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# STEPHEN F. WILLIAMS ON FEDERALISM: GETTING IT RIGHT

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## INTRODUCTION

Stephen F. Williams cared deeply, sometimes passionately, about federalism. That orientation comes naturally to a jurist who thinks like a political economist: in politics as in markets, a firm presumption against monopoly and in favor of competition is a very good place to start.

Steve Williams did *not* much care for the conservative-libertarian orthodoxies that dominated federalism's advocacy and jurisprudence over his illustrious career as a scholar and an appellate judge. His views, as articulated in his scholarly writings and judicial

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opinions, ran orthogonal to the mainstream federalism debate. Still or perhaps therefore, they make eminent sense, and they might yet provide a basis for a durable, constitutionally grounded, jurisprudentially sound approach to urgent federalism questions.[1]

Federalism jurisprudence over the past half-century has been driven by two overlapping but somewhat different orientations. The first is embodied by the Rehnquist Court's state-protective federalism. It starts, on an oddly functionalist note, with federalism's "numerous advantages."[2] To preserve those advantages, it insists on a federal "balance."[3] It rejects the New Deal-ish "process federalism" idea that ordinary political dynamics will protect that balance and instead assigns the federal judiciary an active role in protecting the dignity of the "states as states."[4] Adherents of this jurisprudence have deployed aggressive federalism canons and clear statement rules;[5] curbed congressional or regulatory attempts to expose states to private suit;[6] and operated with state-friendly, often a-textual "postulates" and presumptions.[7]

The second orientation, of course, is textualism and originalism. Textualist-originalists are more inclined than are "balance

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[1] Judge Williams's federalism, as explicated here, sounds suspiciously like mine. *See generally* MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION (Harv. Univ. Press, 2012). But that was also true in real life. My defense against an understandable charge of mobilizing the great man's authority to peddle an agenda is to quote and footnote him at length and to drum readers with sufficient patience through somewhat recondite Williams writings and opinions.

[2] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[3] *See, e.g.*, Alden v. Maine, 527 U.S. 706, 757 (1999); Gregory, 501 U.S. at 458-61. *See generally* Robert Lipkin, *Federalism as Balance*, 79 TUL. L. REV. 93 (2004).

[4] Alden, 527 U.S. at 714-15, 749; Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 554, 588-89 (1985) (5-4 decision) (O'Connor, J., dissenting).

[5] *See, e.g.*, Gregory, 501 U.S. at 460-61, 467; Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 15-17 (1981).

[6] *See, e.g.*, Armstrong v. Exceptional Child Ctr., 575 U.S. 320 (2015); Gonzaga v. Doe, 536 U.S. 273 (2002); Alexander v. Sandoval, 532 U.S. 275 (2001).

[7] *E.g.*, Seminole Tribe v. Florida, 517 U.S. 44 (1996).

federalists" to insist on hard constitutional limits to congressional power;[8] less likely to wax about federalism's functional advantages; and more skeptical of larding up statutory analysis with substantive federalism canons.[9] Textualist-originalism's federalism lodestar is *Erie Railroad*[10]: either the Constitution or Congress must provide the substantive rule of decision. When those materials run out, federal judges must dance to the state courts' latest tunes.

In some respects, the two orientations just sketched overlap and yield identical results. (For example, implied private rights of action go by the boards either way.)[11] Still, tensions are palpable. What, for example, is a committed textualist to do with a balance-driven "presumption against preemption"—or, for that matter, an idea of state "dignity" that protects state agencies from even appearing in a federal *administrative* proceeding?[12] What, conversely, is a committed balance federalist to do when super-strong clear statement rules that protect traditional state functions against federal usurpation bump up against (then-still-sacrosanct) *Chevron* canons?[13]

Judge Williams was well aware of the dilemma.[14] However, he never mounted either of those federalism hobby horses. He firmly agreed that federalism—*of a certain kind*—has "numerous advantages"; but he believed that a "balance" metaphor is no substitute for serious thought as to what those advantages might be and how

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[8] *E.g.*, Bond v. United States, 572 U.S. 844 (2014) (Scalia, J., concurring); United States v. Morrison, 529 U.S. 598 (2000); Printz v. United States, 521 U.S. 898 (1997).

[9] *E.g.*, Wyeth v. Levine, 555 U.S. 555, 583 (2009) (Thomas, J., concurring); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

[10] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[11] *See, e.g.*, cases cited *supra* notes 5-6.

[12] *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 755, 769 (2002).

[13] Ignore *Chevron*, is one answer. *See, e.g.*, Gregory, 501 U.S. 452 (1991).

[14] Judge Williams flagged the issue even when the lawyers appearing in his court did not: "[W]hether an agency decision against preemption of a state or local law receives *Chevron* deference is an open question in this circuit. Yet plaintiffs offer no argument on the question; we commonly treat such an omission as a waiver." Fayus Enters. v. BSNF Ry. Co., 602 F.3d 444, 446 (2010) (case citations omitted). *See also* discussion *infra* notes 122-123 and accompanying text.

they might shake out against federalism's equally palpable disadvantages, under differing constitutional rules and institutional arrangements. In a lawyerly spirit, he insisted that yes and of course, we must start with the text, constitutional or statutory. But then, we must also make the Constitution and the statutes *work*, and that will require far more than contentless metaphors or blinkered, clause-bound textualism.

Part I sketches Judge Williams's general view of federalism, as articulated in his scholarly writings. Parts II and III address his views on two subjects that loomed large in his mind: the dormant Commerce Clause, and federal preemption. Throughout, I will cast a sideway glance on the differences between the Judge's thought and (conservative) federalism orthodoxies. A brief Conclusion follows.

## I. FEDERALISM!

What is it good for—absolutely nothing? Not exactly. For one thing, centralized government over a vast country will entail massive error costs and deadweight loss, foremost including states' authority to govern their affairs in accordance with their citizens' widely varying preferences.[15] For another thing, federalism *of the right kind* may

[15] *See* Stephen F. Williams, *Severance Taxes and Federalism: The Role of the Supreme Court in Preserving a National Common Market for Energy Supplies*, 53 U. COLO L. REV. 281, 301 (1982) ("[T]he quantification of environmental values for other people . . . is integrally related to another highly intangible value of the federal system: the ability of different communities to reach diverse conclusions upon the right trade-off between such values as environmental quality and community stability, on the one hand, and pecuniary income and economic dynamism, on the other. The geographic and cultural diversity of the United States requires local autonomy on that trade-off.") (footnote omitted); *see also* Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) ("The framers sought . . . to preserve decentralized decision making because smaller units of government are better able to further the interests and general welfare of the people.").

serve as a "market for legal rules."[16] Under suitable conditions and over a certain range, that arrangement promises to generate better legal rules than anything a central legislature can be expected to produce.[17] Federalism may have other virtues; for example, it may help to train citizens and their elected officials in the virtues of self-government.[18] But the initial Hayekian thoughts were deeply ingrained in Steve Williams's mind, and they begat two further thoughts. One, you will want to minimize the friction and error costs that come along with any federalism arrangement. Two, and more fundamentally, you will want to let federalism's vertical, federal-state "balance" be whatever it may turn out to be and instead think carefully about *horizontal* federalism rules that organize relations between and among states and their citizens. That is because federalism's vaunted advantages evaporate when states unilaterally appropriate the collective benefits of the enterprise—when they embargo their own products; tax or prohibit imports; impede capital or labor mobility; or export the costs of their regulatory undertakings to sister-states.

The Founders did think long and hard about rules to block such stratagems. (They *had* to.) The Constitution teems with horizontal federalism rules, such as the Contracts Clause, the Privileges and Immunities Clause, and the Full Faith and Credit Clause.[19] Similarly, six of the Constitution's nine grants of federal jurisdiction make federal courts available for horizontal federalism disputes (provided that Congress bestirs itself to grant that jurisdiction). In sharp contrast, we moderns no longer give much thought to the matter. We don't

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[16] *See* Stephen F. Williams, *Property Rules Without Borders*, YALE L.J. (The Pocket Part), Oct. 2005 [https://perma.cc/ZLD2-6CNA]; *see generally* ERIN O'HARA & LARRY RIBSTEIN, THE LAW MARKET (Oxford Univ. Press, 2009).

