

# ATLAS CROAKS. SUPREME COURT SHRUGS.

*Michael S. Greve\**

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## I. INTRODUCTION

The Supreme Court’s 2010 Term has confirmed, yet again, the legal commentariat’s conviction that the Roberts Court’s conservative majority is recreating an America of Ayn Rand’s imagination.<sup>1</sup> States, the Court has held, may not sue to protect

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\* John G. Searle Scholar, American Enterprise Institute. The author serves as Chairman of the Competitive Enterprise Institute, which represented the plaintiffs-petitioners in *S&M Brands v. Caldwell*, 614 F.3d 172 (5th Cir. 2010), which is discussed further below.

1. For a sampling of commentary in this vein, see Steven Greenhouse, *Wal-Mart Case Is a Blow for Big Cases and Their Lawyers*, N.Y. TIMES, June 20, 2011, <http://www.nytimes.com/2011/06/21/business/21class.html>; Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 18, 2010, at A1, available at <http://www.nytimes.com/2010/12/19/us/19roberts.html>; Dahlia Lithwick, *Operating Instructions: The Supreme Court Shows Corporate America How to Screw Over Its Customers and Employees Without Breaking the Law*, SLATE (July 1, 2011), <http://www.slate.com/id/2298330/pagnum/all>; Mark

their citizens against out-of-state operators of coal-fired, carbon-spewing power plants.<sup>2</sup> Foreign manufacturers of cutting machines that lop off operators' limbs may sell the infernal instruments without fear of liability, so long as they do not physically enter or deliberately aim to sell in the plaintiff's home state.<sup>3</sup> Generic drug makers and vaccine producers may kill and maim their consumers, so long as their labels and products comply with perfunctory federal requirements.<sup>4</sup> All drug makers may overcharge state and local government purchasers, subject only to virtually nonexistent federal administrative oversight.<sup>5</sup> Corporations may force consumers into arbitration agreements; bill them to the tune of a few bucks each but, given the large numbers, for stupendous profits; and then defend against a class action on the grounds that arbitration is not made for that legal device.<sup>6</sup> Also, employers may freely discriminate against millions of employees, so long as they do not inflict an injury that is sufficiently common to warrant a class action.<sup>7</sup> And to protect this order, the plutocracy is constitutionally entitled to buy its own legislators: Public attempts to "level the playing field"

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Sherman, *Business, Free Speech Cases Top Supreme Court Term*, HUFFINGTON POST (June 25, 2011, 6:30 PM), [http://www.huffingtonpost.com/2011/06/25/supreme-court-2011\\_n\\_884577.html](http://www.huffingtonpost.com/2011/06/25/supreme-court-2011_n_884577.html); James Vicini, *Analysis: Big Business Scores Key Supreme Court Term Wins*, REUTERS (June 28, 2011), <http://www.reuters.com/assets/print?aid=USTRE75R68X20110628>; *Democrats Criticize Supreme Court for Wal-Mart, Pro-Business Verdicts*, HUFFINGTON POST (June 29, 2011, 12:39 PM), [http://www.huffingtonpost.com/2011/06/29/democrats-supreme-court\\_n\\_886981.html](http://www.huffingtonpost.com/2011/06/29/democrats-supreme-court_n_886981.html); *Panel Discusses Pro-Business Bias in Supreme Court*, ALLIANCE FOR JUST. (July 1, 2011), <http://afjjusticewatch.blogspot.com/2011/07/panel-discusses-pro-business-bias-in.html>.

2. See *Am. Elec. Power Co. v. Connecticut*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2527, 2540 (2011).

3. See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2780, 2791 (2011).

4. See *PLIVA, Inc. v. Mensing*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2567, 2581–82 (2011).

5. See *Astra USA, Inc. v. Santa Clara Cnty.*, 563 U.S. \_\_\_, \_\_\_, 131 S. Ct. 1342, 1349–50 (2011).

6. See *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. \_\_\_, \_\_\_, 131 S. Ct. 1740, 1753 (2011).

7. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2541, 2561 (2011).

violate the First Amendment.<sup>8</sup> Full speed ahead for the Taggart Railroad!

Or maybe not. Upon inspection, the notion that the Roberts Court's jurisprudence heralds a restoration of unbridled capitalism—or, more modestly, of reliable rules of the road for commercial actors—proves untenable, if not downright absurd. It is true that the Supreme Court often rules for business. And this past Term, unlike in preceding years, those rulings have often been the work of a narrow 5-4 or 5-3 conservative majority.<sup>9</sup> Justice Elena Kagan, though recused from many cases this past Term, has found her reliably liberal voice in no time flat. (She does write like a charm, though). However, the pattern is hardly unbroken.<sup>10</sup> Moreover, and far more important, the conservative Justices' pro-business decisions look like picking weeds in downtown Detroit or for that matter Mrs. Rand's crumbling New York—well-meant, but unlikely to improve the neighborhood on a lasting basis. The point emerges in contemplation of the charter and instrument that the Supreme Court is supposed to protect: the United States Constitution.

## II. CONSTITUTIONAL POLITICAL ECONOMY

Among the Constitution's elementary commitments is the protection of a free domestic market—the right to conduct commerce across the United States without hindrance and discrimination by the states.<sup>11</sup> The states' interferences with that commerce under the Articles of Confederation provided a

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8. See *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2806, 2828–29 (2011).

9. See *Concepcion*, 563 U.S. at \_\_\_, 131 S. Ct. at 1743; *Nicastro*, 564 U.S. at \_\_\_, 131 S. Ct. at 2785; *PLIVA*, 564 U.S. at \_\_\_, 131 S. Ct. at 2571; *Dukes*, 564 U.S. at \_\_\_, 131 S. Ct. at 2546 (discussing the commonality requirement for class actions).

10. See, e.g., *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. \_\_\_, 131 S. Ct. 1968 (2011) (conservative Justices voting against business interests and liberal Justices voting for business interests); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. \_\_\_, 131 S. Ct. 2729 (2011) (finding that a California statute prohibiting the sale or rental of violent video games to minors violates the First Amendment right to free speech).

11. See U.S. CONST. art. I, § 8, cl. 3.

powerful impetus for the Constitution and the establishment of a federal government capable of breaking the balkanizing force of parochial state politics. Fully expecting that the centrifugal forces that provided such a compelling reason *for* the Constitution would survive *under* the Constitution, the Founders empowered Congress to prohibit—to preempt, as we now say—state interferences with interstate commerce.<sup>12</sup> All this we teach in fourth grade, in high school and college, and again in law school.

What we *do not* teach, and what in fact is missing from the mainstream of post-New Deal constitutional scholarship, is that the Founders fully expected Congress to fall down on its job.<sup>13</sup> One could refer to *The Federalist* or even more esoteric sources to demonstrate the point. But one need not, for the Constitution itself speaks loudly on the issue. To be sure, it entrusts Congress with awesome powers. But it also contains numerous prohibitions that can be judicially enforced against the states *without* any congressional action. No state may make a law impairing the obligation of contract, coin money, or make anything but gold and silver legal tender.<sup>14</sup> Each state must grant sister states' citizens the same privileges and immunities that it grants its own citizens.<sup>15</sup> No state may impose import or export duties,<sup>16</sup> or enter into compacts with other states without the consent of Congress.<sup>17</sup> All these prohibitions are commercial at their core; all are calculated to prevent state attempts to exploit or impede interstate commerce. And note this further common feature central to any sensible understanding of the Constitution's political economy: *all the prohibited activities could be enjoined by Congress*, acting pursuant to its copious enumerated powers. Manifestly, however, the Founders refused to rely on a fickle legislature to safeguard the Constitution's free-

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12. See U.S. CONST. art. IV, § 2.

13. For references and a terrific exposition of the point, see Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 222–28 (1985).

14. U.S. CONST. art. I, § 10, cl. 1.

15. U.S. CONST. art. IV, § 2, cl. 1.

16. U.S. CONST. art. I, § 10, cl. 2.

17. U.S. CONST. art. I, § 10, cl. 3.

trade commitment. Instead, they entrusted the defense against disintegrating forces primarily and in the first instance to the federal courts and especially the Supreme Court.

Some Founders, prominently including James Madison in his dark post-Convention mood, did not trust that solution either. State governments, Madison warned in a long letter to Thomas Jefferson, would cleverly legislate around the constitutional prohibitions and, when enjoined, would simply ignore the courts.<sup>18</sup> Moreover, courts cannot be proactive. They depend on plaintiffs, and those plaintiffs would not always come forward.<sup>19</sup> Madison got the analysis *almost* right. What he missed, however, and what has kept the Constitution's commercial structure intact for much of our history, is the political economy of constitutional litigation.

Alexander Hamilton—not coincidentally, an accomplished business lawyer—grasped this point. It appears (among other places) in *The Federalist No. 6*, where Hamilton undertakes to demolish the utopian notion that the existing commercial relations among the states would produce an ever closer union without a decisive constitutional act.<sup>20</sup> The opposite, Hamilton says, might well come to pass:

The habits of intercourse, on the basis of equal privileges, to which we have been accustomed from the earliest settlement of the country, would give a keener edge to those causes of discontent, than they would naturally have, independent of this circumstance. We should be ready to denominate injuries, those things which were in reality the justifiable acts of independent sovereignties, consulting a distinct interest. The spirit of enterprise, which characterizes the commercial part of America, has left no occasion of displaying itself unimproved. It is not at all probable, that this unbridled spirit would pay much respect to those regulations of trade, by which particular

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18. See Letter from James Madison to Thomas Jefferson (Oct. 24, 1787) (discussing the state legislatures' tendency to follow local interests over national interests), *available at* <http://press-pubs.uchicago.edu/founders/documents/v1ch17s22.html>.

