PREEMPTION OF TORT LAWSUITS: THE REGULATORY PARADIGM IN THE ROBERTS COURT*

Christina E. Wells**
William E. Marcantel***
Dave Winters****

I. INTRODUCTION

Federal preemption of state tort lawsuits (especially products liability and negligence lawsuits) has concerned the Supreme Court in recent decades. Since 1992, the Court has decided at least sixteen cases involving this issue.[1] The Roberts Court alone has handed down six such cases[2] with the two most recent having just been decided in the 2010 term.[3] The large number of cases has spurred discussion of the Roberts Court's "keen interest in

* © 2011, Christina E. Wells, William E. Marcantel & Dave Winters. All rights reserved. We are indebted to Martha Dragich, Kent Gates, Ron Krotoszynski, Paul Litton, the participants of the University of Illinois College of Law Faculty Colloquium, and the Saint Louis University School of Law Faculty Workshop for their willingness to discuss ideas with us and read other versions of this Article.

** Enoch H. Crowder Professor of Law, University of Missouri School of Law. J.D., *cum laude*, University of Chicago School of Law, 1988; B.A., *cum laude*, University of Kansas, 1985.

*** J.D., University of Missouri School of Law, 2009.

**** J.D. expected 2011, University of Missouri School of Law.

1. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068 (2011), *aff'g sub nom. Bruesewitz v. Wyeth Inc.*, 561 F.3d 233 (3d Cir. 2009); *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011); *Wyeth v. Levine*, 129 S. Ct. 1187, 1200–1201 (2009); *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008); *Exxon Ship. Co. v. Baker*, 554 U.S. 471 (2008); *Warner Lambert Co. v. Kent*, 552 U.S. 440 (2008) (mem. affirming 4–4); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431 (2005); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *Buckman Co. v. Pls.' Leg. Comm.*, 531 U.S. 341 (2001); *Geier v. Am. Honda Motor Corp.*, 529 U.S. 861 (2000); *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344 (2000); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *CSX Transp. v. Easterwood*, 507 U.S. 658 (1993); *Cipollone v. Liggett Group Co.*, 505 U.S. 504 (1992).

2. *Bruesewitz*, 131 S. Ct. 1068; *Williamson*, 131 S. Ct. 1131; *Wyeth*, 129 S. Ct. 1187; *Altria Group, Inc.*, 129 S. Ct. 538; *Exxon Ship. Co.*, 554 U.S. 471; *Riegel*, 552 U.S. 312.

3. *Bruesewitz*, 131 S. Ct. 1068; *Williamson*, 131 S. Ct. 1131.

preemption battles."[4] More important than the number of cases, however, is that the Roberts Court has come to accept a particular view of tort lawsuits in its preemption decisions—one that envisions such lawsuits not as vehicles to redress "wrongs done by private parties to private parties" but rather as merely "arm[s] of the public regulatory state."[5] This regulatory view of tort lawsuits may eventually affect the outcome of the Court's preemption decisions.

Under the Court's preemption doctrine, federal law displaces conflicting state law in cases of overlapping regulatory authority.[6] For almost two decades, however, the Court has struggled to define the extent to which state tort law actually conflicts with federal law. The Court sometimes found preemption after characterizing tort lawsuits as having a primarily regulatory effect—i.e., it viewed tort law as merely a form of public law much like statutes or regulations.[7] In this regulatory paradigm, the purpose of tort law (and tort lawsuits) was to maximize social welfare by deterring undesirable behavior and promoting socially optimal activity.[8] If tort lawsuits arguably interfered with the federal government's attempt to regulate such behavior, the Court found preemption was appropriate. In other cases, the Court eschewed the regulatory paradigm in favor of a compensatory paradigm regarding tort lawsuits—i.e., it adopted a view that focused primarily on the private law characteristics of tort law.[9] In these cases, the Court found against preemption because it viewed common law tort verdicts as not having an effect on businesses similar enough to statutes and regulations to amount to conflict-

4. Sandra Zellmer, *Preemption by Stealth*, 45 Hous. L. Rev. 1659, 1696 (2009).

5. Alexandra Klass, *Tort Experiments in the Laboratories of Democracy*, 50 Wm. & Mary L. Rev. 1501, 1508, 1565 (2009).

6. Zellmer, *supra* n. 4, at 1666.

7. *E.g. Riegel*, 552 U.S. 312; *Geier*, 529 U.S. 861; *CSX Transp.*, 507 U.S. 658; *Cipollone*, 505 U.S. 504.

8. For a discussion of tort law as public law, see Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 Tex. L. Rev. 1801, 1801 (1997) (explaining deterrence theory in tort law).

9. For a discussion of tort law as private law, see Jules Coleman, *Risks and Wrongs* 373–374 (Cambridge U. Press 1992) (noting that the obligation of a wrongful injurer to compensate a wrongfully injured victim flows from the fact of injury); Benjamin C. Zipursky, *Rights, Wrongs & Recourse in the Law of Torts*, 51 Vand. L. Rev. 1, 71 (1998) (arguing that tort law is a law of individualized wrongs in which "justice requires that a tortfeasor restore those whom his wrongdoing has injured").

ing legal mandates.[10] It further found that preemption interfered with the purpose of compensating victims for wrongs done to them by others.[11] In recent years, the Court has increasingly trended toward the regulatory paradigm,[12] with the Roberts Court adopting it both in cases in which it found preemption[13] and in which it did not.[14]

Theoretically, the choice between a regulatory or compensatory paradigm when framing the nature of tort lawsuits should not matter. Congressional intent to preempt state law is the supposed *sine qua non* of the Court's analysis, and its cases purport to engage in careful scrutiny of that intent.[15] How the Court views tort lawsuits would seem to be somewhat beside the point. Nevertheless, viewing tort lawsuits as merely another form of state regulation gives the Court great leeway to manipulate preemption. Even express preemption provisions are notoriously vague, often noting simply that federal law displaces conflicting state "laws," "requirements," or "standards."[16] If tort lawsuits are an extension of regulatory law, courts more easily justify reading a vague statutory clause as applying not only to statutes but to tort law as well.[17]

Similarly, if tort lawsuits are regulatory in nature, courts quite reasonably defer to administrative officials' claims that such lawsuits interfere with their regulatory regimes.[18] Specific attention to whether Congress *actually* meant to preempt lawsuits or to whether lawsuits serve an important nonregulatory purpose—

10. *E.g. Bates*, 544 U.S. 431; *Sprietsma*, 537 U.S. 51; *Lohr*, 518 U.S. 470; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

11. *Lohr*, 518 U.S. at 487 (observing that preemption would bar "most, if not all, relief for persons injured").

12. For scholars noting this trend, see Klass, *supra* note 5, at 1549–1555; Catherine Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 Geo. Wash. L. Rev. 449, 460–465 (2008); *The Supreme Court, 2004 Term—Leading Cases*, 119 Harv. L. Rev. 169, 385–386 (2005) [hereinafter *Leading Cases*].

13. *Riegel*, 552 U.S. at 323–324.

14. *Wyeth*, 129 S. Ct. at 1204.

15. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (noting that federal preemption must be "the clear and manifest purpose of Congress").

16. *Cipollone*, 505 U.S. at 522; *see also* Zellmer, *supra* n. 4, at 1666–1670 (discussing the difficulty courts have in applying preemption).

17. *See Cipollone*, 505 U.S. at 522 (rejecting the assertion "that the phrase 'requirement or prohibition' limits the 1969 Act's [preemptive] scope to positive enactments by legislatures and agencies").

18. *E.g. id.* at 522–524.

such as redressing private wrongs—is unnecessary. Viewing tort lawsuits as part of the regulatory apparatus creates a shortcut that makes those questions unnecessary. Given that the Court has never clarified the level of deference to be applied to administrative assertions of preemption, lower courts are sure to be confused (at the very least) regarding whether to defer to agency officials' claims that their regulations of particular products preempt litigants' ability to file tort lawsuits about those very same products.