[17] Stephen F. Williams, *Preemption: First Principles*, 103 NW. U. L. REV. 323, 324 (2009).

[18] *Id.* at 332.

[19] U.S. CONST. art. I, § 10, cl. 1.; *id.* art. IV, §§ 1-2, cl. 1.

teach this stuff in Constitutional Law courses, generally.[20] Instead, horizontal federalism questions pop up—piecemeal, and often out-of-constitutional-context—in Civil Procedure; Family Law; and Federal Courts. For the most part they have been relegated to a course called Conflicts of Law. Conflicts law is an intellectual tohu wa-bohu and a constitutional embarrassment: by and large, the rules are whatever some parochial state court may decide. The Supreme Court's jurisprudence reflects indifference and incomprehension.[21] Most of the Constitution's horizontal federalism rules are effectively unenforceable;[22] and in the absence of a federal statute, diversity disputes are generally decided under state law—typically, the law of whichever opportunistic litigant sues first.[23]

Still and always, Steve Williams thought these questions mattered.[24] A splendid encapsulation of his approach is a 2005 book

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[20] Leading Constitutional Law textbooks—*originalist* textbooks, mind you—make no mention of the applicable provisions, except by way of reminding students that once upon a time those clauses had something to do with slavery. *See, e.g.*, MICHAEL W. MCCONNELL ET AL., CONSTITUTION OF THE UNITED STATES: TEXT, STRUCTURE, HISTORY, AND PRECEDENT (Foundation Press ed. 2010).

[21] Go read any canonical conflicts case—say, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981). Or perhaps Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 499 (2003) ("Without a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of law under the Full Faith and Credit Clause.").

[22] *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (due process clause requires no more than "minimum contacts"); *see also* South Dakota v. Wayfair, Inc., 138 S. Ct 2080 (2018) (Commerce Clause); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978) (Compact Clause); Home Bldg. & Loan Bank Ass'n v. Blaisdell, 290 U.S. 398 (1934) (Contract Clause); S&M Brands, Inc. v. Caldwell, 614 F.3d 172 (5th Cir. 2010), *cert. denied*, 562 U.S. 1270 (2011) (Compact Clause).

[23] Erie R.R., 304 U.S. 64 (1938); *see* Robert R. Gasaway & Ashley C. Parrish, *In Praise of Erie — And Its Eventual Demise*, 10 J.L. ECON. & POL'Y 225, 238-40 (2013).

[24] In that way he was a much better constitutionalist than judges and scholars who would bury horizontal federalism rules six feet deep, while declaiming their originalist convictions atop the grave. *See, e.g.*, Comptroller of Treasury of Md. v.

review in the *Yale Law Journal*.[25] The authors of the book under review argue that private actors in a federal system should be able to choose the state rules that apply to property titles and transactions. "The good news," writes the reviewer, is that:

> [The authors] see federalism's potential to foster benign competition in the production of legal rules. This vision takes federalism beyond the traditional view of states as laboratories for experiment. It looks to federal structures that create a market for legal rules—a market with minimal distortions and thus with good prospects for races to the top, with optimal rules coming to prevail.[26]

The bad news, the review continues, is that property (especially real property) is quite probably the last set of transactions on which you will want to experiment with free choice of law. With respect to property transfers, "the key value is minimizing information and error costs—namely, the time needed for a title examiner to assess the validity of a current (apparent) holder's title and the chances that the examiner will get it wrong. The introduction of alien rules, at the election of individual property owners, seems far more likely to increase these costs than to cut them."[27] With respect to rules governing nuisances and the like, owners would opportunistically select favorable rules, and "the competitive chase for favorable rules would make

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Wynne, 575 U.S. 542, 572 (2015) (Scalia, J., dissenting) ("The fundamental problem with our negative Commerce Clause cases is that the Constitution does not contain a negative Commerce Clause. It contains only a Commerce Clause."); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 618 (1997) (Thomas, J., dissenting) ("[T]he negative Commerce Clause rationale . . . remains unsettling because of that rationale's lack of a textual basis.").

[25] Williams, *supra* note 16.

[26] *Id.*

[27] *Id.* This is the principal reason why in classical conflicts jurisprudence *in rem* disputes were governed by the situs. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 927-31 (Charles C. Little et al. eds., 3d ed. 1846).

renvoi look like a picnic."[28] And rules governing ownership relations *inter sese* (as with joint tenancy) are easily chosen by contract. Thus, it is hard to identify any set of property rules that might benefit from free choice of law. Property rules may be better in some states than others; but there is no *federalism* reason to suspect that they will be systematically biased in any state.

But that is not so, Steve Williams concludes, for other sets of transactions:

> [F]or activities potentially involving several states, such as sales of products, states' work as laboratories is skewed because venue, personal-jurisdiction, and choice-of-law doctrines obscure the pertinent data. For example, under current law, a state contemplating a relatively constrained products liability regime has no reason to expect an offsetting benefit in consumer prices: Because injured parties will often be able to file suit in high-liability jurisdictions, sellers cannot adjust their prices in a particular state to reflect its rules. Perhaps [the authors] will next devote their considerable ingenuity to imagining venue, jurisdiction, and conflicts rules that would refine the states' laboratory role.[29]

The seemingly gentle suggestion is actually a subdued *cri de coeur*, echoed elsewhere in Judge Williams's writings. For example, the Judge lamented the Supreme Court's stand-offish approach to jurisdictional and choice-of-law questions,[30] and he repeatedly warned of the insidious dynamics of products liability litigation under the existing rules.[31]

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[28] Williams, *supra* note 16.
[29] *Id.*
[30] *See* Williams, *supra* note 17, at 328.
[31] *See id.*

To my knowledge, Judge Williams never explicitly advocated a bold program to rehabilitate a (horizontal) federalism more in line with both constitutional precepts and elementary insights of political economy. He did, however, devote a great deal of thought and attention to two legal issues that fall squarely in this domain. One of them is the "dormant" Commerce Clause—a horizontal federalism rule that is not textually spelled out in the Constitution but, ironically, the only such rule that still has some bite. The other issue is federal statutory preemption—in the absence of judicially enforceable constitutional or general common law rules, the only viable way of ordering interstate relations. The Commerce Clause question is, what if Congress says nothing? The preemption question is, what if Congress burbles or "stakeholders" (so called because they would drive a stake through the heart of an intelligible federalism order) stage an end-run around the congressional scheme under state law? The following Parts address those questions in turn.

## II. STATES AMONGST THEMSELVES: THE DORMANT COMMERCE CLAUSE

The "dormant" or "negative" Commerce Clause forbids, of its own force and in the absence of federal legislation, state laws that discriminate against interstate or foreign commerce; as well as state laws that pose an excessive burden on such commerce, relative to the putative local benefits.[32] Over the past decades, originalist judges and justices have articulated grave doubts about the doctrine , and it has narrowed substantially.[33] Steve Williams's academic writings on

[32] City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978); Pike v. Bruce Church, 397 U.S. 137, 142, 145 (1970).

[33] *See* Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 DENV. L. REV. 255, 277 (2017).

the subject predate those judicial discontents;[34] they take for granted a doctrine that, prior to modern-day originalism's rigidities, had never been seriously questioned by any Supreme Court Justice.[35] Instead, Professor Williams's writings probe the doctrine's sensible scope and deployment.