19. *Id.*

20. THE FEDERALIST NO. 6, at 32, 37 (Alexander Hamilton) (E.H. Scott ed., 1898) (emphasis in original).

States might endeavour to secure exclusive benefits to their own citizens.<sup>21</sup>

Thinly hidden in Hamilton's warning of what would happen if the Constitution were to be defeated is a prediction of what would happen if it were accepted. Intercourse "on the basis of equal privileges" would become a constitutional guarantee in the form of the Privileges and Immunities Clause—"the basis of the Union" (as Hamilton calls it elsewhere) and enforceable by the courts under the federal judiciary's diversity jurisdiction.<sup>22</sup>

The Constitution's commercial structure is not self-enforcing in any mechanical sense. As Hamilton recognized, it requires properly incentivized plaintiffs to act as constitutional "norm entrepreneurs," as political scientists now say.<sup>23</sup> And who might those people be? Why, *business*—the commercial part of America. The dominance of those plaintiffs in cases implicating the constitutional structure and commercial order is no plutocratic conspiracy. It is the constitutionally envisioned and hoped-for scenario.

### III. OUT OF CONTROL (AND INTO *ERIE*)

The brief trip down constitutional memory lane helps to put the Roberts Court's decisions in perspective. Its plain implication is this: because the Constitution relies on commercial norm entrepreneurs for the defense of its open-economy commitment, *any jurisprudence that takes the Constitution's structure seriously will have a very pro-business look*. The Supreme Court has to monitor state courts and federal appellate courts. If it did no more than beat back the most adventurous departures from the Constitution's commercial order, it would have a 100% pro-business record. Put the other way around, a "perfect Term" for the Chamber of Commerce need not herald the restoration of a

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21. THE FEDERALIST NO. 7, at 40 (Alexander Hamilton) (E.H. Scott ed., 1898).

22. THE FEDERALIST NO. 80, at 436 (Alexander Hamilton) (E.H. Scott ed., 1898).

23. See *id.*; see also Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (defining norm entrepreneurs as "people interested in changing social norms").

freer economy or a re-approximation of constitutional norms. It may and usually does mean no more than, “Yet more disaster averted. Lousy equilibrium preserved.”

Even that modest program has proved beyond the Roberts Court’s reach—not only because the four liberal Justices oppose it, but also for deeper reasons. First, even a Court composed of nine diehard constitutionalists could not afford a 100% record; to protect an aura of impartiality, it will have to toss the other side a few morsels.<sup>24</sup> Second, more important, and at variance with the Supreme Court’s excessive emphasis on circuit splits as a condition of granting review, status quo maintenance—let alone improvement of the legal order—is not a mere coordination or monitoring problem; it is a control problem. That problem is out of hand, for two reasons.

First, the federal judicial system is built for the monitoring of lower courts that commit occasional errors. It is *not* built for inferior courts, especially the Ninth Circuit Court of Appeals, that deliberately flaunt clear Supreme Court rules and precedents in the (accurate) expectation that the Justices cannot possibly correct more than a handful of the most egregious transgressions. In several important pro-business decisions this past Term, the Supreme Court *unanimously* reversed appellate court rulings.<sup>25</sup> This does not signal that the system works. It signals that plaintiffs feel free to plead and that appellate courts feel free to embrace claims that are completely off the reservation. Neither the wayward courts nor their clientele care the slightest bit about the reversals, which are but a small price to pay for all the stuff that slips through.

Second, as noted, the Constitution relies on regulated

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24. See THE FEDERALIST NO. 39, at 214 (James Madison) (E.H. Scott ed., 1898). See generally Martin Shapiro, *The Success of Judicial Review and Democracy*, in ON LAW, POLITICS, AND JUDICIALIZATION 149 (Martin Shapiro & Alec Stone Sweet eds., 2002).

25. See, e.g., Wal-Mart Stores, Inc. v. Dukes, 564 U.S. \_\_\_, 131 S. Ct. 2541 (2011) (unanimously rejecting class action certification under FRCP 23(b)(2)), *rev’g* 603 F.3d 571 (9th Cir. 2010); Astra USA, Inc. v. Santa Clara Cnty., 563 U.S. \_\_\_, 131 S. Ct. 1342 (2011), *rev’g* 588 F.3d 1237 (9th Cir. 2009); Am. Elec. Power Co. v. Connecticut, 564 U.S. \_\_\_, 131 S. Ct. 2527 (2011), *rev’g* 582 F.3d 309 (2d Cir. 2009).

parties—business—to act as legal entrepreneurs in defense of commerce-protective norms. It is not built for a legal order that empowers the *enemies* of the Constitution’s commitment to unimpeded interstate commerce—the plaintiffs’ bar, advocacy groups, state regulators and state attorneys general—to act as norm entrepreneurs.<sup>26</sup> Ever since the New Deal, however, that upside-down order has been ours. Its linchpin, and the heart of the New Deal Constitution, is *Erie Railroad Co. v. Tompkins*,<sup>27</sup> which commands federal courts in diversity cases among parties from different states to follow the law of the state in which they sit—in effect, the state law chosen by the plaintiff.<sup>28</sup> In that fashion, *Erie* unleashed—not by accident, but by design—both the post-contractual opportunism of parties in interstate commerce and the parochial bias of states, especially state courts. To this disastrous decision, its spirit, and its corollaries—for example, niggling legal doctrines of federal abstention and preemption that renounce federal jurisdiction in supposed deference to “Our Federalism,” as well as doctrines of choice-of-law and personal jurisdiction that systematically block commercial actors’ escape from hostile jurisdictions<sup>29</sup>—we owe the centrifugal, balkanizing tendencies of our legal system: a roving plaintiffs’ bar, hellhole jurisdictions, migrating mass torts, state attorneys general, and treasurers on the prowl against national industries, and state laws that contrive to govern the internet and the ecosphere, brought to us by states that are demonstrably incapable of governing themselves.<sup>30</sup> It would take a resolute Supreme Court to arrest this tide.

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26. See U.S. CONST. art. I, § 8, cl. 3.

27. 304 U.S. 64 (1938).

28. *Id.*; see also *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

29. See, e.g., Justice Black’s encomium to “Our Federalism” in *Younger v. Harris*, 401 U.S. 37, 44–45 (1971); see also *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 489 (2003) (unanimous opinion) (finding that the Full Faith and Credit Clause is effectively unenforceable with respect to “public Acts”); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (finding an “assumption against preemption”); *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (defining personal jurisdiction based on “minimum contacts”).

30. For California’s policies, see Christopher Swope, *Made in Sacramento*, GOVERNING (July 2003), available at <http://www.governing.com/topics/politics/Made-In-Sacramento.html>.



## IV. WHAT IT WOULD TAKE

To state the obvious: thirty-odd Supreme Court business cases per Term are not remotely enough to pacify a legal war zone where the combatants are encouraged to push the envelope all the time, at numerous legal fronts and in fifty state judicial systems and some federal circuits that are always open for business against business and the Constitution's commercial order. That is so especially since a great many of those cases will be taken up with mere judicial "housekeeping"—the clarification of obscure statutory provisions, the resolution of circuit splits that are due to confusion and honest disagreement rather than deliberate defection, arcane points of copyright or patent law, and so forth.<sup>31</sup> To restore a semblance of constitutional order, the Supreme Court would have to go beyond picking the dozen or so most obnoxious weeds. It would have to reconstruct order among the ruins. What would such an agenda look like?

First, at a minimum, the Court would enforce the Constitution's explicit commerce-protective norms (such as the prohibitions of Article I, Section 10). The Constitution is imperfect, but it is much better than what we have. As a matter of judicial strategy and economy, moreover, enforcement of the constitutional rules would fence off large areas of illicit conduct, including areas that the Court must otherwise monitor by other, inadequate means.

Second, the Court would draw clear, unambiguous legal lines.<sup>32</sup> Furthermore, it would draw the lines "far enough in" to

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31. Numerous cases decided during the past Term fit this description. *See, e.g.*, *Mayo Found. for Med. Ed. & Research v. United States*, 563 U.S. \_\_\_, 131 S. Ct. 704 (2011) (tax law); *Amara v. CIGNA Corp.*, 563 U.S. \_\_\_, 131 S. Ct. 2900 (2011) (ERISA); *Gen. Dynamics Corp. v. United States*, 563 U.S. \_\_\_, 131 S. Ct. 1900 (2011) (government contracts); *Ransom v. FIA Card Servs.*, 563 U.S. \_\_\_, 131 S. Ct. 716 (2011) (bankruptcy); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. \_\_\_, 131 S. Ct. 1325 (2011) (Fair Labor Standards Act); *Costco Wholesale Corp. v. Omega, S.A.*, 562 U.S. \_\_\_, 131 S. Ct. 565 (2010) (copyright); and three patent cases of modest interest: *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. \_\_\_, 131 S. Ct. 2060 (2011); *Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. \_\_\_, 131 S. Ct. 2188 (2011); *Microsoft Corp. v. i4i Ltd.*, 564 U.S. \_\_\_, 131 S. Ct. 2238 (2011).

