the objective is not threatened and to harmonize a complex body of federal and state law.”¹³¹ To address preemption adequately, Congress would have to sift through hundreds of state laws and local ordinances as well as predict future laws that may be passed by states and localities — both impossible tasks.¹³² Because this method of lawmaking is simply not “realistic,”

Vattel’s approach is quite similar to textualism. Cf. Manning, *supra* note 2, at 2420 n.123 (citing cases in which textualist judges have endorsed the absurdity canon). But cf. *id.* at 2392 (rejecting the absurdity canon as inconsistent with textualism).

¹²⁸ See generally ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007).

¹²⁹ See Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 TUL. L. REV. 1257, 1262–63 (2010).

¹³⁰ Meltzer, *supra* note 8, at 377; see *id.* at 376–78.

¹³¹ *Id.* at 376.

¹³² See *id.* at 376–77.

Meltzer argues in favor of a broad role for the courts.¹³³ This justification seems lacking, though, for it applies just as well to other areas of lawmaking, it overlooks that lawmaking may be difficult by design, and there is reason to suspect preemption is not a uniquely difficult subject for legislative resolution.

First, it is worth noting that cases like *Ouellette* cast doubt on Meltzer's explanation for the Court's deviation from textualism. In *Ouellette*, the Court was faced with a statute in which Congress explicitly resolved the question of preemption under the CWA, yet the Court looked beyond Congress's provision.¹³⁴ It seems hard to justify a broad role for the judiciary where Congress has indeed succeeded in addressing the preemption question. The Court's intervention to abrogate the plain text of Congress's enactments suggests the Court has in mind a much broader — and even less justifiable — role than mere gap-filling.

Even if the Court limited itself to the role Meltzer envisions, it is unclear why the same rationale should not apply to lawmaking issues other than preemption. Indeed, Meltzer acknowledges that there is nothing particularly "unique[]" about preemption cases, writing that such cases are "continuous with the problems that arise in other areas" but that "the Court's approach to lawmaking across [those] areas" is "not continuous."¹³⁵ There is a reason the Court has rejected the broad judicial role envisioned by Meltzer in other areas of interpretation. Many aspects of lawmaking are undoubtedly "difficult," and it would surely be more convenient if judges could formulate rules based on both statutory text and extratextual considerations. Unlike lawmakers, federal judges are not required to submit to regular evaluations by the populace, theoretically giving them freer rein over law and policy. The Constitution, however, leaves policy judgments to the elected branches of government, not the judiciary.¹³⁶ Meltzer might respond that the Constitution "says nothing either about the proper methodology for interpreting statutes passed according to the specified procedures or about the appropriate role of federal common lawmaking," so the issue remains open.¹³⁷ But he offers no basis for a court to decide which policy judgments it can legitimately make and which it cannot. The decision to preempt state law is no less a policy judgment

¹³³ *Id.* at 377.

¹³⁴ See *supra* pp. 1060–61.

¹³⁵ Meltzer, *supra* note 8, at 378.

¹³⁶ See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute."); see also THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 96, at 464–65.

¹³⁷ Meltzer, *supra* note 8, at 382.

than any other decision that Congress regularly makes in writing bills and that the President makes in deciding whether to sign those bills into law. To wit, preemption speaks to which *policy* will govern the lives of the citizenry, the state or the national. It will not do simply to laud the benefits of national uniformity, as some commentators have done in defending broad obstacle preemption,¹³⁸ for it is undeniable that the people's representatives do not always seek to advance national uniformity above other goals.¹³⁹ For example, national uniformity may often be a less attractive goal than state experimentation.¹⁴⁰ The fundamental point is that placing broad power in the courts to decide preemption policy ultimately transfers power from the citizenry, the people who are affected by the policy choice, to largely unelected judges.

A related point is that the lawmaking process is difficult by design. In *The Federalist No. 51*, James Madison worried that the legislative branch would encroach on the other branches, so his solution was "to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other" as possible.¹⁴¹ The inclusion of a presidential signature requirement served as an additional check on the legislature, for the Founders considered "mere parchment delineation of the boundaries of each [department]" to be "insufficien[t]."¹⁴² Critically, the veto provision was also added to be "an additional security against the enactment of improper laws."¹⁴³ Hamilton was quite explicit on this point: "The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones."¹⁴⁴ Along with the division of power between the national and state governments, this structure formed "a double security [that] arises to the rights of the people."¹⁴⁵ Indeed, the "diffusive construction of the national government" embodied by the lawmaking process itself serves to give the state governments a "superiority of influence."¹⁴⁶ Overly broad judicial preemption thus undermines

¹³⁸ See, e.g., Untereiner, *supra* note 129, at 1262–63.