This short Article first examines the Court's general preemption doctrine, including relevant criticisms. It then details the rise of the regulatory paradigm in the Supreme Court's cases, especially as it culminates in the Roberts Court's reliance on it. Finally, it examines potential implications of increasing reliance on that paradigm, including manipulation of preemption doctrine by judges, continued deference to agency officials' decisions to preempt, and adverse effects on individual tort plaintiffs.

II. PREEMPTION—GENERAL PRINCIPLES

A. The Legal Regime

Because Congress and the states have concurrent regulatory authority in most areas,[19] numerous opportunities arise for conflict between state and federal law. The Supremacy Clause resolves these conflicts in favor of the federal government.[20] Accordingly, the Court's preemption doctrine holds that federal law displaces conflicting state regulation, thus elevating federal law as the source of legal authority.[21] Preemption of state law can serve several important goals, including providing uniform national standards for "safety, health, or environmental protection";[22] providing national markets that preserve economies of

19. *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 152–153 (1982).

20. U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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.").

21. *Cipollone*, 505 U.S. at 516 ("[S]ince our decision in *McCulloch v. Maryland* . . . it has been settled that state law that conflicts with federal law is 'without effect.'" (citation omitted)).

22. Robert Verchick & Nina A. Mendelson, *Preemption and Theories of Federalism*, in *Preemption Choice: The Theory, Law, and Reality of Federalism's Core Question* 18 (Wil-

scale and coordination or distribution of products;[23] and preventing the "imposition of externalities [on regulated entities] by unfriendly state legislation."[24]

Nevertheless, preemption can upset the delicate balance of powers between federal and state governments. Accordingly, the Court requires that preemption be "the clear and manifest purpose of Congress."[25] Congress can manifest preemptive intent in many ways. Most obviously, Congress can expressly preempt state law by explicitly stating its intent in the text of a statute.[26] Express preemption is not, however, required.[27]

Two general categories of implied preemption exist, usually called field preemption and conflict preemption.[28] Field preemption occurs when the federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it"[29] or when it addresses such a "dominant" interest that courts will assume federal law "preclude[s] enforcement of state laws on the same subject."[30] In such situations, the comprehensiveness of the regulatory scheme or the nature of the issue it addresses warrants an implication of congressional intent to preempt state law.[31]

---

liam Buzbee ed., Cambridge U. Press 2008).

23. Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. Rev. 1353, 1369 (2006); *but see* Robert A. Schapiro, *Monophonic Preemption*, 102 Nw. U. L. Rev. 811, 828–829 (2008) (discussing whether national standards are better solutions than state standards).

24. Issacharoff & Sharkey, *supra* n. 23, at 1356; Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 Ariz. L. Rev. 917, 922 (1996); *but see* Schapiro, *supra* n. 23, at 824–828 (discussing weaknesses in spillover-effects arguments).

25. *Rice*, 331 U.S. at 230; *see also Cipollone*, 505 U.S. at 516 ("[T]he purpose of Congress is the ultimate touchstone of [preemption] analysis." (internal quotations omitted).

26. *Pac. Gas and Elec. Co. v. St. Energy Resources Conserv. & Dev. Commn.*, 461 U.S. 190, 203 (1983) ("It is well-established that within [c]onstitutional limits Congress may preempt state authority by so stating in express terms."). Express preemption requires that Congress "include[ ] in the enacted legislation a provision explicitly addressing that issue," and that provision must provide "a reliable indicium of congressional intent with respect to state authority." *Cipollone*, 505 U.S. at 517.

27. *Crosby v. Natl. For. Trade Council*, 530 U.S. 363, 388 (2000) ("[T]he existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict.").

28. *Id.* at 373.

29. *Rice*, 331 U.S. at 230.

30. *Id.*; *see also Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties[,] and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.").

31. *Rice*, 331 U.S. at 232–233.

Conflict preemption occurs either when a direct conflict between state and federal law makes compliance with both "a physical impossibility"[32] or "when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[33] The impossibility or direct prong of conflict preemption is "vanishingly narrow,"[34] implicating only those instances in which regulated entities cannot simultaneously comply with both state and federal law.[35] In contrast, obstacle preemption can be very broad, extending to "all other cases in which courts think that the effects of state law will hinder accomplishment of the purposes behind federal law."[36] Courts thus imply congressional intent, assuming that Congress does not want state laws to obstruct the operation, policies, or purposes of federal law.[37]

B. Preemption and the Problems of Interpretation

Although the preemption doctrine seems relatively straightforward, its application is complicated and occasionally incomprehensible. Despite the Court's intimation that express preemption is straightforward, express preemption analysis requires far more than a simple statutory reading.[38] A court must determine the meaning of an often imprecise preemption clause, its preemptive scope, and the possible interaction between that clause and a savings clause (i.e., a clause exempting areas from

32. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963).

33. *Fidelity Fed. Sav.*, 458 U.S. at 152 (quoting *Hines*, 312 U.S. at 67).

34. Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 228 (2000).

35. Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 739 (2008) (noting the narrow situations in which federal law trumps state law in impossibility preemption).

36. Nelson, *supra* n. 34, at 228–229; William Funk et al., *The Truth about Torts: Using Agency Preemption to Undercut Consumer Health and Safety* 3, http://www.justice.org/cps/rde/xbcr/justice/Truth_Torts_704.pdf (Sept. 2007) (remarking that courts are largely responsible for determining whether conflict preemption exists).

37. Funk et al., *supra* n. 36, at 3–4.

38. *See e.g. CSX Transp.*, 507 U.S. at 664 (explaining that "[i]f the statute contains an express [preemption] clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains best evidence of Congress' [preemptive] intent"); *English v. General Electr. Co.*, 496 U.S. 72, 78–79 (1990) ("[Preemption] fundamentally is a question of congressional intent . . . and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.").

preemption).[39] All of these tasks are fraught with ambiguity, making express preemption more complicated than on first glance.[40] Implied (usually obstacle) preemption raises additional problems. Without an explicit preemptive clause, the notion that courts rely on congressional intent to preempt is misguided at best.[41] Judges have enormous discretion to determine the existence of such intent and the extent to which federal law displaces state law.[42]

Commentators have thus criticized the Court's express and implied preemption standards as allowing too much federal preemption. Some argue that the Court's preemption standards allow judicial manipulation of the issues that actually drive the preemption doctrine.[43] For others, the Court's preemption doctrine undermines the political safeguards of federalism built into the Constitution.[44] Accordingly, the benefits of regulation at the state and local level—which include increased government accountability,[45] the diffusion of power associated with divided

39. *See* Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. Rev. 559, 566 (1997) (noting that the Court uses "standard methods of statutory construction," including determining for the plain meaning of language, considering statutory context, and reviewing legislative history); *see also* S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 685, 700 (1991) (observing that "the Court tends to employ standard statutory construction techniques" with express preemption).

40. Donald P. Rothschild, *A Proposed "Tonic" with* Florida Lime *to Celebrate Our New Federalism: How to Deal with the "Headache" of Preemption*, 38 U. Miami L. Rev. 829, 843–844 (1984) ("The doctrine of express preemption is easily stated. Its application, however, is far more problematic. . . . The problem of ascertaining congressional intent is not limited to poorly phrased preemption clauses. Even unambiguous statements of statutory intent require analysis to determine the scope of the preemption clause.").

41. Merrill, *supra* n. 35, at 740 ("[I]t is somewhat anomalous to say that legislative intent or purpose is the 'touchstone' of a doctrine in which implied preemption plays such a large role.").