32. In some settings, signals and standards may also be helpful. However, they usually work only to the extent that the lower courts *want* them to work.

obviate not only the legal maneuver at hand but also the next, sure-to-come attempts to plead and litigate around the rules.

Finally, a Court that is unprepared to take steps one and two but still intent on protecting the Constitution's commercial order would make the most of the doctrines that it is still willing to enforce. It would recognize their second-best, compensatory nature and configure them accordingly.

These thumbnail features of a commerce-protective jurisprudence are best illustrated not by way of example but by way of contrast. With rare exceptions, the single, unifying feature of the Roberts Court's conservative majority is a persistent failure to execute *any* of the steps just described.

## V. STEP ONE: WHAT CONSTITUTION?

The most demoralizing case of the 2010 Term was the one that wasn't. *S&M Brands, Inc. v. Caldwell* presented a challenge to the 1998 "Master Settlement Agreement" (MSA) between state attorneys general and the major tobacco producers.<sup>33</sup> Although the agreement supposedly settled the manufacturers' liability for past misconduct, it actually ensured that present and future consumers, rather than the corporate malefactors, would pay virtually all of the cost.<sup>34</sup> To that end, the MSA created, through a fiendishly clever structure and without the vote of a single state or federal legislator, a nationwide, Altria-led tobacco cartel and a massive national excise tax on tobacco products.<sup>35</sup> The proceeds amount to upwards of \$200 billion in payments to the states, plus some \$15 billion for the trial bar and untold billions in monopoly profits for Altria and its tobacco-peddling pilot

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In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. \_\_\_, 129 S. Ct. 1937 (2009), the Supreme Court heightened pleading standards for the explicit purpose of making it easier for defendants to obtain dismissal of dubious cases prior to expensive discovery. By most accounts, the heightened standards appear to have had the desired result—most likely, because they coincide with district judges' incentive to un-clutter their dockets.

33. 614 F.3d 172, 173–74 (5th Cir. 2010), *cert. denied*, 563 U.S. \_\_\_, 131 S. Ct. 1601 (2011) (No. 10-6022).

34. For references and discussion, see Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 346–64 (2003).

35. *Id.*

fish.<sup>36</sup>

The Constitution explicitly prohibits any compact among states without congressional consent.<sup>37</sup> Congress never approved the MSA; in fact, it refused to accept an earlier, very similar agreement submitted for its approval.<sup>38</sup> The *S&M Brands* petition, filed by the Competitive Enterprise Institute and principally authored by Erik Jaffe and Stanford Law School professor (and former judge) Michael McConnell, compellingly argued the obvious: if the MSA—a binding, permanent agreement from which no state may ever withdraw—does not violate the Compact Clause, *no* otherwise lawful compact will ever require congressional consent.<sup>39</sup> The position was supported by powerful *amicus* briefs—one, filed by antitrust experts and another by an unusual coalition of law professors: Richard Epstein, Kathleen Sullivan, and Alan Morrison (who authored the brief).<sup>40</sup>

The *S&M Brands* petition was relisted once, meaning that at least one and more likely two of the Justices voted to grant review.<sup>41</sup> If the petitioners could not find a third or fourth vote, that is not because the constitutional violation was debatable but because it was so blazingly obvious. A vote to grant certiorari

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36. *Id.*

37. U.S. CONST. art. I, § 10, cl. 3.

38. Greve, *supra* note 35, at 348–50.

39. See Petition for Writ of Certiorari, *S&M Brands, Inc. v. Caldwell*, 614 F.3d 172 (5th Cir. 2010), *cert. denied*, 562 U.S. \_\_\_, 131 S. Ct. 1601 (2011) (No. 10-622), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2010/11/SM-Cert-Pet-Final.pdf>.

40. See Brief for Antitrust Law Professors as Amici Curiae in Support of Petitioner, *S&M Brands, Inc.*, 614 F.3d 172 (5th Cir. 2010), *cert. denied*, 562 U.S. \_\_\_, 131 S. Ct. 1601 (2011) (No. 10-622), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/03/03-04-SM-Antitrust-Prof-Amicus.pdf>; Brief of Constitutional Law Scholars as Amici Curiae in Support of the Petition, *S&M Brands, Inc.*, 614 F.3d 172 (5th Cir. 2010), *cert. denied*, 562 U.S. \_\_\_, 131 S. Ct. 1601 (2011) (No. 10-622), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/03/03-04-SM-Constitutional-Law-Scholars-Amicus.pdf>.

41. Petition for Writ of Certiorari, *S&M Brands, Inc.*, 614 F.3d 172 (5th Cir. 2010), *cert. denied*, 562 U.S. \_\_\_, 131 S. Ct. 1601 (2011) (No. 10-622) (redistributed for conference on Feb. 28, 2011), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2010/11/SM-Cert-Pet-Final.pdf>.

was a vote to overturn the MSA (more precisely, to require congressional consent), and this, the Justices were not prepared to do. Sure, the thinking goes, what we have here is a clear-cut constitutional violation which, if tolerated, renders the constitutional prohibition a nullity. And sure, we are looking at a singularly sinister arrangement—a government-sponsored cartel that works without any supervision over its pricing and profits for the dirtiest industry in America. But then, states need the money. No one but a few agitators and law professors seems terribly upset. And no circuit split exists or seems likely to develop. Why bother?

Why? Because *S&M Brands* was a potential constitutional teaching moment—a rare chance to reconstruct a piece of the Constitution's text, architecture, and political economy and an opportunity to foreclose further cooperative state schemes in defiance of the Constitution and federal law (for example, greenhouse gas compacts).<sup>42</sup> A Court that fails to seize on a petition of that nature is indifferent to the commercial constitution, oblivious to strategic opportunities, or both.

## VI. STEP TWO: WHAT LINES?

Among the Supreme Court's routine preoccupations are private actions to enforce Section 10b of the Securities Exchange Act and the Securities Exchange Commission's (SEC) Rule 10b-5, which governs publicly traded companies' duty to disclose material information.<sup>43</sup> The operative statute envisions enforcement of the statutory and regulatory requirements by the SEC.<sup>44</sup> The private enforcement rights are a judicial creation, as is their subsequent transformation into a vehicle for massive, bet-the-company class actions.<sup>45</sup> Congress has legislated twice to

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42. Cf. Michael S. Smith, *Murky Precedent Meets Hazy Air: The Compact Clause and the Regional Greenhouse Gas Initiative*, 34 B.C. ENVTL. AFF. L. REV. 387 (2007).

43. Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2010).

44. See 15 U.S.C. § 77b(a)(1) (2006).

45. See *Basic Inc. v. Levinson*, 485 U.S. 224 (1988); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

rein in shareholder “strike suits,”<sup>46</sup> and the Supreme Court has likewise tried to chain the beast of its own creation. It insisted that plaintiffs must adequately plead and prove up the elements of their cause of action; curbed the plaintiffs’ bar’s creative attempts to litigate around the federal statutes that limit shareholder class actions; adopted narrow, literal interpretations of the statutory language; and, intermittently, ordained bright-line rules that are calculated to keep private actions in bounds.<sup>47</sup> What the Court has pointedly failed and refused to do is revisit the fundamental question—that is, the basis and legitimacy of private enforcement actions. The Term that just ended brought three more 10b-5 cases.<sup>48</sup> Jointly and severally, they illustrate the near futility of the Court’s limiting enterprise.

*Janus Capital Group, Inc. v. First Derivative Traders* held that 10b-5 liability extends only to actors who actually made allegedly misleading statements.<sup>49</sup> It does not extend to actors who cooperated in or drafted those statements, such as corporate counsel or (in the case at bar) a mutual fund’s investment advisors.<sup>50</sup> The conservative majority’s opinion, written by Justice Thomas, insisted on a narrow, literal, bright-line-generating reading of the statutory text implementing the SEC regulation: the prohibition against *making* false statements, it said, must not be expanded into a broader injunction against *creating* them.<sup>51</sup> In so holding, the majority rejected the plaintiffs’, the government’s, and the four liberal dissenters’ view

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46. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.); Securities Litigation Uniform Standards Act of 1998 (SLUSA), 15 U.S.C. § 78bb(f)(1) (2006).

47. *See, e.g.*, *Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc.*, 552 U.S. \_\_\_, 128 S. Ct. 761 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. \_\_\_, 127 S. Ct. 2499 (2007); *Merrill Lynch v. Dabit*, 547 U.S. 71 (2006); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005).

48. *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. \_\_\_, 131 S. Ct. 2296 (2011); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. \_\_\_, 131 S. Ct. 2179 (2011); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. \_\_\_, 131 S. Ct. 1309 (2011).

49. *Janus*, 564 U.S. \_\_\_, 131 S. Ct. 2296.

50. *Id.* at \_\_\_, 131 S. Ct. at 2302.