Two law review articles illustrate that approach. Both address, naturally, natural resource issues—respectively, state severance taxes on resource extraction and state embargoes on water exports. Both focus on then-recent or pending Supreme Court decisions. Both articles take as a given that the dormant Commerce Clause doctrine, sensibly understood, is an essential tool in ordering interstate relations for the collective good. Both feature a close, sophisticated economic analysis of the relevant interstate markets. However, the articles breathe a rather anti-Posnerian spirit. They assume that economic analysis has a great deal to teach us, both by way of understanding market dynamics and by way of identifying the range and the contours of a sensible dormant Commerce Clause doctrine. All the same, judges should hesitate before going to town with those shiny econ toys. Courts, Steve Williams explained, are ill-equipped to get the subtle empirics right; and an overly aggressive deployment of the doctrine might invite unwanted state responses. *Professor* Williams thought and sounded like a judge well before he became one.

### A. SEVERANCE TAXES

In a much-underrated law review article, Professor Williams, then freshly appointed to the University of Colorado Law School

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[34] The opening salvo in the originalist attack on the doctrine was Justice Antonin Scalia's opinion in Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232 (1987). Prior to that time there had been occasional scholarly calls to bury the doctrine. *See, e.g.*, Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982).

[35] For empirics and discussion, see GREVE, *supra* note 1, at 91-111.

faculty, tackled the nasty subject of state severance taxes on resource extraction.[36] The article, an expanded version of a prestigious lecture delivered at the law school, discusses the Supreme Court's then-recent decision in *Commonwealth Edison Co. v. Montana.*[37] Montana had imposed a heavy severance tax on coal extraction. Montana coal producers and out-of-state utilities consuming Montana coal challenged the rates, claiming that the tax unduly interfered with interstate commerce.[38] Virtually all of the coal would be exported, they said, and therefore so would the tax. That would be either discriminatory, or an undue burden on interstate commerce, or both. Still, the Supreme Court sustained the scheme by a 6-3 vote. Steve Williams endorsed that result, though not with any great enthusiasm about the majority opinion. "Although some features of the tax rendered it extreme and suspect," he wrote, "the Court was right, I think, not to intervene."[39]

Much of the Article consists of a close analysis of the Justices' reasoning and of the economics that they missed or garbled. At the outset, however, the author widens the lens. "The case," he writes, "is an interesting example of the limits of adjudication."[40] You will want to see both sides of the problem, not-yet-Judge Williams explains. On one side:

> People outside Montana, unrepresented in the Montana legislature, may well bear a large portion of the tax. If so, it is a kind of "taxation without representation." Because of that likely flaw in the political process, the tax may well be excessive; it may impose costs (for example, in stifling valuable

[36] Williams, *supra* note 15.
[37] 453 U.S. 609 (1981).
[38] *Id.* at 613, 629, 633.
[39] Williams, *supra* note 15, at 281.
[40] *Id.*

> coal production) well in excess of the benefits that it generates.[41]

In short, "taxation without representation" in the state legislature "may not only be tyranny, but may also chill productive activity."[42] On that ground rests the case for a judicially enforced dormant or "negative" Commerce Clause. Then again, one will want to ask two further questions:

> (1) Conceding that such taxes [i.e., state tax exports] represent an imperfection in our federal system, are the costs of the imperfection greater than the costs of curing it? (2) Is the Supreme Court the federal institution that can best solve the problem?[43]

The Article explores those questions, along with the question—closely related, we shall see anon—of suitable constitutional anti-circumvention rules.

By way of background explored in the Article, the pre-New Deal Court analyzed *dormant* Commerce Clause cases with the same categorical distinctions that it applied to *affirmative* Commerce Clause cases involving the powers of Congress. Thus, it upheld a state severance tax on coal extraction on the grounds that it fell on mining and production rather than "commerce among the several states."[44] That will not do, Steve Williams noted. The form of a state tax tells us virtually nothing about its incidence, with the result that categorical distinctions will prove both over- and under-inclusive. For reasons of that sort, the post-New Deal Court wisely abandoned those distinctions and instead focused on *discrimination* between in-state and out-

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[41] *Id.* at 281.
[42] *Id.* at 290 (footnote omitted).
[43] *Id.* at 303 (alteration in original).
[44] *See, e.g.*, Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922).

of-state actors of commerce as the lodestar of dormant Commerce Clause analysis.

It takes a great deal of work, however, to operationalize that concept. One obvious option is to invalidate only "facially" discriminatory state laws. The *Commonwealth Edison* majority seemed to suggest that approach; Steve rejected it.[45] In all too many cases, state legislatures will be adept at writing facially neutral but massively discriminatory taxes and regulations. Thus, one needs some anti-circumvention rule "as a backstop to rules against express discrimination."[46] The question is, what should it look like?

On Steve William's account, the *Commonwealth Edison* dissenters angled for some such rule. Under their approach:

> [T]he trial court would explore whether the tax was "exported." . . . [I]f plaintiffs established exportation, the court would sustain the tax only if it met [a] "fair relationship" test. A tax would do so either if (a) it is "a legitimate general revenue measure identical or roughly comparable to taxes imposed upon similar industries," or (b) if "there is some reasonable basis for the legislative judgment that the tax is necessary to compensate the State for the particular costs imposed by the activity."[47]

That test "has a conceptual beauty about it."[48] Still, seemingly easy cases may make bad doctrine. While "[t]he peculiar facts of

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[45] Williams, *supra* note 15, at 296 ("The majority . . . seemed implicitly to take the view that courts should find unconstitutional discrimination against interstate commerce only when it is express. I think that this view of discrimination is not only too narrow, but deviates from the Court's normal view of the matter.").

[46] *Id.* at 297. Heresy upon heresy: sworn textualists-originalists take a dim view not only of the dormant Commerce Clause but also of anti-circumvention rules—foremost, the "mischief rule" of *Heydon's Case*; *see, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 347-49 (Thompson/West 2012).

[47] Williams, *supra* note 15, at 289 (footnotes omitted).

[48] *Id.* at 289-90.

*Commonwealth Edison* created a deceptive impression of the ease with which a court might identify an 'exported tax,',"[49] any serious effort to identify discriminatory export taxes would entail "extraordinary factual complexities, line-drawing difficulties, and intrusions into state policy-making."[50] For instance, "Montana's export of ninety percent of its coal by no means shows that it would export ninety percent of the tax. . . . [A] court could discover what portion of the tax was exported only after complex economic inquiries,"[51] such as price elasticities in the relevant market. Thus, a robust test along the lines proposed by the *Commonwealth Edison* dissenters might expose "innumerable taxes . . . to judicial review, with their validity known only after long trials, replete with econometric evidence, and arbitrary judicial line-drawing[.]"[52] At the end, the inquiry "would be similar to rules equating disproportionate impact with unconstitutional discrimination,"[53] and that is not an enticing prospect.

Does this mean that the courts should throw in the towel? Not quite:

> There is a class of cases where the relation between the statute and the economic circumstances, and here I mean only rather obvious, easily ascertained economic circumstances, is extreme enough to justify a judicial finding that the

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[49] *Id.* at 290.

[50] *Id.* at 289.

[51] *Id.* at 293-94. The dissenting justices in *Commonwealth Edison* acknowledged the difficulty. However, Judge Williams notes wryly, "[i]n the can-do spirit of the modern federal judiciary . . . the dissenters went on: 'but its difficulty does not excuse our failure to undertake it.'" *Id.* at 302 (quoting *Commonwealth Edison Co.*, 453 U.S. at 652 (Blackmun, J., dissenting)).

[52] *Id.* at 290.

[53] *Id.* at 295. Steve notes that the Supreme Court had rejected such a test—for constitutional purposes—even in cases involving race discrimination. *See id.* at 295 note 77 (citing Washington v. Davis, 426 U.S. 229, 248 (1976)).

> legislature must have acted with an intent to discriminate against interstate commerce.[54]

Without such a test, the author insists, "any rule against express discrimination will be too readily circumvented."[55] Judge Williams's conclusion may leave diehard formalists dissatisfied: How does one know what is "extreme enough"? Then again, that difficulty is inherent in any act of judging.