42. Rothschild, *supra* n. 40, at 854.

43. *See e.g.* Hoke, *supra* n. 39, at 716–717 (discussing how the "pliant standards" governing preemption allow "judicial policymaking"); Rothchild, *supra* n. 40, at 854 ("The second inherent weakness in the 'frustration of purpose' doctrine is that the consideration of whether a statute's purpose will be frustrated encourages courts to proceed in a more hypothetical, abstract fashion. If a court is antagonistic to the state's legislation, it will usually hypothesize situations that produce a conflict between the state and federal legislation.").

44. Grey, *supra* n. 39, at 565; Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 Mich. L. Rev. 813, 817–818 (1998); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 Hastings Const. L.Q. 69, 88 (1988).

45. Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. Rev. 1, 4 (2007); Nina A. Mendelson, *A Presumption against Agency Preemption*, 102 Nw. U. L. Rev. 695, 710 (2008).

government,[46] enhanced government engagement with citizens,[47] and greater experimentation with regulatory solutions[48]—are lost when federal law preempts state law.

The Court's "presumption against preemption" ostensibly exists to avoid these criticisms by assuming that "the historic police powers of the States [are] not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress."[49] The Court uses the presumption both to interpret express preemption clauses narrowly[50] and to guide its implied preemption analysis.[51] Numerous commentators, however, note that the Court's reliance on the presumption is haphazard and inconsistent.[52] Others argue that the presumption is too weak to make much difference to courts[53] or is actually a presumption in favor of preemption.[54] Accordingly, the Court's attempt to rein in the potentially expansive application of its doctrine through the presumption against preemption has yielded few results.

Agencies' role in preemption determinations further complicates matters. While agencies can preempt state law,[55] the precise contours of this power are unclear. Agencies may issue preemptive rules if Congress expressly delegates preemptive power to them.[56] More controversially, an agency may also issue preemp-

46. Mendelson, *supra* n. 45, at 710.

47. Verchick & Mendelson, *supra* n. 22, at 4.

48. *Id.* at 4–5; Schapiro, *supra* n. 23, at 820–821.

49. *Rice*, 331 U.S. at 230.

50. *Cipollone*, 505 U.S. at 518.

51. *Altria Group, Inc.*, 129 S. Ct. at 543; *CSX Transp.*, 507 U.S. at 673 n. 12. Ironically, the presumption is not used much in cases of implied preemption. Sharkey, *supra* n. 12, at 458 n. 34.

52. *See e.g.* Grey, *supra* n. 39, at 560 ("The Court has vacillated in its approach in the area, shifting from presumptions for to presumptions against preemption, most recently changing its course within the span of a few decisions."); Sharkey, *supra* n. 12, at 458 (discussing "the Court's haphazard application of the presumption" against preemption in products liability cases within the span of a few decisions).

53. Merrill, *supra* n. 35, at 742 ("The doctrine also exaggerates the judicial reluctance to displace state law. While continuing to invoke the presumption against preemption, federal courts apply preemption more than any other constitutional doctrine.").

54. Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. Rev. 967, 971 (2002).

55. *E.g. N.Y. v. FCC*, 486 U.S. 57, 63–64 (1988); *Hillsborough Co. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985); *Fidelity Fed. Sav.*, 458 U.S. at 141; *United States v. Shimer*, 367 U.S. 374 (1961).

56. *Mistretta v. United States*, 488 U.S. 361, 372–373 (1989). Congress can delegate legislative authority to agencies if it provides intelligible principles for them to follow. *Id.* Congress occasionally explicitly grants agencies the discretion to preempt state law. *See*

tive regulations pursuant to valid exercises of generally delegated administrative power.[57] Absent explicit delegation of preemptive authority, it makes sense to imply such authority in agencies when state law *directly conflicts* with agency regulations.[58] But problems arise when an agency asserts that its rules preempt state law because that law poses an *obstacle* to accomplishment of federal goals.[59] Without an expression of congressional intent or a direct conflict with agency rules, judges find it especially difficult to assess whether preemption of state law is warranted.[60] Furthermore, because the agency is an interested party, problems of agency bias can arise.[61]

Similar problems arise when an agency interprets a vague statutory preemption clause in order to determine its scope[62] or when an agency interprets a statute as having preemptive effect although it does not otherwise mention preemption.[63] Such instances involve the Court in two conflicting doctrines—the search for congressional intent that is at the heart of preemption analysis and the Court's deference to agency interpretations of ambiguous laws under *Chevron v. National Resources Defense Council*.[64] Unfortunately, the Court has never adequately

---

e.g. 15 U.S.C. § 1203(a) (2006) (preempting flammability standards and regulations for fabric); 30 U.S.C. § 1254(g) (2006) (preempting state laws that "are in effect to regulate surface mining and reclamation operations).; *see also* Susan Bartlett Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 Va. L. Rev. 1429, 1429–1430 (1984) (discussing statutes delegating preemptive authority).

57. *N.Y.*, 486 U.S. at 63–64 ("[A] federal agency acting within the scope of its congressionally delegated authority may [preempt] state regulation." (quoting *La. Pub. Serv. Commn. v. FCC*, 476 U.S. 355, 368–369 (1986))).

58. Mendelson, *supra* n. 45, at 700 ("[I]t is reasonable to assume that Congress would want a properly authorized agency action to be effective, and thus to trump directly conflicting state law.").

59. *See id.* at 701–704 (describing recent agency assertions of obstacle preemption).

60. Ernest A. Young, *Executive Preemption*, 102 Nw. U. L. Rev. 869, 895–896 (2008).

61. Foote, *supra* n. 56, at 1441 ("The agency is an interested party, not an independent arbiter. This conflict of interest . . . exacerbates the federal bias inherent in the agency's non-representative character.").

62. *See e.g. Smiley v. Citibank*, 517 U.S. 735, 743–744 (1996) (discussing the agency's interpretation of the term "interest" in an ambiguous statute and whether that affected the preemptive scope of the statute).

63. *See e.g. Geier*, 529 U.S. at 874–875 (holding that a narrow reading of the statute avoided the agency's conclusion that state common law interfered with the goals of the federal statute and was impliedly preempted).

64. 467 U.S. 837, 865 (1984) (deciding that courts must defer to agency interpretations of ambiguous statutes if the agency interpretation is reasonable).

explained which of the two approaches prevails.[65] Critics have noted that judicial deference to agency interpretations that federal law preempts state law may result in preemption in instances in which Congress never anticipated it.[66]

III. THE SUPREME COURT, PREEMPTION, AND STATE TORT LAWSUITS

The introduction of tort lawsuits exacerbates problems with the Court's preemption doctrine. The Court ostensibly utilizes its traditional preemption tools when state tort law is involved, looking to statutory language with express preemption or attempting to divine congressional intent with implied preemption.[67] But tort law does not fit easily within this framework. Positive enactments, such as statutes or regulations, involve general and prospective rules establishing standards of conduct.[68] When preemption involves positive enactments at both the federal and state levels, the primary question is whether a conflict exists between their mandates such that federal law should triumph. But when the preemption question involves a potential conflict between federal statutes or regulations, on the one hand, and state tort law, on the other, an additional question arises—i.e., whether tort law damages verdicts establish a mandate at all.

Given that tort law derives from adjudications involving individuals in retrospective and personal dispute-resolution processes,[69] tort law is arguably an altogether different creature

65. *Wyeth*, 129 S. Ct. at 1201 (declaring that the weight accorded an "agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness" when Congress has not expressly granted preemptive authority to the agency); *Geier*, 529 U.S. at 883–884 (placing "some weight" on the Department of Transportation's interpretation of agency safety standards); *Smiley*, 517 U.S. at 744 (assuming de novo review applied to preemption, but applying *Chevron* deference to an agency interpretation of a statute, arguably broadening the statute's preemptive scope); *see also* Mendelson, *supra* n. 45, at 715–717 (commenting on the Court's conflicting approaches).

66. Mendelson, *supra* n. 45, at 714; Merrill, *supra* n. 35, at 740; Funk et al., *supra* n. 36, at 9.

67. *See Bruesewitz*, 561 F.3d at 239 (discussing the types of preemption the Supreme Court has recognized).