51. *Id.* at \_\_\_, 131 S. Ct. at 2303–04.

that responsibility for 10b-5 violations should be a more fact-intensive, circumstantial inquiry.<sup>52</sup>

In the other two cases, the Court unanimously rejected appellate court rulings that limited shareholder actions.<sup>53</sup> *Matrixx Initiatives, Inc. v. Siracusano* held that a company may be sued for a failure to disclose “material” information even if the non-disclosed adverse events are statistically insignificant.<sup>54</sup> The situation is common in the pharmaceutical industry: “adverse events” in clinical trials and post-marketing monitoring happen all the time, but most of them lack significance. Treat them as “material,” disclosable information, and markets will move on hot air. *Erica P. John Fund, Inc. v. Halliburton Co.* rejected a Fifth Circuit doctrine requiring class plaintiffs in so-called “fraud on the market actions” to demonstrate loss causation as a condition of class certification.<sup>55</sup>

The seemingly curious pattern arises from the Justices’ unwillingness to draw the one bright, honest, text-based line that would actually matter: there *are* no private actions under § 10b and Rule 10b-5, period. By the Court’s own telling, those actions were not so much a creation as an inadvertent discovery: one fine day in a long-bygone era, the Supreme Court woke up pregnant with the devil’s spawn.<sup>56</sup> However, the Justices are united on a crucial principle of Supreme Court practice: never say “sorry.” They also agree that private 10b-5 actions have kind of gotten out of hand, but they disagree on how far and how much. That disagreement, in turn, has produced a quirky pattern of second-best moves—signals to lower courts to the effect that the actions are disfavored and bright-line rules of construction. Occasionally, the results are truly strange. *Matrixx*, for instance, was a black swan event—a unanimous affirmance of the Ninth Circuit Court of Appeals, which had deliberately created a conflict with the

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52. *Id.* at \_\_\_, 131 S. Ct. at 2306 (Breyer, J., dissenting).

53. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. \_\_\_, 131 S. Ct. 2179 (2011); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. \_\_\_, 131 S. Ct. 1309 (2011).

54. *Matrixx*, 563 U.S. \_\_\_, 131 S. Ct. 1309.

55. *Erica P. John Fund*, 563 U.S. \_\_\_, 131 S. Ct. 2179.

56. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 729 (1975).

Second Circuit on the question at issue.<sup>57</sup> Betwixt liberal Justices who champion private actions (provided no abuse is evident) and conservative Justices who, in the interest of clarity, hesitate to lard up a statutory term (for example, “material” information) with statistical significance tests, it is all systems go for the plaintiffs’ bar.

The larger problem is that this peculiar class of norm entrepreneurs needs no green light and, in fact, will not take “no” for an answer. In *Janus Capital*, the dissenters denounced the distinction between making and creating misleading statements as artificial<sup>58</sup>—plausibly so, given the close arrangements between mutual funds and their advisors. The conservative Justices nonetheless stomped their collective feet on account of their apprehension that the trial bar had found a clever way of pleading around the rule of *Stoneridge Investment Partners, L.L.C. v. Scientific-Atlanta, Inc.*, which held that private actions—unlike the SEC’s enforcement authority—run only against “primary” violators but not against “secondary” actors and on a theory of “scheme liability.”<sup>59</sup> *Stoneridge*, in turn, had shored up an even earlier decision restricting private actions.<sup>60</sup> Perhaps, the plaintiffs’ bar will slink off after the fourth iteration of the game, but only an idiot would bet money on that proposition.

*Erica P. John Fund* strongly suggests that the Court is unwilling to revisit not only its inadvertent creation of private 10b-5 actions but even their equally inadvertent and regrettable transformation into a vehicle for vexatious class action litigation.<sup>61</sup> The source of that transformation is the Court’s 4-2 decision in *Basic Inc. v. Levinson*, which held that plaintiffs who were unaware of (and therefore could not have relied on) a

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57. *Matrixx*, 563 U.S. at \_\_\_, 131 S. Ct. at 1309–13, *aff’g* *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167 (9th Cir. 2009).

58. *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2296, 2306 (2011) (Breyer, J., dissenting).

59. *Id.*; *see Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 161 (2008).

60. *See Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).

61. *See Erica P. John Fund*, 563 U.S. at \_\_\_, 131 S. Ct. at 2184–85.

corporation's misinformation or failure to disclose material information may still establish "reliance"—an essential element of their cause of action—by means of a presumption, rebuttable by the defendant, that the shares were traded in an "efficient market."<sup>62</sup> In cases leading up to *Erica P. John Fund*, the Fifth Circuit had grafted an additional requirement onto *Basic*: To obtain class certification, plaintiffs must show that the defendants' misrepresentation caused their loss.<sup>63</sup> Does that doctrine make sense in the *Basic* framework?

Not if you want to be all "CivPro-ey" about it: loss causation goes to the merits (and perhaps damages), not the commonality of the class.<sup>64</sup> As it so often does, however, the procedural framework has enormous substantive implications and effects. Probably in keeping with the *Basic* Court's liberal four-member majority's intentions—but certainly at variance with the expectations of the University of Chicago crowd that cooked up the "efficient market" theory and the Reagan administration officials who pushed it on the Court—*Basic* unleashed the torrent of shareholder class actions that Congress and the Court have sought to stem ever since.<sup>65</sup> The Fifth Circuit had plausible reasons to anticipate that the Supreme Court would countenance just about any appellate court cut-back and, perhaps, use any direct confrontation between *Basic*'s logic and its own subsequent, contrary signals to re-think the analysis and to draw a *Stoneridge*-style line: confine private actions to investors who relied on direct misrepresentations, and leave the messy, amorphous "fraud on the market" universe to the SEC.<sup>66</sup>

No such luck. After a curt rejection of the Fifth Circuit's

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62. 485 U.S. 224, 248 (1988) (Rehnquist, C.J., Kennedy & Scalia, JJ., not participating). Without that presumption, plaintiffs would have to show individual reliance, which would destroy the commonality of the class. *Id.*

63. See *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 269 (5th Cir. 2007), *abrogated by* *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. \_\_\_, 131 S. Ct. 2179 (2011).

64. See *Erica P. John Fund*, 563 U.S. at \_\_\_, 131 S. Ct. at 2183.

65. For a judicious, insightful discussion of *Basic*'s origin, logic, and trajectory, see Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151 (2009).

66. See *Erica P. John Fund*, 563 U.S. at \_\_\_, 131 S. Ct. at 2185.



doctrine and the defendants' attempt to render it more palatable and, supposedly, consistent with *Basic*, Chief Justice Roberts' opinion for the unanimous Court terminates in a diffident disclaimer to the effect that other questions about *Basic* and its presumption remain open.<sup>67</sup> Also, defendants remain free to renew on remand any other objections to class certification to the extent that they preserved them.<sup>68</sup> You all get to fight another day, and we will tell you what the rules are—eventually.

## VII. STEP THREE PREEMPTION: MAKING UP FOR *ERIE*?

Federal preemption is a pristine example of a commerce-protective doctrine that has come to do the work of constitutional norms and doctrines that the Supreme Court will not enforce directly.<sup>69</sup> *Erie* demolished the federal “general common law” that had theretofore provided actors in interstate commerce with access to an impartial body of law.<sup>70</sup> In *Erie*'s wake and consistent with its spirit, the Court proceeded to wipe out constitutional norms and doctrines that had previously constrained the extraterritorial, exploitative reach of states and especially state courts, from the Full Faith and Credit Clause to due process-based restrictions on the reach of personal jurisdiction.<sup>71</sup> It soon transpired, however, that no serious federal country can actually live with an *Erie* regime that encourages plaintiff opportunism, state parochialism, and systematic war on interstate commerce. Largely for this reason, the judiciary created a “new” federal common law, supposedly derived from congressional statutes (and occasionally from substantive grants of Article III jurisdiction), to cabin the effects. Superficially, this approach harmonizes the New Deal Constitution's basic premise—“the will of the Congress must prevail”—with the realization, embodied in the actual Constitution's structure, that

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67. *Id.* at \_\_\_, 131 S. Ct. at 2187.

68. *Id.*

69. See Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93 (2002).

70. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

71. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 324–25 (1945) (expanding the reach of personal jurisdiction).

a commerce that must struggle for congressional protection is already dead.<sup>72</sup> Preemption law reflects these rival, conflicting, and confused impulses.

Over time, the tensions gave rise to a convoluted set of doctrines.<sup>73</sup> Very roughly, preemption is either “express” (meaning that Congress explicitly stated its intent to preempt state law) or “implied.”<sup>74</sup> Federal and state law may confront private actors with inconsistent demands (“do A, do not do A”); this is called “conflict preemption.”<sup>75</sup> Or, state law may run up against the “purposes and objectives” of a federal enactment; this is called “obstacle preemption.”<sup>76</sup> This messy scheme is, or was, overlaid with a judicial “presumption against preemption.”<sup>77</sup> In the interest of protecting the “federal balance,” the Court will not lightly presume that Congress meant to displace the states’ “historic” powers.<sup>78</sup> Judicially implied preemption reflects the can’t-live-with-*Erie* side, while the “presumption against preemption” reflects *Erie*’s exploitative, let’s-hear-it-for-the-states side. For commercial actors, *everything* hangs on the Court’s situational judgments of the proper “balance” in this or that case, under this or that statute. (Coming, mind you, from a Court that had supposedly embraced a minimalist, deferential role.)<sup>79</sup> The usual cite whenever the Justices advert to preemption’s foundation is to the Court’s 1941 decision in *Hines v. Davidowitz*.<sup>80</sup>

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72. *Cf. Duckworth v. Arkansas*, 314 U.S. 390, 401 (1941) (Jackson, J., concurring) (criticizing Court opinion that “would allow the states to establish the restraints and let commerce struggle for Congressional action to make it free”).