### B. WATER EMBARGOS

A second Article by Professor Williams, discussing a Supreme Court decision involving a state water embargo, reflects a very similar disposition.[56] *Sporhase v. Nebraska Ex Rel. Douglas*[57] arose over funky facts. The Sporhases, owners of contiguous tracts of land in Nebraska and Colorado, pumped water from a well on the Nebraska tract to irrigate their land in both states.[58] Nebraska sought injunctive relief in state court against the Sporhases' use of the water out of state, on the grounds that they had failed to even apply for a required permit. The permit conditions included an unambiguous proviso that no Nebraska water could be exported unless the destination state had a reciprocal arrangement to permit water exports to the import state; and since Colorado at the time also had a water embargo statute, the Sporhases had no chance of obtaining said permit. Predictably, the Nebraska courts granted the state its sought-for relief.

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[54] *Id.* at 296. The Article identifies and briefly discusses several such cases. *Id.* at 296-97. The emphasis in the quoted passage is on real-world, *economic* circumstances. Judge Williams rejected the option of inferring discriminatory purposes from legislative history. That move, he explained, would merely incentivize state legislatures to re-enact an invalidated statute on a "clean" record—in other words, "to act hypocritically. That is perhaps the last injunction legislatures need." *Id.* at 298.

[55] *Id.* at 297.

[56] Stephen F. Williams, *Free Trade in Water Resources: Sporhase v. Nebraska Ex Rel. Douglas*, 2 SUP. CT. ECON. REV. 89 (1983).

[57] 458 U.S. 941 (1982).

[58] *Id.* at 944.

The Supreme Court, in a majority opinion by Justice Stevens, enjoined the state's reciprocity provision, while letting the discretionary permit requirements stand as an "evenhanded" set of regulations.

Professor Williams's comment on the decision and opinion welcomes the Court's willingness to subject water allocation to Commerce Clause scrutiny[59] and zeroes in on the "essential economic justification for the Court's negative applications of the commerce clause": "Free interstate trade allows resources to be applied to their most valuable uses, and such applications, in turn, tend to generate increases in economic welfare. Barriers to interstate trade thwart such increases."[60] Thus, here as in the *Commonwealth Edison* Article, the author begins with the basic rationale for a dormant Commerce Clause. Here as there, he chides the Court for its indifference to basic economics. Here as there, though, he cautions against an excessively aggressive judicial posture.

Having invalidated Nebraska's reciprocity requirement as obviously discriminatory, the *Sporhase* Court proceeded to explain, in a manner of speaking, that water "shortages" might yet permit states to embargo that precious good. Professor Williams deemed that proposition essentially meaningless. "Shortage," he explained in a slightly exasperated tone, might mean any number of things:

> [F]irst, not enough water is available for survival of the existing population; second, not enough water is available for essential survival purposes at "reasonable" prices; third, water is scarce; that is, under market conditions, a positive price

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[59] The *Sporhase* Court rejected the notion that water resources are owned by the state, and thus not an article of commerce at all; and therefore exempt from Commerce Clause scrutiny altogether. Justice Rehnquist, joined by Justice O'Connor, dissented briefly on that point. *Id.* at 963 (Rehnquist, J., dissenting).

[60] Williams, *supra* note 56, at 89.

> is necessary to clear the market; fourth, not enough water is available for purposes that are "essential" in some vaguer sense than survival; and fifth, because of government intervention, such as price controls, failure to charge market-clearing prices for government-owned supplies, or restrictions on transfer, or because of government failure to define property rights in water adequately, the water market will not clear and non-price mechanisms must be used to allocate existing supplies among competing uses.[61]

None of the supposed "shortages," Professor Williams observed, make any sense. The first two are wildly unrealistic—just a way of "teasing the arid states of the West."[62] And, if the Court intended any of the other likely candidates, "the *Sporhase* decision either loses all of its significance or produces perverse results."[63] On the third theory, states could regiment *anything* that has a positive price. The fourth theory is "an escape from definition."[64] And the fifth meaning:

> [W]ould give *Sporhase* consequences at variance with the Court's general purpose in its negative commerce clause jurisprudence. The most obvious example is municipal water supply. By failing to meter supplies, or by setting the price of water below market-clearing levels, any municipality can generate a shortage overnight. And, many do so.[65]

"I do not wish to suggest," the author concludes,

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[61] *Id.* at 95-96.

[62] *Id.* at 96.

[63] *Id.* at 97.

[64] *Id.* at 96. The purported definition, the author explains, "cuts loose both from the physically measurable idea of survival and from the economically measurable concept of scarcity; it provides nothing by way of a substitute. " *Id.* at 96-97.

[65] *Id.* at 97-98. Evidently, *Professor* Williams did not have the luxury *Judge* Williams enjoyed—a coterie of law clerks to "de-snark" his writings (his term).

> that the Court should reject state adoption of non-market solutions to common-pool or other conservation problems, or that its tolerance of state solutions should increase in the degree that those solutions approximate the market. But, the Court's language in *Sporhase* seems to go to the opposite extreme of an unbridled enthusiasm for bureaucratic regulation.[66]

In the end, Steve Williams deemed it impossible to say anything definitive about *Sporhase*'s import "until the Court clarifies its concept of shortage."[67] While "the opinion's general tenor suggests that an allegation of shortage will help a state to defend an export barrier only if there is a scarcity so extreme that it impinges directly on human survival in the source state,"[68] certain passages—as well as the Court's green-lighting of Nebraska's permitting system—suggest a high judicial tolerance for state regulations that produce water "shortages." Thus, the challenge for the Court will be "to apply the clause with enough dexterity that it does not lead states to increase ad hoc discretionary interference in the water market. Any marked rise in such interference would throw obstacles in the way of free intrastate and interstate trade in water greater than the obstacles to interstate trade that the Court sought in *Sporhase* to remove."[69]

To my knowledge, Judge Williams never adjudicated a dormant Commerce Clause case. Perhaps, that is just as well: he would have

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[66] *Id.* at 100. *See also id.* at 99 ("What is surprising, and dismaying, is [the Court's] implicit assumption that categorical prohibitions on transfer . . . and discretionary bureaucratic review . . . represent apt devices for achieving conservation. Market devices for achieving conservation, such as a clear definition of property rights and maximum transferability, are completely neglected.").

[67] *Id.* at 98.

[68] *Id.*

[69] *Id.* at 105.

been compelled to apply the modern-day Court's uncomprehending precedents.

## III. FEDERAL PREEMPTION

Judge Williams explicated his views on federal statutory preemption in a brief, forceful 2009 Article entitled "Preemption: First Principles."[70] The first Section of this Part summarizes that Article and places it in the context of the scholarly and judicial preemption debate, then and now. The following Sections provide three examples of as-applied Williams preemption: an early law review article dealing with certain amendments to the Natural Gas Act; a majority opinion in a game-changing FERC case decided in 2008; and his what-are-you-thinking dissent from his Court's 2019 decision in *Mozilla v. FCC*,[71] which committed internet regulation to the tender mercies of the states.

### A. FIRST PRINCIPLES

"[A]ll hands currently agree," Judge Williams begins, "that preemption cases depend on some notion of congressional intent."[72] However, there is more than one way to discern that intent. *First Principles* departs from the then-and-now dominant preemption analysis in three crucial respects.

*First*, Judge Williams rightly observes, "the judicial search for this [congressional] intent is usually carried on at a rather micro level: a study of the meaning and interplay of the relevant statutory provisions."[73] But that "essential" inquiry is—or rather should be "often

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[70] Williams, *supra* note 17.

[71] 940 F.3d 1 (D.C. Cir. 2019).

[72] Williams, *supra* note 17, at 323.