¹³⁹ See Nelson, *supra* note 74, at 280 ("[O]ur federal system is premised on the notion that members of Congress will not pursue federal policies to the total exclusion of state policies.").

¹⁴⁰ See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

¹⁴¹ THE FEDERALIST NO. 51 (James Madison), *supra* note 96, at 319.

¹⁴² THE FEDERALIST NO. 73 (Alexander Hamilton), *supra* note 96, at 441.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 442.

¹⁴⁵ THE FEDERALIST NO. 51 (James Madison), *supra* note 96, at 320.

¹⁴⁶ THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 96, at 115. See generally Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321

both parts of this “double security” by distorting the national/state division of power *and* the executive/legislative/judicial division of power. The Constitution made the lawmaking process difficult for a very good reason — to protect the rights of the people — and circumventing the process threatens those rights.

Finally, there is reason to suspect that the problem facing Congress is not as severe as Meltzer makes it out to be. In many cases, Congress will simply want to preempt all state laws that have some given effect, and there will be no need for Congress to examine state laws one by one to write an appropriate provision. Even assuming preemption requires this type of investigation, and assuming Congress has some hitherto suppressed aversion to hiring staffers and passing complex legislation, Congress can still delegate its preemption authority to administrative agencies.¹⁴⁷ This delegation would free Congress from having “to specify in advance which of the common law and statutory rules of fifty states (and, in some cases, of tens of thousands of localities) should be displaced.”¹⁴⁸ Of course, this ability to delegate is in some tension with the intentional difficulty of the lawmaking process mentioned above, and some scholars have argued that courts should be particularly wary of preemption by agencies.¹⁴⁹ Resolving this dispute is beyond the scope of this Note, but suffice it to say that there is nothing unique about preemption by agency action that would render delegated preemption different in kind than other congressional delegations — or warrant a different interpretive approach by the courts.

Another reason that preemption need not be particularly difficult under a textualist approach is that textualism does not prohibit Congress from expressing its preemption preferences at a relatively high level of generality. Modern textualism dictates that “judges must respect the level of generality at which the legislature expresses its policies.”¹⁵⁰ If Congress phrases its commands at a high level of generality, courts must give effect to those commands by devising rules to effect Congress’s intent.¹⁵¹ As Judge Easterbrook has explained, Congress “can identify the goal and instruct courts or agencies to design

(2001) (“[F]ederal lawmaking procedures . . . preserve federalism both by making federal law more difficult to adopt, and by assigning lawmaking power solely to actors subject to the political safeguards of federalism.” *Id.* at 1324.).

¹⁴⁷ See *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (“[S]tate laws can be pre-empted by federal regulations as well as by federal statutes.”).

¹⁴⁸ Meltzer, *supra* note 8, at 376–77.

¹⁴⁹ See, e.g., Clark, *supra* note 146, at 1433 (“Administrative rulemaking is suspect to the extent that it displaces state law without adhering to the constitutionally prescribed lawmaking procedures designed to safeguard federalism.”).

¹⁵⁰ John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1316 (2010).

¹⁵¹ See *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (“[I]t is up to Congress, by the relative specificity or generality of its statutory commands, to determine — up to a point — how small or how large th[e] degree [of interstitial lawmaking] shall be.”).

rules to achieve the goal.”¹⁵² In fact, Congress has taken that route in at least one statute, writing a preemption provision that sounds similar to the Court’s obstacle preemption test.¹⁵³ A statute dealing with hazardous material transportation provides that any state law that “is an obstacle to accomplishing and carrying out this chapter” is preempted.¹⁵⁴ Where Congress’s command is itself phrased at a high level of generality, the courts would have to formulate an appropriate preemption rule to give effect to Congress’s intent. In such cases, the courts have more discretion in deciding preemption questions. This process may, for instance, entail determining the statute’s goals based on its text, using interpretive canons and other semantic evidence of context.¹⁵⁵ Reasonable people can disagree about what the text reveals, but courts would at least be seeking to give effect to the words of laws enacted in accordance with the Constitution. Thus, if it is actually difficult for Congress to write specific preemption rules in its statutes, Congress can relatively easily give the courts discretion to devise appropriate preemption rules by including preemption provisions that speak at a high level of generality.