73. *See, e.g., Caleb Nelson, Preemption*, 86 VA. L. REV. 225 (2000).

74. *See id.* at 226.

75. *See id.* at 227–29.

76. *See id.* at 228–29.

77. *Id.* at 227.

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

79. For a defense of minimalism, see CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 259–63 (1999). For the (correct) proposition that judicial minimalism in theory means maximalism in fact, see Neil Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951 (2005) (reviewing Sunstein).

80. 312 U.S. 52 (1941).

Remarkably, *Hines* and its entire framework may be on their way out due to Justice Thomas’s energetic, admirable campaign to bring analytic clarity and constitutional reason to the confused preemption field.<sup>81</sup> In a series of thoughtful opinions, Justice Thomas has insisted first, that the erratically invoked “presumption against preemption” is a made-up canon that ought to be discarded.<sup>82</sup> He has insisted second, that judicial reliance on congressional “purposes and objectives” is illegitimate.<sup>83</sup> Obstacle preemption, he argues, is simply a form of conflict preemption.<sup>84</sup> This past Term’s decision in *PLIVA v. Mensing* marks a potential breakthrough: writing for the 5-4 conservative majority, Justice Thomas gained three additional votes for his position.<sup>85</sup>

At issue in *PLIVA* was a statutory provision requiring producers of generic drugs to supply the same warning labels that the federal Food and Drug Administration (FDA) mandates for the producer of the original patented drug.<sup>86</sup> If a consumer is harmed by a generic product does the federal provision still permit state tort suits predicated on a “failure to warn”?<sup>87</sup> The obvious answer appears to be no: state law requirements would subject generic manufacturers to duties that conflict with the federal labeling requirements. That straightforward analysis, however, is greatly complicated by the Supreme Court’s prior decision in *Wyeth v. Levine*, which held that FDA-mandated labels do *not* protect the original (patent) manufacturer against failure-to-warn suits under state law.<sup>88</sup> The difference, the *PLIVA* majority says, is that original—but not generic—manufacturers can unilaterally petition the FDA for a label change, and a failure to do so (upon learning of adverse

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81. See *PLIVA, Inc. v. Mensing*, 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2567, 2579 (2011).

82. See *id.*; *Wyeth v. Levine*, 555 U.S. \_\_\_, \_\_\_, 129 S. Ct. 1187, 1205 (2009) (Thomas, J., concurring).

83. *Wyeth*, 555 U.S. at \_\_\_, 129 S. Ct. at 1217 (Thomas, J., concurring).

84. *Id.*

85. *PLIVA*, 564 U.S. at \_\_\_, 131 S. Ct. at 2571 (Justice Kennedy agreed with the holding and all but one part of Justice Thomas’s opinion).

86. *Id.* at 2573.

87. *Id.*

88. *Wyeth*, 555 U.S. \_\_\_, 129 S. Ct. 1187 (2009).

experiences with a drug) may trigger liability under state law.<sup>89</sup> The difference between the regulatory regimes, however, is razor-thin; and as the liberal dissenters in *PLIVA* noted, and the majority conceded, the resulting regime—potential liability for patent products, immunity for generics—makes very little sense as a practical matter.<sup>90</sup> Responding to the dissenters’ objection to imputing such an odd regime to the will of Congress, the majority essentially paraphrased scripture: can anything good come from that place?<sup>91</sup>

The future of preemption—and, to a considerable extent, of the commerce of the United States—hangs on the Justices’ ability to realize that Justice Thomas’s analysis, while compelling at a conceptual level, does not resolve the ambiguities of the New Deal regime but rather compresses them into a single inquiry: What exactly constitutes a “conflict” for purposes of preemption? The correct answer to that question, in turn, requires what Justice Thomas’s analysis so ostentatiously disavows—an inquiry into the purposes of the state as well as the federal law at issue. Preemption cases decided this past Term—just a few brief months or weeks before *PLIVA*—illustrate the salience of that analysis and the perils of getting it wrong.

For purposes of a unified implied conflict/obstacle preemption analysis, as in cases of express preemption, the Court must take a hard look at the actual operation of the allegedly preempted state law. Without that inquiry, any state could escape preemption by the simple means of calling a preempted statute by a non-preempted name. Increasingly, though, the Justices—especially conservative Justices—have come to tolerate such maneuvers. *Chamber of Commerce of the United States v. Whiting* arose over and under a federal law that subjects employers who knowingly hire unauthorized aliens to civil and criminal sanctions.<sup>92</sup> The federal law expressly preempts “any State or local law imposing civil or criminal sanctions (other than

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89. *PLIVA*, 564 U.S. at \_\_\_, 131 S. Ct. at 2573.

90. *Id.* at \_\_\_, 131 S. Ct. at 2592 (Sotomayor, J., dissenting).

91. *See id.* at \_\_\_, 131 S. Ct. at 2582 (majority opinion); cf. *John* 1:46 (“Can anything good come from Nazareth?”).

92. 563 U.S. \_\_\_, 131 S. Ct. 1968 (2011).

through licensing and similar laws).”<sup>93</sup> Arizona, among other states, enacted a law allowing courts to suspend or revoke any state business license—including “any agency permit, certificate, approval, registration, charter or similar form of authorization”<sup>94</sup>—of employers who knowingly hire unauthorized aliens.<sup>95</sup> Chief Justice Roberts’ majority opinion rejected the Chamber’s and the federal government’s contention that the Arizona statute obviously attempts to do, in the transparent disguise of a “licensing law,” just what the federal statute expressly and impliedly forbids.<sup>96</sup> The majority arrived at that conclusion by a direct route: “The Arizona law, *on its face*, purports to impose sanctions through licensing laws.”<sup>97</sup> And if Arizona says so, that is good enough for us. No need to kick the tires.

*Williamson v. Mazda Motor of America* illustrates another, yet more alarming strategy of judicial conflict avoidance.<sup>98</sup> A federal safety standard permits automobile manufacturers to equip certain vehicles with either lap-and-shoulder belts or lap-only belts.<sup>99</sup> The question in *Williamson* was whether that standard preempts state tort suits predicated on the theory that lap-only belts constitute a design defect.<sup>100</sup> In *Geier v. Honda Motor Co.*, the Court had found that an earlier version of the federal standard did have preemptive force.<sup>101</sup> That version permitted manufacturers to equip a portion of their new car fleet—but not the entire fleet—with airbags.<sup>102</sup> “Defective design” suits over non-airbag cars, the Court held, would conflict with the federal objective of encouraging an airbag phase-in by means

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93. 8 U.S.C. § 1324a(h)(2) (2006).

94. ARIZ. REV. STAT. ANN. § 23-211(9)(a) (2011).

95. *Id.* § 23-212.

96. *Whiting*, 563 U.S. at \_\_\_, 131 S. Ct. at 1973.

97. *Id.* at \_\_\_, 131 S. Ct. at 1977 (emphasis added).

98. 563 U.S. \_\_\_, 131 S. Ct. 1131 (2011).

99. Federal Motor Vehicle Safety Standards; Occupant Crash Protection, 49 C.F.R. § 571.208 (2007).

100. *Williamson*, 563 U.S. at \_\_\_, 131 S. Ct. at 1134.

101. 529 U.S. 861 (2000).

102. *Id.* at 881.

of giving manufacturers a choice.<sup>103</sup> *Geier* can be read as an early example of the unified conflict/obstacle preemption analysis urged by Justice Thomas.<sup>104</sup> However, Justice Thomas does not see it that way (he dissented in *Geier* and has harshly criticized the decision ever since), and *Geier* increasingly looks like a this-day-and-train-only decision.<sup>105</sup> *Williamson* marks, for now, the high point of that trajectory. Uniformly, lower courts—including, astoundingly, California state courts—had determined that the standard at issue in *Williamson* was indistinguishable, preemption-wise, from the one at issue in *Geier*.<sup>106</sup> Not so, said Justice Breyer (the author of *Geier*), writing for the unanimous *Williamson* Court.<sup>107</sup> The “choice” authorized by the *Geier* standard, Justice Breyer averred, was integral to the federal agency’s safety objectives; the choice at issue in *Williamson*, not so much.<sup>108</sup> That supposed distinction, however, is absurd. Under *Williamson*, manufacturers can be sued on a design defect theory if they install lap-only belts—and if they install lap-and-shoulder belts or for that matter pink ribbons.<sup>109</sup> On that damned-if-you-do, damned-if-you-don’t theory, it is hard to see the point of a federal safety statute and agency. On this crabbed, constricted theory, “no conflict/obstacle preemption” means that federal regulators remain free to spin their wheels while the trial

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103. *Id.* at 870.

104. *See, e.g.*, *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. \_\_\_, 131 S. Ct. 2296 (2011) (holding that because the alleged false statements were made by a subsidiary of an investment and capital management group, no claim can be stated under the Security and Exchange Act of 1934 or Rule 10b-5 of the Securities and Exchange Commission).