[73] *Id.* (alteration in original). The implied criticism is entirely warranted, and widely shared. *See, e.g.*, Catherine Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 455-59 (2008). For case examples see, *e.g.*,

aided by having a broader sense of the statute's overall purpose and where it fits in our constitutional scheme."[74] *Second*, preemption analysis was and is supposedly guided by a "presumption against preemption." The reach and application of that presumption have been notoriously uncertain and wavering.[75] Judge Williams aims to "stir some doubt about the soundness of any across-the-board presumption against preemption, such as the one embraced in *Rice v. Santa Fe Elevator Co.*,"[76] by most lights the origin of the presumption. *Third*, the presumption against preemption is part and parcel of a "judicial federalism" that seeks to protect and preserve the (vertical) federal "balance" between the states and the federal government. In a strikingly offhand passage, Judge Williams expresses a complete lack of interest in that enterprise. He cheerfully concedes that his "proposal almost completely abandons the current quest for 'balance' between state and federal power. . . . Rather, it focuses on the risk that state action may impose costs on the welfare of citizens of other states."[77]

Instead of a micro-textual, presumption-laden, vertical-balance-driven preemption jurisprudence, Judge Williams proposes a statutory-purpose-oriented, structural approach that focuses on federalism's horizontal dimension. Prior to deploying any presumption for

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Sprietsma v. Mercury Marine, 537 U.S. 51 (2002); and *compare* Wyeth v. Levine, 555 U.S. 555 (2009) (no protection against state liability lawsuits for patent producers of pharmaceutical drugs and devices) *with* PLIVA v. Mensing, 564 U.S. 604 (2011) (preemption of state law liability for producers of generic drugs, based on a grimly clause-bound reading of the applicable statutes); Sharkey, *supra*, at 458-59 (noting that the regime makes no sense).

[74] Williams, *supra* note 17, at 323.

[75] *See* Sharkey, *supra* note 73, at 454. Judge Williams's Article is sensibly read as an attempt to explain when and why such a presumption should apply, and when and why not.

[76] Williams, *supra* note 17, at 333 (citing Rice v. Santa Fe Elevator, 331 U.S. 218 (1947)).

[77] *Id.*

or against preemption, the court should ask: "What interstate collective action problem did Congress seek to solve?"[78] Judge Williams seeks to anchor this approach in the structure of the Constitution—not the text or history of some individual clause,[79] mind you, but it's overall, which teems with clauses that are manifestly intended to vest Congress with powers over matters that "no State [is] separately competent to legislate."[80] Foremost, those include the provision of public goods that are national in scale, starting with the national defense. Closer to the preemption question, it includes powers (such as the Commerce power) that authorize Congress to legislate in matters where states, by design or accident, might inflict serious harm on citizen in other states.

Reframing that structural concern—state collective action problems—"in terms of modern political economy,"[81] Judge Williams sketches three broad categories of federal interventions and the presumptions that should accompany each. The cleanest case is that of federal statutes that block interstate externalities, paradigmatically transboundary air or water pollution. The obvious concern underlying statutes of that description is "the relative indifference of each state's legislators to out-of-state damage. Given that purpose, it would be extremely odd to impute to Congress an intent to preempt

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[78] *Id.* at 324.

[79] Judge Williams explicitly acknowledges that point. *See id.* at 331-32. To highlight the significance of this point, compare Judge Williams's approach to a self-consciously—and to my mind misguided—originalist attempt to ground preemption law in a single constitutional provision (the Supremacy Clause): Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000) and Wyeth v. Levine, 555 U.S. 555, 590, 601 (2009) (Thomas, J., concurring) (extensively relying on Professor Nelson's analysis).

[80] Williams, *supra* note 17 at 325-26. The quoted language appears in the congressional debates in support of an amendment granting Congress the power "to legislate in all cases for the general interests of the Union." Before being adopted, the language was further amended from its "functional approach to a categorical enumeration of powers closely resembling the final version of Article I, Section 8." Judge Williams freely concedes that not all congressional powers address collective action issues. Most prominently, the Civil War Amendments do not. *Id.*

[81] *Id.* at 332.

more demanding state rules. Here the type of collective action problem involved easily dictates a presumption against preemption."[82]

At the opposite end of the spectrum are federal laws that impose minimum standards for the sale of goods and services in interstate commerce. The case is more complicated because one can imagine a legal system that addresses collective action problems in this domain without federal legislative or regulatory intervention, through judicially administered rule of jurisdiction, choice of law, and contract. However:

> [G]iven (1) the Supreme Court's rather mild limits on in personam jurisdiction, (2) its almost complete laissez faire as to state choice-of-law decisions, (3) the way in which products and buyers wander among the states, and (4) modern courts' virtually complete indifference to contract provisions relating to liability, firms selling in interstate commerce cannot, as a practical matter, match selling prices to varying levels of litigation risk. . . . Because the firms have no effective way of pricing on the basis of local liability standards, no state gets a meaningful price signal for the stringency of its rulings. As a result, state development of liability standards proceeds with artificially reduced concern for the effect on price. In short, states externalize the costs of their liability rulings onto customers in other states.[83]

Against that backdrop, statutes governing standards for sales of goods and services in interstate commerce should come with a presumption of a congressional intent to preempt stricter or different state standards. At least barring some very clear indication to the contrary, legislative standards of this type should operate as a floor

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[82] *Id.* at 327.
[83] *Id.* at 328.

*and a ceiling* vis-à-vis conflicting state regulation. No presumption against preemption here.[84]

In the third category one finds national rules that govern air or water emissions but are obviously not addressed to interstate physical externalities.[85] Such statutes are often said to be prompted by worries over a "race to the bottom" among the states—either because competition for productive industries might prompt states to adopt excessively lax standards, or because polluters might have greater rent-seeking advantages at the state rather than at the federal level. If congressional legislation were indeed driven by those perceived collective action problems, presumably the federal standards would be intended as a mere regulatory floor that leaves states free to impose more demanding requirements.[86] However, Judge Williams was deeply skeptical of the "race to the bottom" theory in either version[87]:

> [T]he premise that competition is inherently distorting seems to run against our procompetitive national ethos, and the disparagement of state governments implicit in the public choice theory seems out of tune with the initial premises of the federal union. Thus, it may make sense for courts to resist the race-to-the-bottom theories, subject of course to the

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[84] *Id.* at 327-28.

[85] As it happens, almost the entire Clean Air Act fits that description *See* Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 932 (1997) ("When one examines existing environmental regimes more closely . . . little meaningful regulation of transboundary pollution actually exists."); s*ee generally* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA L. REV. 2341 (1996).

[86] *See* Williams, *supra* note 17, at 329.

[87] *See id.* (citing Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to the Critics*, 82 MINN. L. REV. 535 (1997); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992)).

> recognition that a clearly expressed congressional viewpoint would prevail.[88]

Thus, the author suggests a strong presumption against a supposed effort to prevent a race to the bottom. Exclusion of that rationale "will commonly leave a likely congressional purpose to facilitate an efficient national market, specifically to constrain excessive balkanization (or other state externalization of regulatory costs)."[89] That, in turn, again compels a presumption that Congress intended federal standards—or regulatory arrangements that authorize agencies to specify such standards—to serve as a floor *and* a ceiling.

In a brief, trenchant conclusion, Judge Williams defends his approach against objections. He cheerfully agrees that his approach "isn't primarily grounded in the text or history of specific clauses" of the Constitution.[90] With equal good cheer, he concedes that "[i]t is rather fictional to think of congressional action as a response to a collective action problem," as opposed to a sequence of grim interest group bargains. "But we do live in a constitutional republic, and when the legislature acts, the system overall may benefit if we generally impute to it a goal of carrying out one of the missions for which it was empowered."[91] Sure, he volunteers: the proposed preemption jurisprudence might constrict state legislatures' ability to serve as a proving ground where politicians can develop skills. But the "proposed analysis is directed largely to state rules that intentionally or accidentally impose external costs on other states," and "disabling

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[88] Williams, *supra* note 17, at 331.