68. For a comparison of rules and adjudications, see *Bi-Metallic Inv. Co. v. St. Bd. of Equalization*, 239 U.S. 441 (1915); *Londoner v. City of Denver*, 210 U.S. 373 (1908).

69. *See generally* Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. Rev. 941, 952–953 (1995) (noting how "[r]etrospective decisions act upon the basis of past circumstances or conduct").

from statutory and regulatory law. Much of the purpose of tort law (and tort lawsuits) is to right private wrongs and to provide redress in particularized and concrete disputes.[70] Furthermore, unlike positive enactments, a negligence or products liability verdict leaves a defendant with a choice between compliance and absorbing damages as a cost of doing business.[71] Thus, it is not clearly a primary goal of tort law to establish legal or regulatory standards in the same manner as statutes or agency regulations. On the other hand, potential defendants surely do not ignore the possibility of large damage awards and may accordingly change their behavior as a result of such awards. Thus, tort damage awards can exert a regulatory effect (i.e., deterrence or promotion of certain behaviors)[72] similar to statutory and regulatory law.

The Court's preemption cases have acknowledged both the regulatory and compensatory aspects of lawsuits.[73] Originally, its choice of one view over the other paralleled its decision to preempt state tort lawsuits.[74] In recent years, especially in the Roberts Court, the regulatory aspect of tort damages has come to dominate the Court's vision, even in those cases in which the Court does not find preemption.[75]

A. Foundational Cases and the Aftermath

In *San Diego Building Trades Council v. Garmon*,[76] the Court famously noted the regulatory nature of tort lawsuits in the preemption context:

> [State] regulation can be . . . effectively exerted through an award of damages . . . . The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are

70. *See supra* n. 9 (discussing private law aspects of tort law).

71. *Cipollone*, 505 U.S. at 536–537 (Blackmun, Kennedy, & Souter, JJ., concurring in part, concurring in the judgment in part, and dissenting in part).

72. *See supra* n. 8 (discussing public law aspects of tort law).

73. *E.g. Cipollone*, 505 U.S. at 521.

74. *E.g. id.* at 521–522.

75. *E.g. Wyeth*, 129 S. Ct. at 1201; *Altria Group, Inc.*, 129 S. Ct. at 545; *Exxon Ship. Co.*, 554 U.S. at 486–487; *Riegel*, 552 U.S. at 330.

76. 359 U.S. 236 (1959).

> potentially subject to the exclusive federal regulatory scheme.[77]

Garmon, however, did not deny the individual the compensatory aspect of tort lawsuits; rather, it simply noted that the regulatory effects overshadowed compensatory aspects, thus requiring preemption.[78]

The Court in *Silkwood v. Kerr-McGee Corp.*[79] took a similar approach when it held federal law did not preempt a punitive-damages award for injuries suffered by a laboratory analyst who was exposed to plutonium while employed at a nuclear facility.[80] Despite federal occupation of the field regarding most of nuclear safety, the Court found no indication that Congress intended the federal government to preempt state tort remedies for radiation-related injuries.[81] Congress' silence on that issue "[took] on added significance in light of [its] failure to provide any federal remedy for persons injured by such conduct," and the Court found it "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."[82] Like *Garmon*, however, *Silkwood* recognized that damage awards could exert a "regulatory" effect because they might coerce nuclear plants to "conform to state standards."[83] Congress nevertheless tolerated that regulatory consequence in that case.[84]

77. *Id.* at 247.

78. *Id.* (noting incidents in which the Court did not find the federal interest in preemption sufficient to overcome the state interest in compensation for tortious wrongdoing in the labor-regulation field).

79. 464 U.S. 238.

80. *Id.* at 258. Karen Silkwood's father brought the lawsuit after she was killed in a car accident, suing under Oklahoma common law for personal injury and property damage. *Id.* at 242–243. The case was submitted to the jury under negligence and strict liability theories. *Id.* at 244. The jury awarded $505,000 in compensatory and $10 million in punitive damages. *Id.* at 245. The Tenth Circuit reversed the compensatory damages award for personal injury because Silkwood's injuries were covered exclusively by workers compensation law, but the court upheld the property-damage award. *Id.* The Tenth Circuit also reversed the punitive-damages award, finding the award was preempted by federal law. *Id.* at 246.

81. *Id.* at 251.

82. *Id.* (citing *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 663–664 (1954)).

83. *Id.* at 256.

84. *Id.* Furthermore, the Court found the regulatory effect of punitive damages too weak to pose an actual conflict with, or an obstacle to, the accomplishment of federal goals. *Id.*

Less than a decade later, these parallel visions of tort law were at the center of the Court's disagreement in *Cipollone v. Liggett Group, Inc*.[85] *Cipollone* involved a smoker with lung cancer who sued cigarette manufacturers alleging various common law violations, including design defect, negligence, failure to warn, breach of express warranty, fraudulent misrepresentation, and conspiracy to defraud.[86] The Court agreed with the manufacturers' argument that the Public Health Cigarette Smoking Act of 1969 (1969 Act),[87] which governed warning labels on cigarette packages, preempted her claims.[88]

Section 5(b) of the 1969 Act barred state law from imposing any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes" labeled in a manner consistent with federal law.[89] Citing to *Garmon*, the plurality opinion argued that "[t]he phrase 'no requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of [common law] rules."[90] The opinion further noted that "the essence of the common law [is] to enforce duties that are either affirmative *requirements* or negative *prohibitions*."[91] It thus rejected Cipollone's "argument that the phrase 'requirement or prohibition' limits the 1969 Act's [preemptive] scope to positive enactments by legislatures and agencies."[92] Accordingly, the regulatory effect of those claims, coupled with broad terms like "requirement or prohibition," led the Court to find preemption for Cipollone's common law claims related to the cigarette company's failure to warn.[93]

85. 505 U.S. 504.

86. *Id.* at 509–510. Rose Cipollone's son maintained the original action after her death. *Id.* at 509.

87. 15 U.S.C. §§ 1331–1340 (2006).

88. *Cipollone*, 505 U.S. at 524–526.

89. 15 U.S.C. § 1334(b).

90. *Cipollone*, 505 U.S. at 521 (quoting *Garmon*, 359 U.S. at 247).

91. *Id.* at 522 (emphasis in original). The Court also referred to the plain language of the 1969 Act, which simply said "law" rather than "statute or regulation," suggesting that Congress wanted to reach beyond positive law. *Id.* at 522–523. In contrast, the Court declined to find that that the Federal Cigarette Labeling and Advertising Act of 1965 preempted Cipollone's claims because of the absence of expressly preemptive language regarding common law actions. *Id.* at 518–520.

92. *Id.* at 522.

93. *Id.* at 524.

Three Justices dissented in *Cipollone*, arguing that "[t]he principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find [preemption] where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously."[94] The phrase "requirement or prohibition," they concluded, did not clearly evidence an intent to preempt common law tort claims of any kind.[95] They also rejected the notion that common law damage awards exerted a regulatory effect akin to positive enactments:

> The effect of tort law on a manufacturer's behavior is necessarily indirect. Although an award of damages by its very nature attaches additional consequences to the manufacturer's continued unlawful conduct, no particular course of action . . . is required. A manufacturer found liable on . . . a failure-to-warn claim may . . . decide to accept damages awards as a cost of doing business and not alter its behavior in any way . . . . Or, by contrast, it may choose to avoid future awards by dispensing warnings through a variety of alternative mechanisms. . . . The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from positive enactments such as statutes and administrative regulations. Moreover, tort law has an entirely separate function—compensating victims—that sets it apart from direct forms of regulation.[96]

Citing to *Silkwood*, the dissenters scolded the plurality for ignoring recent decisions in which the Court had "declined . . . to find the regulatory effects of state tort law direct or substantial enough to warrant [preemption]."[97]

Commentators and the Court have noted that *Cipollone* "unleashed a torrent of preemption litigation."[98] Its effect on the

---

94. *Id.* at 533 (Blackmun, Kennedy & Souter, JJ., concurring in part, concurring in the judgment in part, and dissenting in part).