105. For limiting decisions prior to *Williamson*, see, e.g., *Wyeth v. Levine*, 555 U.S. \_\_\_, 129 S. Ct. 1187 (2009); *Bates v. Dow AgroSciences L.L.C.*, 544 U.S. 431 (2005); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002).

106. *See, e.g.*, *Williamson v. Mazda Motor of Am., Inc.*, 84 Cal. Rptr. 3d 545, 551 (Cal. Ct. App. 2008), *rev'd* by 563 U.S. \_\_\_, 131 S. Ct. 1131 (2011).

107. *Williamson*, 563 U.S. \_\_\_, 131 S. Ct. at 1131.

108. *Compare* *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (holding that a jury verdict requiring airbags “might establish a safety standard that was not identical with [federal law]”), *with Williamson*, 563 U.S. \_\_\_, 131 S. Ct. 1131 (holding federal regulation allowing vehicle manufacturers to install either lap shoulder seatbelts in certain seat positions preempts a state law tort claim).

109. *Williamson*, 563 U.S. \_\_\_, 131 S. Ct. at 1131.

lawyers do their thing.

The analysis is confirmed, albeit indirectly and by way of contrast, by the 5-4 decision in *AT&T Mobility L.L.C. v. Concepcion*, far and away the most encouraging decision of the 2010–2011 Term.<sup>110</sup> The Federal Arbitration Act (FAA) protects binding arbitration agreements by means of preempting state law, except to the extent that the agreements contravene generally applicable state law.<sup>111</sup> *Concepcion* arose over a mandatory arbitration clause, contained in a standard consumer contract that—while remarkably generous in all other respects—barred the use of class actions in arbitration.<sup>112</sup> Under California Supreme Court doctrine, consumer contracts that block class actions are “unconscionable” and therefore unenforceable, whether in civil litigation or arbitration.<sup>113</sup> However, Justice Scalia wrote for the conservative majority, the general applicability of the doctrine does not save it from FAA preemption: class action arbitration is inconsistent with the kind of arbitration Congress had in mind and with the purposes and objectives for which it enacted the FAA.<sup>114</sup>

It is fair to note that Justice Scalia’s *Concepcion* opinion is quite discordant with his general preference for hard-and-fast rules; his reluctance to inquire into federal or state legislative purposes; and his general hostility to common-law modes of argument in supposed reliance on congressional mandates.<sup>115</sup> However, when Justice Scalia chooses to show up for constitutional work (as opposed to repairing to textualism’s false comfort), he is at his unrivaled best. Unlike *Chamber of Commerce*, *Concepcion* probes the state’s averments with a critical eye, as opposed to taking them at face value. And unlike *Williamson*, *Concepcion* seeks to give full force and effect to the federal statute at issue.

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110. 563 U.S. \_\_\_, 131 S. Ct. 1740 (2011).

111. Federal Arbitration Act, 9 U.S.C. § 1 (2006).

112. *Concepcion*, 563 U.S. at \_\_\_, 131 S. Ct. at 1742.

113. *Discover Bank v. Super. Ct.*, 113 P.3d 1100 (Cal. 2005).

114. *Concepcion*, 563 U.S. at \_\_\_, 131 S. Ct. at 1748.

115. *Compare id.*, with *Cuomo v. Clearing House Ass’n*, 557 U.S. \_\_\_, 129 S. Ct. 2710 (2009).

*Concepcion* invites comparison with *Lincoln Mills*—engraved on every Civil Procedure and Federal Courts student’s mind as the post-*Erie* Court’s most extravagant attempt to derive substantive federal rules of decision from a procedural statute to escape *Erie*’s universe.<sup>116</sup> But while *Lincoln Mills* produced a “New Deal-ish” result (a preemptive body of federal labor law),<sup>117</sup> *Concepcion* holds out the promise of a pre-New Deal world: It allows parties to contract out of *Erie*’s mayhem.<sup>118</sup> That world will have to operate outside the purview of federal courts (which are bound by *Erie*), but it will operate under their protective, preemptive umbrella. Instead of pulling weeds, *Concepcion* creates an oasis of good sense and commercial order.

This is all very good. It would be better yet if the Court—or more precisely its conservative majority—could bring itself to be less cagey about the enterprise and, moreover, connect the premises of *Concepcion* to its broader jurisprudence. Unfortunately, *Concepcion* ends on a chilling note: having gotten everything right, Justice Scalia characterizes the holding, unnecessarily, as a case of *Hines v. Davidowitz*-style, “purposes-and-objectives” preemption—which, by the lights of *PLIVA*, we should longer have.<sup>119</sup> The contours of preemption doctrine remain unsettled.

#### VIII. MORE OF THE SAME: THE 2011 TERM

On the evidence of grants of certiorari to date, the 2011 Term will resemble the 2010 Term. Business cases continue to constitute a strikingly large portion of the Court’s docket, especially its civil docket: of the forty-one grants of certiorari as of publication, twenty-one can be classified as involving business and commercial questions. The docket features some statutory cases of modest import;<sup>120</sup> a smattering of patent, copyright, and

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116. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

117. *See id.*

118. *See Concepcion*, 563 U.S. at \_\_\_, 131 S. Ct. at 1753.

119. *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

120. *See, e.g.*, *Caraco Pharm. v. Novo Nordisk*, 601 F.3d 1359 (Fed. Cir. 2010), *cert. granted*, 564 U.S. \_\_\_, 131 S. Ct. 3057 (June 27, 2011) (No. 10-844) (*Hatch-Waxman Act*); *FAA v. Cooper*, 622 F.3d 1016 (9th Cir. 2010), *cert*



bankruptcy cases;<sup>121</sup> and the obligatory securities case.<sup>122</sup> The Federal Arbitration Act is again on the docket,<sup>123</sup> as is the entertainment industry's perennial campaign to explore the outer bounds of good taste and public decorum.<sup>124</sup> Amid this humdrum fare, three issues bear attention. Two of these have to do with the political economy of Supreme Court review; the third with the development of preemption doctrine.

### A. The Ninth's Amendment

Of the twenty-one business cases the Court has granted certiorari thus far for the coming Term, seven feature the U.S. Supreme Court in its capacity as a Ninth Circuit reversal machine. The Ninth Circuit decisions under review include the invention of *Bivens* remedies against private government contractors;<sup>125</sup> the artful creation of a "preemption" cause of action as a substitute for plainly non-existent causes of action

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*granted*, 564 U.S. \_\_\_, 131 S. Ct. 3025 (June 20, 2011) (No. 10-1024) (finding "actual damages" under Privacy Act); *Mims v. Arrow Fin. Servs.*, 421 F. App'x. 920 (11th Cir. 2010), *cert. granted*, 564 U.S. \_\_\_, 131 S. Ct. 3063 (U.S. June 27, 2011) (No. 10-1195) (Sec. 1331 of the Telephone Consumer Protection Act); *Pac. Operators Offshore, L.L.P. v. Valladolid*, 604 F.3d 1126 (9th Cir. 2010), *cert. granted*, 562 U.S. \_\_\_, 131 S. Ct. 1472 (Feb. 22, 2011) (No. 10-507) (OCSLA).

121. *See, e.g.*, *Hall v. United States*, 617 F.3d 1161 (9th Cir. 2010), *cert. granted*, 564 U.S. \_\_\_, 131 S. Ct. 2989 (June 13, 2011) (No. 10-875) (tax and bankruptcy); *Kappos v. Hyatt*, 625 F.3d 1320 (Fed. Cir. 2010), *cert. granted*, 564 U.S. \_\_\_, 131 S. Ct. 3064 (June 2010) (patents); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 581 F.3d 1336 (Fed. Cir. 2009), *cert. granted*, 564 U.S. \_\_\_, 131 S. Ct. 3027 (June 20, 2011) (No. 10-1150) (patents); *Golan v. Holder*, 609 F.3d 1076, *cert. granted*, 562 U.S. \_\_\_, 131 S. Ct. 1600 (Mar. 7, 2011) (No. 10-545) (copyright).

122. *Credit Suisse Sec. v. Simmonds*, 638 F.3d 1072 (9th Cir. 2010), *cert. granted*, 564 U.S. \_\_\_, 131 S. Ct. 3064 (June 27, 2011) (No. 10-1261).

123. *CompuCredit Corp. v. Greenwood*, 615 F.3d 1204 (9th Cir. 2010), *cert. granted*, 563 U.S. \_\_\_, 131 S. Ct. 2874 (May 2, 2011) (No. 10-948).

124. First Amendment mavens may speculate whether the odd coalition that invalidated a state law restricting the sale of violent video games to minors will hold when it comes to FCC regulations of wardrobe malfunctions and other such offerings. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. \_\_\_, 131 S. Ct. 2729 (2011); *FCC v. Fox Television Stations, Inc.*, 613 F.3d 317 (2d Cir. 2010), *cert. granted*, 564 U.S. \_\_\_, 131 S. Ct. 3065 (June 27, 2011) (No. 10-1293).