Of course, Congress can also decide the specific rule by which it wants to achieve its goal and write that rule in the statute. In such cases, the courts have a relatively easy job: apply the rule. In this way the courts are faithful to Congress’s choices about the means to effect its statute, or what Manning calls the statute’s “implemental purposes.”¹⁵⁶ Defending a broad judicial role in obstacle preemption cases, one commentator poses a rhetorical question: “Why would Congress want state and local governments to have the ability to interfere with or defeat the methods Congress has chosen to carry out its objectives?”¹⁵⁷ But posing the question in this manner simply assumes the answer. If Congress did not include any method to preempt state law, “it frustrates rather than effectuates legislative intent”¹⁵⁸ to insert an implicit obstacle preemption clause into Congress’s statute.¹⁵⁹ If courts ignore the statute’s implemental purpose and instead, for instance, assume the existence of an obstacle preemption clause in the

¹⁵² Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 546 (1983).

¹⁵³ Nelson, *supra* note 74, at 279 (citing 49 U.S.C. § 5125(a) (2006)).

¹⁵⁴ 49 U.S.C. § 5125(a)(2).

¹⁵⁵ See Manning, *supra* note 1, at 173, 176–80 (“[W]hen an interpreter makes sense of an open-ended statute, it is appropriate if not necessary to read such a statute in light of the broad purposes that inspired its enactment.” *Id.* at 173.).

¹⁵⁶ *Id.* at 115.

¹⁵⁷ Untereiner, *supra* note 129, at 1263.

¹⁵⁸ *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam).

¹⁵⁹ See Nelson, *supra* note 74, at 281 (“The mere fact that Congress enacts a statute to serve certain purposes, then, does not automatically imply that Congress wants to displace all state law that gets in the way of those purposes.”).

statute,¹⁶⁰ they “den[y] to legislatures the choice of creating or withholding gap-filling authority.”¹⁶¹ As should be evident, Congress’s ability to speak at varying levels of generality undermines the argument that preemption is particularly difficult to legislate about — or is an issue different in kind that would warrant deviation from the Court’s normal textualist approach to statutory interpretation.

CONCLUSION

Preemption is no different from any other question of statutory interpretation, and therefore courts should treat preemption cases as ordinary statutory interpretation cases. Indeed, preemption cases are part of what Justice Breyer has called “the ordinary diet of the law,” more important to the “federalist principle” than “the occasional constitutional effort to trim Congress’ commerce power at its edges . . . or to protect a State’s treasury from a private damages action.”¹⁶² Yet it has been left out of the Court’s Textualist Revolution for reasons that do not find support in the Constitution or in practice. The Court’s current obstacle and field preemption doctrines ultimately transfer power from the elected branches to the judiciary and from the states to the national government, in violation of the Constitution’s design. What is particularly striking about the Court’s approach to implied preemption, though, is that even nontextualists should be troubled by obstacle and field preemption doctrine. Given that “new purposivists” take seriously a statute’s choice of implemental purposes and the level of generality at which it speaks,¹⁶³ both textualists and new purposivists should reject automatic implication of obstacle or field preemption clauses capable of overriding explicit statutory text.¹⁶⁴

¹⁶⁰ The Court has held that “[i]n the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where . . . state law stands as an obstacle to the accomplishment and execution of congressional objectives.” *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n*, 489 U.S. 493, 509 (1989).

¹⁶¹ Easterbrook, *supra* note 152, at 546–47; *see* Nelson, *supra* note 74, at 279–81.

¹⁶² *Egelhoff v. Egelhoff*, 532 U.S. 141, 160–61 (2001) (Breyer, J., dissenting).

¹⁶³ Manning, *supra* note 1, at 181–82.

¹⁶⁴ *See* Nelson, *supra* note 74, at 278 (“[U]nder widely shared interpretive conventions, it simply is not true that all federal statutes establish (or authorize courts to establish) an obstacle-preemption clause.”).