95. *Id.* at 535 (noting that the statute was "far from unambiguous and cannot be said clearly to evidence a congressional mandate to [preempt] state [common law] damages actions").

96. *Id.* at 536–537 (citations omitted).

97. *Id.* at 537–538.

98. *E.g.* David C. Vladeck, *Preemption and Regulatory Failure*, 33 Pepp. L. Rev. 95, 106 (2005); *see also Bates*, 544 U.S. at 441 (asserting that after *Cipollone*, a "groundswell of federal and state decisions emerged" that held tort claims preempted).

Court's use of the regulatory paradigm is less clear. Unlike *Garmon* and *Silkwood*, *Cipollone* seemingly accepted a bifurcated view of tort lawsuits.[99] Rather than viewing tort lawsuits as having a parallel regulatory/compensatory effect, the *Cipollone* plurality chose one view and advocated strongly for it.[100]

Accordingly, after *Cipollone* the Court relied on the regulatory paradigm to find that express preemptive provisions barring conflicting state "laws," "rules," or "standards" extended to, and preempted, state tort lawsuits.[101] Although such clauses did not mention tort claims directly, the Court interpreted their language to extend to lawsuits because of their regulatory effect.[102] Even in cases in which statutes seemed expressly to preserve a litigant's ability to bring tort lawsuits with savings clauses, the Court occasionally relied on the regulatory nature of such lawsuits to find that the statutory scheme impliedly preempted them anyway.[103]

In contrast, when the Court found preemption unwarranted, it invoked the compensatory paradigm, finding that statutory terms generally preempting conflicting state "requirements" or "standards" did not indicate a congressional intent to preempt lawsuits in particular. Thus, the Court in *Medtronic, Inc. v. Lohr*[104] rejected an argument that the statutory term "require-

99. *See Cipollone*, 505 U.S. at 521 (noting that common law actions often serve an effective regulatory function).

100. *Id.* Later courts similarly tended to choose one view or the other to determine the appropriateness of preemption. *See infra* nn. 101–106 and accompanying text (discussing cases in which the Court adopted either the regulatory paradigm or the compensatory paradigm).

101. *See e.g. CSX Transp.*, 507 U.S. at 663–664 (relying on *Cipollone* to find that "[l]egal duties imposed on railroads by the common law fall within the scope of these broad phrases").

102. *See id.* at 675 (noting that the "common law of negligence provides a general rule to address all hazards" and that attempts to exempt it from the preemption clause would interfere with the government's ability to regulate). The *CSX Transportation* Court held that preemption applied only to the negligence/excessive speed claims. *Id.* at 676.

103. *See Geier*, 529 U.S. at 867 (finding that a state tort lawsuit was impliedly preempted by a federal statute prohibiting states from imposing "safety standards" that were "not identical to the [f]ederal standard"); *id.* at 881 (noting that a "rule of state tort law" imposing a duty to install an airbag posed an obstacle to the federal government's regulatory goals of providing auto manufacturers with flexibility in providing passive restraints); *see also Buckman*, 531 U.S. at 347 (finding fraud-on-the-agency claims impliedly preempted by the Medical Devices Act because "[p]olicing fraud against federal agencies is hardly 'a field [that] the [s]tates have traditionally occupied'" (quoting *Rice*, 331 U.S. at 230)).

104. 518 U.S. 470.

ment" applied to common law tort claims involving medical devices, noting that

> if Congress intended to preclude all [common law] causes of action, it chose a singularly odd word with which to do it. . . . [Such a] sweeping interpretation of the statute would require . . . interference with state legal remedies, producing a serious intrusion into state sovereignty while simultaneously wiping out the possibility of remedy for the Lohrs' alleged injuries.[105]

Other decisions have similarly followed suit.[106] Interestingly, those cases rejecting preemption also began to highlight not simply the personal redress aspect of tort lawsuits but other aspects as well. *Lohr*, for example, noted not only that legal remedies would be wiped out, but also that preemption was a serious intrusion into state sovereignty,[107] an independent reason for avoiding preemption (and an unsurprising one given the federalism arguments often raised against preemption). By the time of *Bates v. Dow Agrosciences L.L.C.*[108] in 2005, however, the Court relied not only on the compensatory nature of lawsuits to reject preemption, but also on their value to federal regulatory schemes; in fact, the regulatory aspects came to dominate the case.[109]

Bates involved claims against a pesticide manufacturer.[110] The Court held that a federal law prohibiting state "labeling and packaging requirements . . . 'in addition to or different from'" federal law did not necessarily preempt lawsuits for negligence, strict liability, fraud, and breach of warranty by farmers whose crops were damaged after they used a pesticide in accordance with the label's instructions.[111] The Court noted that "[a]n occur-

105. *Id.* at 487–489.

106. *Bates*, 544 U.S. at 449 (expressing concern that preemption would "deprive injured parties of a long available form of compensation"); *Sprietsma*, 537 U.S. at 64 (finding that the Federal Boating and Safety Act did not preempt a negligence claim in light of a savings clause and the common law's "important remedial role in compensating accident victims").

107. *Supra* n. 105 and accompanying text.

108. 544 U.S. 431.

109. *Id.* at 447–449.

110. *Id.* at 434.

111. *Id.* at 447 (emphasis omitted) (quoting 7 U.S.C. § 136v(b) (2006)). Dow sold the pesticide, the label for which stated, "Use of Strongarm is recommended in all areas where peanuts are grown." *Id.* at 435. Farmers who used the pesticide in compliance with the label experienced damaged peanut crops and sued for negligence, strict liability, fraud, and

rence that merely motivates an optimal decision does not qualify as a requirement."[112] Accordingly, the lower court was wrong to equate any jury verdict that "might 'induce'" certain behavior, with the statutory term "requirement."[113] On the other hand, the Court opined, that term "reaches beyond positive enactments, such as statutes and regulations, to embrace [common law] duties."[114] The *Bates* Court saw its task as determining whether the common law verdicts on particular issues—e.g., negligence and fraud—were "requirements" that actually conflicted with the statutory preemption clause pertaining to labeling.[115] In effect, the Court applied the regulatory paradigm, noting that damages verdicts based on certain common law duties could have the same effect as conflicting positive enactments depending on the scope of the common law duty.[116]

Only after this discussion did the Court express its distaste for preemption that would "deprive injured parties of a long available form of compensation."[117] This was especially true in light of the "long history of tort litigation against manufacturers of poisonous substances."[118] Even here, the Court relied heavily on the regulatory advantages of tort lawsuits:

> [T]ort suits can serve as a catalyst in [the agency decision-making] process: "By encouraging plaintiffs to bring suit for injuries not previously recognized as traceable to pesticides . . . a state tort action . . . may aid in the exposure of new dangers associated with pesticides. Successful actions of this sort may lead manufacturers to petition EPA to allow more

---

breach of warranty. *Id.* at 435–436.

112. *Id.* at 443.

113. *Id.*

114. *Id.*

115. *Id.* at 443–445.

116. *Id.* at 444. Ultimately, the Court found that whether the federal statute preempted common law depended on whether the requirements of both overlapped (i.e., whether the common law and the statute were both aimed at packaging and labeling requirements) and whether the common law requirements were different from those imposed by the statute. *Id.* The Court found that petitioners' defective design, negligence, and breach of warranty claims were not packaging and labeling requirements. *Id.* Petitioners' fraud and failure-to-warn claims were such requirements, but the Court remanded to the lower court for a determination as to whether they were "*in addition to or different from*" federal law. *Id.* at 453 (emphasis in original). For further discussion, consult Sharkey, *supra* note 12, at 469–471.