125. *Minneeci v. Pollard*, 629 F.3d 843 (9th Cir. 2010) (en banc), *cert. granted*, 563 U.S. \_\_\_, 131 S. Ct. 2449 (May 16, 2011) (No. 10-1104).

under statutory law and § 1983;<sup>126</sup> a “no preemption” holding that runs headlong into an express federal statute, a Supreme Court decision directly on point, and extant preemption doctrine, however construed;<sup>127</sup> a night-is-day, black-is-white ruling to the effect that a federal statute that governs liability for offshore operations covers workplace injuries that are suffered on land and are wholly unconnected to any offshore activity;<sup>128</sup> and other pro-plaintiff escapades that range from highly implausible to absurd.<sup>129</sup> Reversal is a foregone conclusion, and the question of interest is the margin of votes on the Supreme Court. That and perhaps the question of how much longer we can tolerate a federal circuit that—in line with the propensities of its home state of California—appears intent on enacting its own version of the political, legal, and economic order of the United States.

### B. The Solicitous General

The Justices’ response to the position of the United States, as conveyed by the Solicitor General, bears particularly close attention. Judicial deference to the political branches of government is a standard refrain on both sides of the Court’s ideological divide, albeit for somewhat different reasons and with differing nuances. It comes in particularly handy when the Court does not really know what it is doing. Thus, the government’s position plays a very large role especially in statutory and preemption cases. A plausible case can be made that the Roberts Court’s pro-business record—accumulated largely under the

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126. *Indep. Living Ct. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644 (9th Cir. 2009), *cert. granted sub nom. Douglas v. Indep. Living Ct. of S. Cal., Inc.*, 562 U.S. \_\_\_, 131 S. Ct. 992 (Jan. 18, 2011) (No. 09-958).

127. *Nat’l Meat Ass’n v. Harris*, 599 F.3d 1093 (9th Cir. 2010), *cert. granted*, 564 U.S. \_\_\_, 131 S. Ct. 3083 (June 27, 2011) (No. 10-224).

128. *Pac. Operators Offshore, L.L.P. v. Valladolid*, 604 F.3d 1126 (9th Cir. 2010), *cert. granted*, 562 U.S. \_\_\_, 131 S. Ct. 1472 (Feb. 22, 2011) (No. 10-507).

129. *See, e.g., FAA v. Cooper*, 622 F.3d 1016 (9th Cir. 2010), *cert granted*, 564 U.S. \_\_\_, 131 S. Ct. 3025 (June 20, 2011) (No. 10-1024); *First Am. Fin. Corp. v. Edwards*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 564 U.S. \_\_\_, 131 S. Ct. 3022 (June 20, 2011) (No. 10-708); *CompuCredit Corp. v. Greenwood*, 615 F.3d 1204 (9th Cir. 2010), *cert. granted*, 563 U.S. \_\_\_, 131 S. Ct. 2874 (May 2, 2011) (No. 10-948) (class actions and arbitration).

Bush administration—is actually a pro-Solicitor General record.<sup>130</sup> Last Term’s *Williamson* case illustrates the potency of the Solicitor’s position in a different way and direction: with the Solicitor firmly denying any preemptive force for the federal agency’s seatbelt standards, not a single Justice rose to defend the logic and holding of *Geier*.<sup>131</sup>

Judicial deference and the prospect of organizing judicial decisions and discourse around this “incompletely theorized” agreement<sup>132</sup> depend on certain presumptions—on Justice Breyer’s theory, an expectation of administrative expertise and regularity;<sup>133</sup> on Justice Scalia’s view, an expectation that the executive branch will defend its institutional prerogatives and, moreover, imbue an ethos of legality over time and across administrations. There are signs, however, that at least some Justices are no longer taking these expectations for granted. By way of example, the Supreme Court’s grant of certiorari in all three of the 2011 preemption cases (briefly discussed below) came over the contrary recommendations of the Solicitor General.<sup>134</sup> In all three cases, the Solicitor General’s office freely acknowledged the salience of the legal questions, the errors in the lower courts’ pro-plaintiff rulings, and the existence of lower court splits. In all three cases, it still found some reason to let the confusion bubble (“percolate,” in “Supreme Court Clerk-ese”) just a little bit longer.<sup>135</sup> Evidently, four or more Justices found those reasons

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130. See Jonathan Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943, 947 n.16 (2009).

131. See *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. \_\_\_, 131 S. Ct. 1131 (2011).

132. Cf. CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 259–63 (1999).

133. Cf. STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993).

134. See *infra* Part VIII.C.

135. See Brief for the United States as Amicus Curiae, *Nat’l Meat Ass’n v. Harris*, 599 F.3d 1093 (9th Cir. 2010), *cert. granted*, 564 U.S. \_\_\_, 131 S. Ct. 3083 (June 27, 2011) (No. 10-224), *available at* <http://www.justice.gov/osg/briefs/2010/2pet/6invit/2001-0224.pet.ami.inv.pdf>; *see also*, Brief for the Federal Respondent in Opposition, *Pac. Operators Offshore, L.L.P. v. Valladolid*, 604 F.3d 1126 (9th Cir. 2010), *cert. granted*, 562 U.S. \_\_\_, 131 S. Ct. 1472 (Feb. 22, 2011) (No. 10-507), *available at* <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/02/02-18-Pacific-Operators-Federal-respondent-BIO.pdf>.

unpersuasive.

The source of the Solicitor's diffident posture is not difficult to gather. For a Republican administration, the defense of business interests and national prerogatives will usually run together. Under Democratic administrations, in contrast, the Solicitor's office will often be torn between constituency politics (i.e., fealty to the plaintiffs' bar) on the one hand and, on the other hand, its role as a "Tenth Justice" and a defender of national prerogatives.<sup>136</sup> When those demands conflict, the best response is to find some reason to keep the cases out of the Supreme Court: the Solicitor has given his best advice (in line with the Justices' general inclination), and the trial lawyers get to live another day. That having failed, the next best response is to slice and dice the claims and issues in a way that will protect the Solicitor's institutional credibility and reputation, without slamming the door shut on the plaintiffs' bar. The Office's briefs in some of the 2011 cases provide ample evidence.<sup>137</sup>

The point of these observations is not to lament the politicization of the Solicitor General's Office—quite the contrary. We elect presidents, who in turn appoint attorneys general and solicitors general, because the faithful execution of the laws is inherently political. (If we really need an office that serves as a "Tenth Justice" or a thirty-seventh law clerk, better selection mechanisms are available.) The point is just the opposite: all too often, the Justices have tended to rely on the Solicitor's eleventh-hour litigation positions not as crib sheets but as true and correct representations of the law or administrative expertise—and, in either version, as a substitute for an independent judicial assessment and ordering of the Constitution's commercial landscape. The 2011 Term may bring important clues concerning the Court's propensity to follow that convenient but ultimately irresponsible course.

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136. For empirical evidence suggesting that the Supreme Court is aware of and, moreover, responds to these dynamics and signals, see Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 13 SUP. CT. ECON. REV. 43 (2006).

137. See, e.g., Brief for the Federal Respondent in Opposition, *supra* note 137.

### C. Preemption

For reasons noted earlier, preemption doctrine is the fulcrum of the Court's business docket. The Court is divided and uncertain about the contours of preemption because it is confused over the Constitution's structure, especially its commercial structure and the Court's role within it, and the 2011 Term may bring yet more confusion. *National Meat Ass'n v. Harris*, arising from (where else?) the Ninth Circuit, presents a flagrant conflict between federal and state law.<sup>138</sup> It will likely produce a lapidary, unanimous opinion that will skirt the disagreements over, and difficulties of, the preemption doctrine. The other two cases raise more complicated and, possibly, disturbing issues.

*Douglas v. Independent Living Center of Southern California, Inc.* implicates the question of the jurisdictional and constitutional basis of preemption claims.<sup>139</sup> The question is whether Medicaid providers may challenge, on preemption grounds, state laws that limit their reimbursement rates (arguably, to a level that will render Medicaid services effectively unavailable to many intended beneficiaries, in violation of federal laws and regulations).<sup>140</sup> This preemption claim rests on the wildly implausible notion that the Supremacy Clause creates a free-standing cause of action to enforce federal law. It is a manifest attempt to re-plead, under a different name, statutory and § 1983 claims that are no longer available under Supreme Court precedent. The Court is bound to reject the plaintiff-respondents' contentions without dissent; the question is whether it will go any further. In many past preemption cases, the Court simply assumed the viability of the plaintiffs' claims, without probing the grounds of the cause of action or the federal courts' jurisdiction.<sup>141</sup> If the claims at issue in *Douglas* are so obviously untenable, why and how do they differ from the drive-by jurisdictional rulings implied by earlier cases—because there,

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138. 564 U.S. \_\_\_, 131 S. Ct. 3083.

139. 572 F.3d 644 (9th Cir. 2009), *cert. granted sub nom.* *Douglas v. Indep. Living Ct. of S. Cal., Inc.*, 562 U.S. \_\_\_, 131 S. Ct. 992 (Jan. 18, 2011) (No. 09-958).