[89] *Id.* at 331.

[90] *Id.* at 332.

[91] *Id.* The imputation is just that—an interpretive premise, subject to rebuttal upon persuasive statutory evidence that Congress in this or that enactment was pursuing some purpose other than to fend of state collective action problems. *Id.* at 333 ("Obviously courts should be alive to that possibility. I don't mean to invite courts to force an analytical round peg into a square hole.").

states from externalizing regulatory costs leaves their politicians competing over a set of options that are healthy vis-à-vis the system as a whole."[92]

Finally, what of the heralded federal-state "balance"? "One can, of course, imagine economic, political, and juridical circumstances under which use of the preemption background norm suggested here would lead to radical imbalance," Judge Williams writes. "But it is hard to believe that rejecting such a preemption doctrine would be the most promising cure for such imbalance."[93]

All this may leave dyed-in-the-wool textualists queasy. On my account, Steve Williams's preemption riff sounds quite like Judge Frank Easterbrook's take on "statutes' domains": judges should examine what kind of a statute (rent-seeking or remedial and public-oriented) they are looking at, and then and accordingly decide to construe it "strictly" or "broadly."[94] Conservative jurists were permitted to entertain such public-choice heterodoxies in the 1980s; now that we are all textualists, not so much. There are two responses to that concern. Both are suggested in the *First Principles* essay—the first, explicitly; the second, a bit obliquely but plain to see for all but the willfully blind.

*First*, the author cautions that his approach is not intended as a "how to" guide to deciding preemption cases.[95] That cannot be done in a brief essay, nor even a long Article. In any given case or regulatory arena, too much hangs on statutory nuances, precedents, and the interplay between federalism and administrative law canons.

*Second*, in the domain of preemption statutes, textualism's supposedly neutral baseline is a mirage. In a post-New Deal world, federal-state relations will be governed by some set of second-best, judge-made, quasi-constitutional rules that cannot come from the

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[92] *Id.* at 332.
[93] *Id.* at 333.
[94] *See generally* Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).
[95] *See* Williams, *supra* note 17, at 323-24, 332-33.

statutes as written. The question is, what will those rules be? Thus, the true preemption choice is between two sets of quasi-constitutional presumptions: the "balance"-driven presumptions of the New Deal Court, or a set of presumptions that seeks to re-constitutionalize the preemption universe by way of thinking in terms of constitutional structure, informed by modern-day political economy.

Can that latter approach have any real traction when brought to bear on actual statutes? Should it? My decided answer to both questions is in the affirmative. By way of illustration, I proffer Steve Williams's answer(s) to the question of what to do, preemption-wise, about state regulation in cases where Congress has decided to regulate up to a certain point, *but no further*; or where it has entrusted a regulatory agency to define the scope of federal preemption. What are states permitted to do in the non-regulated domain?

One perfectly intelligible answer is: nothing. Congress, the argument goes, has exercised its powers and done all it deemed wise. So:

> [A]re the states now to do whatever Congress has left undone? Congress makes such rules as, in its judgment, the case requires; and those rules, whatever they are, constitute the system. All useful regulation does not consist in restraint; and that which Congress sees fit to leave free, is a part of the regulation, as much as the rest.[96]

The required footnote is a spoiler: Steve Williams did not write this. Daniel Webster wrote (or rather said) it, in his argument in *Gibbons v. Ogden*. Nor *could* Judge Williams have articulated this position. He understood perfectly well that it belongs to a long-lost "dual federalism" world of mutually exclusive state and federal powers, whose sorting was the federal courts' business more or less

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[96] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 17-18 (1824) (transcript of argument) (emphasis in original).

regardless of what Congress might have intended.[97] What he *also* understood, however, was that the sorting problem does not simply go away because someone mumbles, "congressional intent." It just becomes more attenuated: how do we construe that intent, in this dimension and against the constitutional backdrop?

The question is closely connected to Judge Williams's unwavering defense of the dormant Commerce Clause. ("What can states do when Congress does nothing" is not so different from asking, "what if it mumbles?") It occupied him from his early academic writings to one of his final decisions on the D.C. Circuit. His writings and opinions on the subject span a wide range, from the Natural Gas Act to the Federal Power Act to the 1996 Telecommunications Act. At the considerable risk of slighting the Judge's meticulous attention to the details of the congressional schemes and the nuances of the administering agencies' regulations, I shall highlight the overarching theme: an insistence on understanding federalism, even and especially under post-New Deal conditions, in light of the constitutional structure, as explicated by Daniel Webster and John Marshall. The canons espoused in *First Principles* operate as interpretive presumptions; but they come pretty close to the original.

### B. APPLICATION (1): THE NATURAL GAS (POLICY) ACT

One of Steve Williams's early academic writings tackles the preemption question just sketched in the context of—what else?—energy regulation.[98] More specifically, it addresses the preemptive effects of a then-recent congressional decision to deregulate certain aspects of the natural gas market.

Under the 1938 Natural Gas Act,[99] the Federal Power Commission, later renamed FERC, broadly regulated the generation and

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[97] Williams, *supra* note 17, at 323, n. 1.

[98] Stephen F. Williams, *Federal Preemption of State Conservation Laws After the Natural Gas Policy Act: A Preliminary Look*, 56 COLO. L. REV. 521 (1985).

[99] At the time of Judge Williams's writing, 15 U.S.C. § 717 (1982).

transmission of natural gas. The Supreme Court gave the statute an even broader reading, with a preemption jurisprudence to match. It held that the statute mandated the federal regulation of wellhead gas prices and went on to find, in a case called *Northern Natural*,[100] that the Act affirmatively preempted enforcement of state "ratable take" orders against an interstate pipeline.[101] Such orders, the Court said, might increase the price of natural gas; and any state measure with that effect was preempted. In 1978, however, Congress enacted the Natural Gas Policy Act (NGPA),[102] which largely eliminated federal ratemaking control over natural gas. The question naturally arises, or in any event it naturally occurred to Steve Williams: what does that reform do to the broad preemption holding of *Northern Natural*?

Anticipating a key point of *First Principles*, the Article begins with the purpose of the statutes (the NGA, and then the NPGA): what congressional intent do those statutes convey? Well, the Supreme Court had said, the NGA served "to protect consumers against exploitation at the hands of natural gas companies" and "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."[103] However, "some reformulation of these purposes is required"[104]: why? Because this, like *Sporhase*'s "scarcity," is New Deal burble. Or, as the author put it more gently, "'exploitation' and 'excessive rates' are terms with little or no cognitive meaning, particularly given the absence of monopoly [in the wellhead

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[100] N. Nat. Gas Co. v State Corp. Comm'n, 372 U.S. 84 (1963).

[101] A "ratable take order" requires that a pipeline purchasing gas must take in proportion to deliverable gas from each well or owner with which it is connected, or from each well or owner in a common source of supply.

[102] 15 U.S.C. §§ 3301-3432 (1982).

[103] Williams, *supra* note 98, at 523-24 (quoting Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 610 (1944) and Atl. Refin. Co. v. Pub. Serv. Comm'n of N.Y., 360 U.S. 378, 388 (1959)).

[104] *Id.* at 522.

market]."[105] What, then, *was* the point of the NPA, as expounded by the Supreme Court? Answer, "to transfer wealth from gas producers to consumers, specifically to transfer 'economic rents.' . . . [T]he Court was resolute in its desire to see the [agency] hold wellhead natural gas prices below market levels, in the name of consumer interests; rightly or wrongly, it imputed such a purpose to Congress."[106]

In 1978, however, Congress rejected the NPA's all-encompassing ratemaking regime and instead *de*-controlled wellhead prices. Was this due to some sudden outburst of free-market sentiment in Congress? Surely not. What prompted reform was the increasingly obvious and pressing evidence of predictable shortages in the natural gas markets.[107] It remains true nonetheless that "the federal scheme [of the NGPA] presupposes the possibility of a workably competitive wellhead market and actively seeks to bring about such a market."[108] Now what, preemption-wise?