117. *Bates*, 544 U.S. at 449.

118. *Id.*

> detailed labeling of their products; alternatively, EPA itself may decide that revised labels are required in light of the new information that has been brought to its attention through common law suits. In addition, the specter of damage actions may provide manufacturers with added dynamic incentives to continue to keep abreast of all possible injuries stemming from use of their product so as to forestall such actions through product improvement."[119]

Accordingly, although *Bates* acknowledged the compensatory aspects of tort lawsuits, the Court viewed these as secondary to the regulatory paradigm that otherwise dominated the case.[120] At least one commentator has thus deemed *Bates* as cementing "the *Cipollone* principle of treating state tort and statutory law alike."[121]

B. The Roberts Court

The Roberts Court has continued to elevate the regulatory function of tort law over its compensatory function. *Riegel v. Medtronic, Inc.*[122] most obviously reflects the culmination of tort law as an arm of regulation.[123] *Riegel* involved the same preemption provision in the Food, Drug, and Cosmetic Act (FDCA)[124] pertaining to FDA-approved medical devices as in *Lohr*.[125] The issue in *Riegel*, however, involved preemption of common law claims arising from failure of a medical device that had gone through a different, and more stringent, approval process.[126] In finding the petitioners' common law claims preempted, Justice Scalia, writing for the Court, cited to the usual *Cipollone* language regarding the regulatory effect of tort damages.[127] Beyond that equation, how-

---

119. *Id.* at 451 (quoting *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1541–1542 (D.C. Cir. 1984)).

120. *Id.* at 449–450.

121. *Leading Cases*, *supra* n. 12, at 376; *see also* Klass, *supra* n. 5, at 1555 (noting the increasing trend of equating state tort law with positive enactments).

122. 552 U.S. 312.

123. *Id.* at 329.

124. 21 U.S.C. §§ 301–399(d) (2006).

125. *Riegel*, 552 U.S. at 322.

126. *Id.* at 322–323.

127. *Id.* at 324 ("As the plurality opinion said in *Cipollone*, [common law] liability is 'premised on the existence of a legal duty,' and a tort judgment therefore establishes that the defendant has violated a [state law] obligation. . . . [A] liability award 'can be, indeed

ever, he intimated that tort damages should be *more* subject to preemption than positive law:

> State tort law that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme no less than state regulatory law to the same effect. Indeed, one would think that tort law, applied by juries under a negligence or strict-liability standard, is *less deserving of preservation*. A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device [that], along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.[128]

Riegel lacks any sense that tort lawsuits serve an individual compensatory function worth preserving; rather, tort lawsuits are subject to preemption simply because they regulate less effectively than positive enactments.[129]

Wyeth v. Levine[130]also follows this pattern although it found against preemption of state tort law.[131] In *Wyeth*, the Court addressed whether the FDCA preempted a tort lawsuit based upon the manufacturer's failure to warn of possible catastrophic consequences of drug misadministration.[132] Because the FDCA contains no express preemption clause, Wyeth, the drug's manufacturer, argued the lawsuits were preempted under both impossibility and obstacle-preemption theories.[133] Although the Court rejected Wyeth's arguments,[134] it described the tort system as acting "as a complementary form of drug regulation" in which "[s]tate tort suits uncover unknown drug hazards and provide

---

is designed to be, a potent method of governing conduct and controlling policy.'" (quoting *Cipollone*, 505 U.S. at 521)).

128. *Id.* at 325 (emphasis added).

129. *See id.* (analyzing preemption by considering the potential effect of state tort suits on the FDA's regulatory standards).

130. 129 S. Ct. 1187.

131. *Id.* at 1204.

132. *Id.* at 1190–1191.

133. *Id.* at 1193–1194.

134. *Id.* at 1204.

incentives for drug manufacturers to disclose safety risks promptly."[135] As in *Bates*, the Court acknowledged the compensatory nature of state tort law, but it did so not because lawsuits redress individual wrongs.[136] Rather such suits were valuable because compensation "may motivate injured persons to come forward with information."[137] Accordingly, even though preemption was unwarranted, this was so because of the beneficial and nonconflicting regulatory aspects of state tort law—not because such law has a particularly important individual redress function.[138]

Two additional cases have less obvious paradigm choices, although one can see hints of each paradigm in the Court's decisions. In *Altria Group, Inc. v. Good*,[139] the Court again considered whether the 1969 Act involved in *Cipollone* preempted a state law claim.[140] Specifically, the *Altria* respondents claimed that the company violated the Maine Unfair Trade Practices Act (MUTPA),[141] which banned the use of "unfair or deceptive acts or practices in the conduct of any trade or commerce."[142] They asserted that Altria's representations of light cigarettes as posing fewer health risks, coupled with its fraudulent concealment of information regarding smoking patterns pertaining to light cigarettes, violated MUTPA.[143] Relying entirely on its reasoning in *Cipollone*, the Court held in a five-to-four opinion that the 1969 Act did not preempt the MUTPA claims.[144] Accordingly, the Court reiterated that to establish whether a specific common law claim is

135. *Id.* at 1202.

136. *Id.*

137. *Id.*

138. *See id.* at 1202–1203 (noting that state tort actions provide "an additional, and important, layer of consumer protection that complements FDA regulation[s]"). The dissent also treated state tort law as merely an arm of regulation, focusing on "the effects of state tort suits on the federal regulatory regime," and on whether the FDA or a state jury is better equipped to perform "cost-benefit-balancing." *Id.* at 1229 (Alito, J., Roberts, C.J. & Scalia, J., dissenting).

139. 129 S. Ct. 538.

140. *Id.* at 542.

141. Me. Rev. Stat. Ann. §§ 205-A to 214 (2011).

142. *Altria Group, Inc.*, 129 S. Ct. at 541 n. 1.

143. *Id.* at 541. The petitioners asserted that Altria knowingly withheld information that indicated that smokers engaged in compensatory behaviors, such as breathing in larger amounts of smoke and holding the smoke in their lungs longer, which negated the effects of the reduced tar and nicotine. *Id.* at 541–542.

144. *Id.* at 551.

preempted, the appropriate inquiry involves "whether the legal duty that is the predicate of the [common law] damages action constitutes a 'requirement or prohibition based on smoking and health . . . with respect to . . . advertising or promotion,' giving that clause a fair but narrow reading."[145]

The *Altria* majority found that MUTPA did not regulate smoking and health, but rather was based on a general common law duty not to deceive; thus, MUTPA was not subject to preemption.[146] The majority's acceptance of *Cipollone*—a decision that openly embraced the regulatory paradigm—suggests (if only weakly) continuing adherence to the notion that lawsuits are primarily regulatory in nature for preemption purposes. This conclusion is somewhat strengthened by the utter absence of discussion concerning the need to compensate injured plaintiffs in a decision that ruled *against* preemption. Furthermore, the four dissenting Justices clearly adhered to the regulatory paradigm in their criticism that the majority's decision would "have the perverse effect of increasing the nonuniformity of state regulation of cigarette advertising."[147]

In contrast, *Exxon Shipping Co. v. Baker*,[148] which involved litigation over the 1989 crash of the Exxon Valdez, briefly invoked the compensatory paradigm. The lower courts had awarded compensatory damages (to which Exxon stipulated liability) and five billion dollars in punitive damages.[149] Exxon claimed that the Clean Water Act (CWA),[150] which created a comprehensive scheme of monetary penalties for discharge of unauthorized pollutants into waterways, preempted awards of punitive damages.[151] Relying on *Silkwood*, the Court quickly dismissed Exxon's argument, noting that its reasoning would effectively apply to many forms of compensatory damages as well, and would "eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals."[152] Because there was "no clear indication of congressional intent to occupy the