140. *Id.*

141. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

unlike here, the plaintiffs were regulated parties?<sup>142</sup> Because preemption claims can arise only under regulatory statutes but not under spending statutes such as Medicaid (which do not implicate the Supremacy Clause in the first place)? Because bona fide preemption claims are anticipatory (injunctive) actions for defenses that plaintiffs—unlike the plaintiffs in *Douglas*—would have in an ordinary enforcement proceeding? Some such theory probably grounds claims against the states under *Ex Parte Young*.<sup>143</sup> To what extent, though, is the federal judicial acceptance of such claims compatible with *Erie Railroad*?<sup>144</sup>

*Douglas* does not require an answer, but it does invite questions. Unfortunately, it is hard to have confidence in the Justices' abilities to adjudicate the first principles of preemption doctrine on an open field, without any clear sense of the role of that doctrine in the Constitution's political economy and commercial architecture. Apprehensions on this score are amplified by *Kurns v. Railroad Friction Products*, posing the question of whether the ancient Locomotive Inspection Act (LIA) preempts state tort suits by workers who suffer asbestos-related harms in the course of repairing locomotive brakes.<sup>145</sup> In a case decided before the New Deal (and therefore correctly), the Supreme Court held that the LIA "occupies the field" of locomotive safety and therefore preempts any and all state laws in that field, regardless of whether or not they conflict with federal standards.<sup>146</sup> This "field preemption" doctrine has the great advantage of obviating the need for any inquiry into whether this, that, or the other state tort law invention conflicts with federal law and the supposed intent of Congress. The Third Circuit, in *Kurns*, adhered to this pre-New Deal doctrine in a

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142. Cf. *Wilderness Soc'y v. Kane Cnty.*, 581 F.3d 1198 (10th Cir. 2009) (McConnell, J., dissenting), *rev'd on other grounds en banc*, 632 F.3d 1162 (10th Cir. 2011).

143. See John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989 (2008).

144. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

145. *Kurns v. A.W. Chesterton, Inc.*, 620 F.3d 392 (3d Cir. 2010), *cert. granted sub nom.* *Kurns v. R.R. Friction Prods.*, 563 U.S. \_\_\_ 131 S. Ct. 2959 (June 6, 2011) (No. 10-879) (discussing preemption of 49 U.S.C. § 20701 (2006)).

146. *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 613 (1926).

refreshingly clear-headed opinion and decision.<sup>147</sup> For example, the court held that the plaintiff's supposed "failure to warn" claim was a poorly disguised design defect claim and therefore preempted by the LIA.<sup>148</sup> That healthy real-world recognition, however, runs up against a Supreme Court jurisprudence that painstakingly separates preempted from supposedly non-preempted state law claims, depending on nothing but the plaintiffs' lawyer's artful pleadings.<sup>149</sup> And in fact, it is not at all clear whether, why, and to what extent the sensible, constitutionally grounded theory of field preemption can survive in a post-New Deal, post-*Erie*, post-*Hines* world—in a preemption universe that is calculated to empower not the entrepreneurs who move the nation's commerce but the ones who apply the brakes. Dagny Taggart, call your office.

## IX. SO-CALLED AMERICAN LAW

Look backward or forward: the Roberts Court seems unwilling or unable to recognize or act on its constitutional mandate to protect the commerce of the United States. The four liberal Justices are irrevocably committed to an agenda of "active liberty" and of "empowering" regulators and plaintiffs' lawyers.<sup>150</sup> The conservative Justices acknowledge the Constitution's commitment to a competitive commercial order, but usually fail to recognize that only the judiciary can make good on that commitment. Occasionally, as in *Concepcion*, the Justices create enclaves of constitutional order.<sup>151</sup> More often, though, they revert to a deeply felt but erroneous premise: the business of America is not judicial business; it is the business of that inveterate guardian of interstate commerce, the United States

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147. *Kurns*, 620 F.3d 392.

148. *Id.* at 399.

149. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. \_\_\_, 129 S. Ct. 1187 (2009); *Bates v. Dow AgroSciences L.L.C.*, 544 U.S. 431 (2004); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504 (1992).

150. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 15–16 (2005); Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 *BROOK. L. REV.* 1313 (2004).

151. *See AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. \_\_\_, 131 S. Ct. 1740 (2011).

Congress. All hail Felix Frankfurter, judicial restraint, *Erie*, textualism, or whatever other trope *du jour* comes to conservatives' minds.

Eventually, one hopes these mental habits—inherited from the New Deal and engrained in decades of originalist jurisprudence—will give way to the recognition that retail-only decision-making poorly serves its intended, limiting function. It merely invites the Ninth Circuit, state courts, and entrepreneurial litigants to invent ever-more esoteric theories, which the Court cannot hope to contain, let alone beat back. Justices who cannot reason their way to meaningful, constitutionally grounded, commerce-protective doctrines may yet embrace them for reasons of judicial economy. “Eventually,” however, may not be soon or good enough.

The 2010 Term’s little-noted decision in *J. McIntyre Machinery, Ltd. v. Nicaastro* held that state courts lack jurisdiction over foreign actors whose products, while having been put into a “stream of commerce,” happen to end up in that state.<sup>152</sup> Personal jurisdiction, Justice Kennedy’s majority opinion declared, requires that the producer either targeted its sales and promotion at that state or had some other “minimum contacts.”<sup>153</sup> Thus, J. McIntyre can be sued in Nevada, where its executives visited trade shows—but, implausibly, not in New Jersey, where the accident involving its product (a cutting machine) occurred. The holding is yet another example of the Roberts Court’s tendency to cut back on perceived excesses of litigation without articulating a coherent theory, and yet another example of an attempt to check *Erie*’s havoc in an outlier case without coming to grips with its atrocious logic and political economy. Justice Kennedy strongly suggests that J. McIntyre could still be sued in a *federal* Court in New Jersey;<sup>154</sup> after all, he had plainly availed himself of the U.S. market, though not New Jersey’s market in particular. Under *Erie*’s logic, though, the defendant will then face the same New Jersey law (and more or less the same jury pool). So what is the point? Naturally, the

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152. 564 U.S. \_\_\_, \_\_\_, 131 S. Ct. 2780, 2784 (2011).

153. *Id.* at \_\_\_, 131 S. Ct. at 2788.

154. *Id.* at \_\_\_, 131 S. Ct. at 2789.



liberal dissenters seized on the incongruities. They also emphasized that J. McIntyre had obviously configured its American distribution system to escape liability.<sup>155</sup> “American law—who needs it?!” McIntyre’s CEO had written to his U.S. distributor.<sup>156</sup>

“Who needs it” is hardly a dirty secret that has to be e-discovered from some perfidious Brit. It is the operating premise of a highly lucrative, loudly advertised American and global legal practice. It is also the general sentiment of businesses across the globe. Even U.S. firms routinely flee into international arbitration;<sup>157</sup> “F-cubed,” anywhere-but-America actions in Amsterdam;<sup>158</sup> IPOs in Hong Kong and London;<sup>159</sup> and litigation in such renowned rule-of-law havens as Ecuador.<sup>160</sup>

This matters because a legal order operates as a factor endowment—like capital, labor, or natural resources. Except for the luxury of operating the world’s reserve currency, the rule of law is the *only* comparative and competitive advantage on which the United States can, or could, hope to rely. We are about to lose our reserve currency status. We surrendered our rule-of-law advantage some time ago, and enactments from Sarbanes-Oxley to Dodd-Frank have further compromised it.<sup>161</sup> At least as far as

155. *Id.* at \_\_\_, 131 S. Ct. at 2796 (Ginsburg, J., dissenting).

156. *Id.* at \_\_\_, 131 S. Ct. at 2801 (Ginsburg, J., dissenting).

157. See generally Eric Bergsten, *The Americanization of International Arbitration*, 18 PACE INT’L L. REV. 289 (2006), available at <http://digitalcommons.pace.edu/intlaw/297> (discussing the significant present of American lawyers and parties in international arbitration).

158. Michael Goldhaber, ‘Shell Model’ Opens Door to European Class Actions, *American Lawyer*, Jan. 7, 2008, available at <http://www.law.com/jsp/tal/ArticleTAL.jsp?id=900005559424&slreturn=1>. “The term refers to securities class action cases that are largely foreign in nature. The investors are foreign, the issuers are foreign, and the alleged fraudulent conduct took place in a foreign land. Foreign, foreign, foreign. Three ‘Fs,’ hence the name: F-cubed.” Ashby Jones, *The Whole World is Watching: ‘F-Cubed’ Case Moves to High Court*, WALL ST. J. L. BLOG (Mar. 29, 2010, 9:06 AM), <http://blogs.wsj.com/law/2010/03/29/the-whole-world-is-watching-f-cubed-case-moves-to-high-court>.

159. Mary Dumon, *How the Sarbanes-Oxley Era Affected IPOs*, INVESTIPEDIA.COM, August 28, 2009, available at <http://www.investopedia.com/articles/financial-theory/09/how-sox-affected-ipos.asp#axzz1ZHQwgImC>.

160. See *Chevron Corp. v. Naranjo*, No. 11-1150, 2011 WL 2686906, at \*1 (2d Cir. July 5, 2011).

161. See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection

the liberal Justices are concerned, though, this does not seem a matter of great urgency. The J. McIntyres of the global economy will live by our legal rules for the same reason that makes the Chinese buy our bonds: because of our size and power, they feel that they have no other choice.

This dishonorable attitude is antithetical to the Founders' constitutional commitments, their candid respect for the opinions of mankind, and their recognition that one cannot run a respectable, prosperous, and entrepreneurial country without a reliable legal system. The Supreme Court renounced those commitments and all that goes with them a long time ago. Perhaps the first step to a recovery is to keep the question ringing in our ears: Who needs American law?

And who is John Galt?

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Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745-810 (2002).