One possible answer is, *Northern Natural* still reigns. Federal ratemaking, federal wipe-out of ratemaking: either way, states are barred from interfering. That was indeed the conclusion the U.S. Supreme Court eventually reached.[109] The underlying intuition resembled Webster's: "[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate."[110]

It is not obvious, however, that preemption should work both ways in this scenario. The natural gas market at the wellhead may

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[105] *Id.* at 524 (alteration in original).

[106] *Id.* (footnote omitted).

[107] *See id.* at 524-25 n. 25.

[108] *Id.* at 526.

[109] *See* Transcon. Gas Pipe Line Corp. v. State Oil and Gas Bd. of Miss., 474 U.S. 409 (1986) (5-4 decision).

[110] *Id.* at 422 (emphasis in original). *See* Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375, 384 (1982). *Cf.* Machinists v. Wis. Emp. Rels. Comm'n, 427 U.S. 132, 150-51 (1976).

have real competition problems (summarized by economists as "oligopsony" and "correlative rights" problems). Now imagine a *pro*-competitive state law or order that realistically promises to fix those problems: preempted under the new regime? Steve Williams did not think so. To squeeze the problem into the Supreme Court's conventional preemption categories (which Judge Williams was never fond of): one can argue that both the NGA and the NGPA are "field-preemptive," such that any state law in the area must give way regardless of any conflict with federal law. But that is a very heavy lift, in the teeth of a statute that on all accounts seemed to have quite specific policy objectives in mind. Reject that approach: the preemption question becomes whether this, that, or the other state regime conflicts with or rather promotes the federal regime. As Professor Williams put it, "a key variable in the preemption puzzle will typically be whether the state intervention is congruent with the long-run federal goal of restoring a workably competitive market at the wellhead."[111] "[S]tate interventions tending to foster such a market seem presumptively compatible. On the other hand, ones tending to distort such a market appear to conflict with the federal objectives."[112]

The Supreme Court's global presumptions gloss over all of this—and, in the process, vitiate congressional objectives. That, to Steve Williams's mind, was a mistake. "Through the NGPA," he concluded:

> [Congress adopted] the restoration of a competitive wellhead market free of price controls. Federal adoption of that goal undermines the premise of *Northern Natural*—that any state action that risked increasing the price of natural gas for ultimate consumers was necessarily preempted. The

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[111] Williams, *supra* note 98, at 522.
[112] *Id.* at 526.

> primary standard should now be whether the state action is congruent with development of the sort of market that Congress sought to achieve.[113]

For good or ill, but mostly for ill, the U.S. Supreme Court declined to heed his suggestion.[114]

### C. APPLICATION (2): FERC, DAM IT

The Federal Power Act (FPA) authorizes the Federal Energy Regulatory Commission (FERC) to regulate hydroelectric power generation under a comprehensive regime. Certain provisions of that regime govern the distribution of costs among FERC licensees situated on the same waterway. An upstream dam typically will render downstream flow more even and predictable and thus enable downstream hydropower plants to operate at a higher capacity. To enable the upstream firms to recoup part of the cost of conferring these "headwater benefits," Congress in § 10(f) of the FPA directed FERC to require its downstream licensees to reimburse upstream operators "for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable."[115] A

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[113] *Id.* at 536.

[114] *See* Transcon. Gas, 474 U.S. at 420-23.

[115] The relevant text reads as follows:

> [W]henever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees affected shall pay to the United States the cost of making such determination as fixed by the Commission.

16 U.S.C. § 803(f) (2006).

2008 case, *Albany Engineering*,[116] presented the question whether § 10(f) preempts state law or rather allows states to mandate compensation for costs other than "interest, maintenance, and depreciation."[117]

In administrative proceedings and in litigation, FERC took the position that § 10(f) preempted state law only insofar as the state authorized charges for interest, maintenance, and depreciation. Thus, FERC said, the statute left states free to authorize upstream firms to assess downstream FERC licensees for all headwater improvement costs other than "interest, maintenance, and depreciation." In a rather diffident brief, the Commission conceded that the petitioners' contrary interpretation of the statute was "not unreasonable."[118] However, it insisted that its own reading of the ambiguous statute was also not unreasonable, and thus deserved *Chevron* deference.[119] The D.C. Circuit rejected that position. "Our review of the text and legislative history of the FPA generally and § 10(f) specifically," Judge Williams wrote for the court, "convinces us that § 10(f) must, in order to accomplish the full objectives of Congress, be understood to preempt all state orders of assessment for headwater benefits."[120]

Several things are noteworthy.

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[116] 548 F.3d 1071 (D.C. Cir. 2008).

[117] The upstream facility in the case was owned and operated by the State of New York, which naturally attempted to charge private downstream entities for operational costs. The facts are quite involved. *See* Albany Eng'g Corp., 548 F.3d at 1073-74, 1077-78; *see also* Erie Boulevard Hydropower, LP v. FERC, 878 F.3d 258, 263-64 (D.C. Cir. 2017); Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist., 673 F.3d 84, 90-91. (2d Cir. 2012); However, the complications are immaterial for present purposes.

[118] Resp't's Br. at 14, 19.

[119] *Id.* at 1074-75, 1077.

[120] *Id.* at 1073. Judge Brown agreed that a remand was appropriate but that the court "need [not] resolve the scope of § 10(f)'s preemption" until FERC provided a better explanation for its orders. *Id.* at 1081.

*First*, it is quite unusual for a federal court to find preemption in a case where the federal agency disclaims it.[121] After all, if the agency cannot perceive any state interference with its mission and the purposes and objectives of Congress, it is not clear how and why the reviewing court might reach the opposite conclusion. *Albany Engineering* is a rare decision that deviates from that general pattern.

*Second*, the *Albany Engineering* opinion flags the notoriously vexing and as-yet unresolved problem of how to reconcile state-friendly preemption canons with *Chevron* and associated deference canons. The near occasion for the excursion was a forceful dissent in an important, then-recent Supreme Court case, insisting (with some vehemence) that *Chevron* should not extend to agency preemption determinations.[122] Judge Williams briefly flagged Circuit precedent to the contrary[123]--and then deftly sidestepped the issue: we reject the agency's position even under *Chevron*.[124] How so?

In litigation, FERC made the inevitable concession that under § 10(f), FERC itself could not impose charges for headwater benefits other than "interest, maintenance, and depreciation": *expressio unius*, and all that.[125] Thus, the Court noted, FERC's position "must be that although Congress would not allow *it* to mandate collection of other types of costs, it meant to allow the states to do so freely."[126] This, the Court continued, made no sense: "[N]either the overall function of the FPA, nor the sense of § 10(f), allows us to infer such a meaning."[127]

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[121] I have not systematically examined appellate decisions. However, empirical studies of Supreme Court preemption decisions over a combined period of twenty-six years failed to discover a single case in which the Court rejected a Republican Solicitor General's "no preemption" position. *See* Michael S. Greve et al., *Preemption in the Rehnquist and Roberts Courts: An Empirical Analysis*, 23 SUP. CT. ECON. REV. 353, 359, 375 (2015).

[122] Watters v. Wachovia Bank, N.A., 550 U.S. 1 (2007).

[123] *See* Albany Eng'g Corp., 548 F.3d at 1074 (D.C. Cir. 2008) (citing Okla. Nat. Gas Co. v. FERC, 28 F.3d 1281, 1284 (D.C. Cir. 1994)).

[124] *Id.* at 1075.

[125] *Id.* at 1076.

[126] *Id.* at 1075.