145. *Id.* at 545 (quoting *Cipollone*, 505 U.S. at 524) (omissions in original).
146. *Id.* at 551.
147. *Id.* at 563 (Thomas, J., Roberts, C.J., Scalia & Alito, JJ., dissenting).
148. 554 U.S. 471.
149. *Id.* at 479–481.
150. 33 U.S.C. §§ 1251–1387 (2006).
151. *Exxon Ship. Co.*, 554 U.S. at 488.
152. *Id.* at 488–489.

entire field of pollution remedies" and allowing punitive damages would have no "frustrating effect on the CWA remedial scheme," preemption was unwarranted.[153] Although *Exxon* runs somewhat against the current infatuation with the regulatory paradigm, its reliance on the compensatory paradigm is hardly surprising given the lack of an explicit preemption clause and the breadth of the possible preemption.[154]

The Court's most recent cases, however, clearly appear to embrace the regulatory paradigm. *Williamson v. Mazda Motor of America, Inc.*[155] involved the question of whether a federal motor-vehicle regulation giving manufacturers an option to install two or three point rear seat belts preempted state law wrongful-death actions.[156] Interestingly, leading up to the decision, many actors explicitly embraced the regulatory paradigm, even when arguing against preemption. The petitioners' brief, for example, never mentioned the need for individual compensation or redress; rather, in arguing against preemption of their common law claims, petitioners noted that tort lawsuits complemented federal regulatory requirements and that tort claims promote the federal regulatory goal of "technological innovation."[157] Similarly, the United States Solicitor General's amicus brief cast its argument against preemption primarily in terms of the regulatory paradigm—noting that petitioners' tort claims did not interfere with the regulatory scheme.[158]

Unlike the lower court, which had relied on an earlier Court decision to find preemption,[159] the Supreme Court found that the wrongful-death lawsuits did not conflict with the federal regulatory objective of auto safety. According to the Court, the option to provide two or three point rear seat belts was a federal safety-minimum standard, which did not bar "[s]tates from imposing

153. *Id.* at 489.

154. *See id.* (noting that Exxon's position, if fully adhered to, would be overly broad).

155. 131 S. Ct. 1131.

156. *Id.* at 1134.

157. Br. for Petrs., *Williamson v. Mazda Motor of Am., Inc.*, 2010 WL 3017750 at **41, 49 (No. 08-1314, 131 S. Ct. 1131 (2010)).

158. Amicus Curiae Br. for the United States in Support of Petrs., *Williamson v. Mazda Motor of Am., Inc.*, 2010 WL 4150188 at **10–14 (No. 08-1314, 131 S. Ct. 1131 (2010)).

159. *Williamson v. Mazda Motor of Am., Inc.*, 84 Cal. Rptr. 3d 545 (2008). The California court relied on *Geier* to find that the wrongful-death lawsuit was preempted. *Id.* at 551–556.

stricter standards."[160] It further noted that "state tort law does not conflict with a federal 'minimum standard' merely because state law imposes a more stringent requirement."[161] Accordingly, although the Court ruled against preemption, it took a decidedly regulatory view of the role that tort lawsuits play in the preemption context.

The Court in *Bruesewitz v. Wyeth LLC*[162] also embraced the regulatory paradigm although it acknowledged the compensatory aspects of tort lawsuits. *Bruesewitz* involved the question of whether the National Childhood Vaccine Injury Act[163] (Vaccine Act) preempted state law negligence and strict-liability claims stemming from a vaccine's administration to a child who subsequently experienced severe side effects.[164] The Vaccine Act established a special vaccine court and victim compensation program to handle such claims.[165] After the child's claim in the vaccine court was dismissed, her parents filed a lawsuit alleging common law design-defect claims.[166]

Writing for the majority, Justice Scalia found that the Vaccine Act preempted the petitioners' claim.[167] Given that the federal statutory scheme was designed as an alternative-redress system,[168] one might have expected the opinion to mention the private-redress aspects of lawsuits. After all, the Vaccine Act is precisely the kind of alternative-compensation system previous Courts had lamented as missing when invoking the compensatory paradigm to deny preemption. Thus, even while ruling in favor of preemption, Justice Scalia had ample reason to discuss the com-

160. *Williamson*, 131 S. Ct. at 1139.

161. *Id.* (citations omitted).

162. 131 S. Ct. 1068.

163. 42 U.S.C. §§ 300aa-1 to 300aa-34 (2006).

164. 131 S. Ct. at 1072.

165. 42 U.S.C. §§ 300aa-11, 300aa-13. The Act entitles a person to compensation if he or she received a vaccine covered by the Vaccine Act, suffered an injury listed in the Act's "Table," and a preponderance of the evidence does not show that the injury was caused by factors unrelated to the vaccine. *Id.*

166. *Bruesewitz*, 131 S. Ct. at 1075. The child's injuries were originally listed as "Table" injuries but had been deleted from the Act's Injury Table prior to her petition in the vaccine court. *Bruesewitz*, 561 F.3d at 237 n. 5.

167. *Bruesewitz*, 131 S. Ct. at 1082.

168. 42 U.S.C. § 300aa-22(e). The Vaccine Act's legislative history notes that the statute created "a new system for compensating individuals who have been injured by vaccines routinely administered to children." H.R. Rpt. 99-908 at 3 (Sept. 26, 1986) (reprinted in 1986 U.S.C.C.A.N. 6344, 6344).

pensatory paradigm. Other than a brief acknowledgement that compensation was one goal of the Vaccine Act and that lack of alternative-compensation schemes had previously been noted by past Courts,[169] however, Justice Scalia's opinion tended more toward the regulatory paradigm. Accordingly, he noted that both state tort law and the Vaccine Act aimed to "prompt[ ] the development of improved [vaccine] designs"[170]—a decidedly regulatory goal. Imposition of tort liability, Scalia also noted, impeded that goal by driving manufacturers away and threatening available vaccines,[171] much as state positive enactments might impose unreasonable burdens on manufacturers counter to the public good.

Justice Breyer echoed Justice Scalia's concerns[172] and further channeled his reasoning in *Levine*. Accordingly, Justice Breyer argued that the preemption of petitioners' design-defect claims was appropriate because determinations best made by experts should not be second-guessed by juries.[173] As in *Levine*, there is little sense that Justice Breyer viewed tort lawsuits as having an important compensatory function; rather, he is concerned solely with the extent to which they exert an unreasonable deterrent effect on otherwise socially important behavior of vaccine manufacturers. Even the dissenting justices, who recognized the unique private law attributes of tort lawsuits, frequently referred to their regulatory benefits, noting, for example, that such lawsuits help promote socially optimal vaccine designs.[174]

IV. POSSIBLE IMPLICATIONS OF THE REGULATORY PARADIGM

The regulatory paradigm is likely to remain a prominent aspect of the Roberts Court's jurisprudence. That reliance will have a further trickle-down effect. Increasingly, parties embrace the regulatory paradigm whether arguing for or against preemption,[175] effectively relegating the compensatory paradigm to an

169. *Bruesewitz*, 131 S. Ct. at 1072–1074.
170. *Id.* at 1079.
171. *Id.*
172. *Id.* at 1084–1085 (Breyer, J., concurring).
173. *Id.* at 1086.
174. *Id.* at 1097–1099 (Sotomayor & Ginsburg, JJ., dissenting).
175. *See e.g.* Br. for Petrs., *Bruesewitz v. Wyeth, Inc.*, 2010 WL 2130598 at *53 (No. 09-

afterthought unless it is unavoidably implicated by schemes such as the Vaccine Act. Lower courts also appear to rely on the regulatory paradigm regardless of the outcome of the case.[176] Even critics of the Court's preemption decisions embrace the regulatory paradigm on some level. For example, those critics arguing that the Court's decisions ignore important federalism concerns tend to embrace the regulatory paradigm by highlighting the Court's failure to recognize the positive contribution state tort lawsuits make to a federal regulatory regime.[177] Other critics argue that the Court's decisions amount to hidden tort reform and similarly embrace the regulatory paradigm by raising utilitarian arguments in favor of tort lawsuits—e.g., that preemption shifts costs from wrongdoers to taxpayers.[178] Accordingly, the Court's use of the regulatory paradigm in preemption cases has had a profound impact on other actors.

But the rise of the regulatory paradigm is likely to exacerbate existing problems within the Court's preemption doctrine as well. That doctrine has always been criticized as easily subject to judi-

---

152, 130 S. Ct. 1068 (2010)) (arguing that tort lawsuits "promote[ ] the public interest by incentivizing improved product design"); *see also* n. 157 and accompanying text (discussing the argument of the petitioners in *Williamson*).

176. *See e.g. In re Prempro Prods. Liab. Litig.*, 586 F.3d 547, 563 (8th Cir. 2009) (finding a state failure-to-warn claim not preempted, but stating that state law was a complimentary form of regulation); *Gaeta v. Perrigo Pharms. Co.*, 562 F. Supp. 2d 1091, 1097 (N.D. Cal. 2008) (declaring a state law preempted and referring to state tort law as a form of regulation); *Mills v. Warner-Lambert Co.*, 581 F. Supp. 2d 772, 780 (E.D. Tex. 2008) (finding preemption and viewing state tort law as a form of regulation); *Forst v. SmithKline Beecham Corp.*, 639 F. Supp. 2d 948, 955 (E.D. Wis. 2009) (rejecting preemption but equating state law as a compliment to federal regulations).

177. *See e.g.* Schapiro, *supra* n. 23, at 821 ("Dialogue facilitates regulatory innovation. The optimal regulatory regime develops and changes over time, with constant interaction from a variety of forces, including information generated by other regulators. State tort suits may produce information of great value to federal regulators.").

178. *See* Amicus Curiae Br. of Const. & Admin. L. Scholars in Support of Respts., *Phillip Morris USA Inc. v. Good*, 2008 WL 2489869 at **19–20 (No. 07-562, 128 S. Ct. 538 (2008)) (asserting preemption results shift accident costs from wrongdoers to taxpayers and the general public); David A. Kessler & David C. Vladeck, *A Critical Examination of the FDA's Efforts to Preempt Failure-to-Warn Claims*, 96 Geo. L.J. 461, 480–481 (2008) (contending that preemption reduces industry incentives to improve product safety); Funk et al., *supra* n. 36, at 13 (arguing that tort lawsuits resist the problem of agency capture because plaintiffs' attorneys have incentives to invest resources to "secure redress for victims of industry misconduct"). To be sure, many of these scholars also clearly challenge the regulatory paradigm by seeking to have tort law's alternative-redress function preserved, or at least considered, in preemption decisions. Grey, *supra* n. 39, at 613–619; Schapiro, *supra* n. 23, at 820; Sharkey, *supra* n. 12, at 466–471; Funk et al., *supra* n. 36, at 10.

cial manipulation or, at best, judicial inconsistency.[179] As Professor Thomas Merrill points out, the preemption doctrine is in large part "substantively empty."[180] It "misdescribes what happens in preemption cases . . . attributing to Congress judgments that are in fact grounded in judicial perceptions about the desirability of displacing state law in any given area."[181] The rise of the regulatory paradigm may exacerbate such manipulation. Although it is unclear whether the regulatory/compensatory dichotomy normatively drove the Court's actions in most cases,[182] that dichotomy provided some grounding for the Court. The characterization of tort lawsuits as regulatory *and* compensatory was a useful reminder to the Justices that tort lawsuits were not *always* equivalent to positive enactments, and the paradigms provided useful descriptive and rhetorical devices for opposing members of the Court.[183] Thus, those ruling in favor of preemption and relying on the regulatory paradigm were forced to deal with the compensatory, private law aspects of tort lawsuits when raised by the dissenters.[184] Without a strong view of tort lawsuits as existing at least partly for personal redress, courts have greater incentive to read vague statutory terms, such as "requirement" or "law," to encompass tort lawsuits although they do not clearly apply to them.[185]

Furthermore, the rise of the regulatory paradigm may promote deference to agency regulators in situations in which it is unwarranted. The role of agency regulators has gained primacy along with the rise of the regulatory paradigm. As Professor Nina Mendelson has noted, "federal administrative agencies increasingly seem to claim for themselves the authority to distribute power between the federal government and the states."[186] The circumstances in which agency officials can preempt state law and the appropriate level of deference due to their interpretations

179. *See e.g.* Sharkey, *supra* n. 12, at 458–459 (noting the amount of scholarly criticism surrounding the Court's inconsistent approach to preemption).

180. Merrill, *supra* n. 35, at 742.

181. *Id.* at 741.

182. Sharkey, *supra* n. 12, at 459.

183. *See supra* nn. 111–121 and accompanying text (discussing the pervasive tension between the regulatory and compensatory functions of tort actions in the *Bates* opinion).

184. *Supra* n. 96 and accompanying text.

185. *See supra* nn. 101–103 (providing examples of when the Court has equated vague statutory terms to encompass preemption of tort lawsuits).

186. Mendelson, *supra* n. 45, at 698.

pose difficult questions for courts in any type of preemption case. Those issues are further complicated when agency regulators claim the ability to preempt tort lawsuits in the face of *congressional silence* on that topic.[187] As interested parties, agency officials may have reason to read otherwise vague statutory terms as extending to lawsuits. By treating lawsuits as merely an extension of the regulatory apparatus, the regulatory paradigm gives agency officials great discretion to make such decisions, thus extending the recent trend of deference to agency regulators when it may be unwarranted.[188]

Furthermore, by characterizing preemption of tort lawsuits primarily as a relationship between federal and state governments, the regulatory paradigm ignores the individuals originally at the heart of the lawsuits—i.e., the plaintiffs. The regulatory paradigm defines the stakes involved as those between the regulatory needs of federal officials versus the regulatory rights of states as sovereigns.[189] Accordingly, other than to view plaintiffs as possible catalysts for improving the federal system of regulation, the regulatory paradigm essentially ignores their existence.[190] There is little sense that plaintiffs, individually or collectively, deserve much consideration as part of the preemption calculus. Surely, tort plaintiffs do not view themselves solely as part of a regulatory system with no sense of individual identity or purpose in bringing a lawsuit. In fact, plaintiffs often have a multitude of reasons for bringing lawsuits.[191] Most of them are personal to their specific situation, although some may overlap with regulatory goals.[192] Shunting them aside in the preemption debate—without adequate consideration of the nature and pur-

187. *See id.* at 698–699 (noting the difficulties inherent in agency preemption, especially in the absence of an explicit directive from Congress).

188. Sharkey, *supra* n. 12, at 471–474 (noting a trend of Supreme Court deference to agency determinations of preemption).

189. *See id.* at 471 (noting the Court's tendency to focus on state sovereignty concerns even when discussing the compensation function of state tort law).

190. *See supra* nn. 127–129 and accompanying text (discussing Justice Scalia's opinion in *Riegel*, which rejected the compensatory paradigm, except as an aid to federal regulatory efforts).

191. *See* Funk et al., *supra* n. 36, at 13 (listing various reasons why plaintiffs bring suit in preemption cases).

192. *See e.g.* Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 Ohio St. J. on Dis. Res. 269, 302–306 (1999) (detailing several possible goals of parties that may pose barriers to monetary settlements).

poses of tort lawsuits—serves no useful purpose, creates antagonism, and further silences plaintiffs' voices.

V. CONCLUSION

None of this means that tort lawsuits are beyond preemption. But equating the regulatory effect of tort lawsuits and statutory or regulatory enactments elides important differences between them. The Court would be better served to acknowledge those differences and adopt a preemption jurisprudence that explicitly deals with them. The preemption defense has become a powerful weapon in lawsuits involving products liability and negligence claims. The Roberts Court is likely to hear future cases involving these conflicts, and it should take the opportunity to clarify this increasingly incoherent paradigm.