[127] *Id.*

Besides, the characterization of "costs" (e.g., as operational or maintenance-related) is notoriously debatable. Thus, leaving states free to impose assessments that are nominally outside the ambit of § 10(f) would invite state evasion and endless disputes.[128]

The key paragraphs of the opinion neatly encapsulate the concerns that animate Judge Williams's approach to statutory preemption—foremost, an emphasis on the structure of the statute as a whole:

> Given the commitment to comprehensive federal regulation, and preclusion of dual licensing authority, it is hard to imagine why Congress would have countenanced disparate state reimbursement schemes, calculated on different bases and potentially imposing severe costs on hydropower firms in other states, downstream of the enacting jurisdiction. This seems like precisely the sort of heterogeneity and conflict that a complete and comprehensive scheme would be expected to prevent. . . .
>
> FERC's holding would undermine Congress's clear intent to limit the total amount of charges imposed on downstream operators. Breach of that limit, combined with the cost-characterization issues (and perhaps others), leads to the conclusion that FERC's interpretation of § 10(f) would conflict with the FPA's purpose to provide for a comprehensive legislative scheme to govern the nation's hydropower development.[129]

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[128] *Id.* at. 1078.
[129] *Id.* at 1074.

### D. APPLICATION (3): NET NEUTRALITY FREE-FOR-ALL

The question of federal non-regulation surfaces in a third permutation in *Mozilla v. Federal Communications Commission*,[130] a central episode in the long-running battle over "net neutrality." Initially, the FCC classified certain internet service providers ("ISP") as "information services." Under Title I of the 1996 Telecommunications Act, such entities are largely exempt from FCC regulation. The idea was that "light touch" regulation would best serve consumers' interests and the demands of a fast-changing, highly innovative industry. In 2015, however, in response to vociferous interest group demands to subject ISPs to service and pricing mandates, the Obama administration's FCC re-classified those same entities as "telecommunication services." Such services fall under Title II of the Telecommunications Act, which authorizes the FCC to impose utility-style rate and service regulations. In 2018, the worm turned yet again. Pursuant to a notice-and-comment rulemaking proceeding, the FCC reverted to its earlier position: ISPs fall under Title I and therefore "light touch" regulation.

Predictably, each episode of this saga was accompanied by ferocious litigation. The crucial piece for present purposes is the D.C. Circuit's response to the FCC's 2018 rule. In a *per curiam* opinion, the Court held that the rule (with a few very minor exceptions) was within the agency's legal authority and neither arbitrary nor capricious. However, the majority rejected the agency's position that its "light touch" policy preempted states from imposing legal requirements on ISPs. Undoubtedly, the Court held, Title II regulations have preemptive force and preclude states from imposing rival or conflicting controls: the statute says so.[131] In contrast, Title I grants the agency no express preemption authority. Thus, once the FCC parked

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[130] 940 F.3d 1 (D.C. Cir. 2019).

[131] "A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a)." 47 U.S.C. § 160(e).

ISPs under Title I, states were set free to regulate them to their hearts' content, subject only to a minor proviso.

Judge Williams dissented in part. While agreeing with the majority's "arbitrary and capricious" holding and opinion, he was—what's the polite word? Mystified? Dumbfounded?—by its preemption holding. He explained his reasons in a lengthy dissenting opinion. The regulators, he noted (after a splendid Shakespeare quote),[132] are being:

> [T]old that they acted lawfully in rejecting the heavy hand of Title II for the Internet, but that each of the 50 states is free to impose just that. . . . If Internet communications were tidily divided into federal markets and readily severable state markets, this might be no problem. But no modern user of the Internet can believe for a second in such tidy isolation; indeed, the Commission here made an uncontested finding that it would be "impossible" to maintain the regime it had adopted under Title I in the face of inconsistent state regulation. On my colleagues' view, state policy trumps federal; or, more precisely, the most draconian state policy [California's, as usual] trumps all else.[133]

Judge Williams readily conceded that Title I does not expressly authorize the FCC to preempt contravening state regulation.

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[132] "And be these juggling fiends no more believed,
That palter with us in a double sense;
That keep the word of promise to our ear,
And break it to our hope."

Mozilla Corp., 940 F.3d at 95 (Williams, J., dissenting) (quoting WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5).

[133] *Id.* (alteration in original) (citation omitted).

However, preemption authority may be implied;[134] and here, "the statute, its history and its interpretation give ample reason to infer a congressional intent that the Commission be authorized to preempt state laws that would make it 'impossible or impracticable' for ISPs to exercise the freedom that the Commission meant to secure by classifying broadband under Title I."[135]

On the majority's theory, Judge Williams continued, the consequence of the Commission's choice of Title I "essentially turned the field over to states and localities, leaving each free to select as prescriptive control over broadband as it might think best."[136] But that makes no sense. The better view by far "is that the congressional grant of power to choose Title I entailed Commission authority to choose a genuinely light-touch national regime—for all broadband in the United States."[137] After all, "[i]t is hard to imagine a rational Congress providing for use of Title I, but requiring that any national deregulatory policy be implemented only to the degree that it might prove achievable under the internal constraints of Title II."[138] We all agree, Judge Williams concludes:

> [T]he 1996 Act affords the Commission authority to apply Title II to broadband, or not. Despite the ample and uncontested findings of the Commission that the absence of preemption will gut the Order by leaving all broadband subject to state regulation in which the most intrusive will prevail . . . and despite Supreme Court authority inferring

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[134] Under established law preemption authority may be implied from a statute's structure even where an express preemption provision in the same statute may seem to govern. *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000); Freightliner Corp. v. Myrick, 514 U.S. 280 (1995). For reasons explained in Judge Williams's dissent, *see* Mozilla Corp., 940 F.3d at 104 (Williams, J., dissenting), *expressio unius* is an easily trumped canon in this setting.

[135] Mozilla Corp., 940 F.3d at 97.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 122.

> preemptive power to protect an agency's regulatory choices, [the majority] vacate[s] the preemption directive. Thus, the Commission can choose to apply Title I and not Title II—but if it does, its choice will be meaningless. I respectfully dissent.[139]

Judge Williams was sufficiently exasperated to email me the decision and opinions the day they came out, along with a cheeky plea: "please tell me I have this right." Up to a point, Judge. Agencies have an affirmative duty to avoid absurd results;[140] and when, as here, non-preemption would produce the very result that the agency seeks to forestall, I would need a very good reason to let them sail on. The FCC's preemption choice under review wasn't just reasonable in a *Chevron*-ish sense; it was the only legally permissible choice. In his written opinion, Judge Williams did not go there; he did not need to. Quite plainly, however, that is what he thought.

## CONCLUSION: THINK, AND BELIEVE, LIKE STEVE

Stephen F. Williams's passing would have been untimely at any time, but especially at this point of our jurisprudence and politics. On that wistful note, a few concluding thoughts.

Over the past four decades, spanning Steve Williams's academic and juridical life, the political economy mode of thought that he championed has undergone a startling decline. Law & Economics scholarship has gone down the rabbit hole of ever-more exotic econometric models, which substitute difference-in-difference-in-difference models for institutionally-oriented thought about political actors and their incentives. That way lies law school tenure—but no

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[139] *Id.* at 107 (citation omitted).
[140] *See, e.g.*, Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014).

serious insight concerning our public affairs, or for that matter a sensible jurisprudence.

Political economy is keenly alert to the limitations, human and institutional, of political actors, including courts. That thought, too, has disappeared from the dominant strands of scholarship and adjudication. *Some* jurisprudence, Judge Williams thought, is needed as a useful first-cut framework of organizing a mess of cases and empirics. But the first cut is never the final (judicial) answer, which will always require meticulous attention to statutory and empirical detail. In short, you cannot take the judging out of judging. That sensibility, alas, is missing almost wholly from an originalist orthodoxy that clouds itself in an air of neutrality and to that end resorts to acontextual hyper-textualism[141]—only to turn it upside-down when certain cases, with dismaying frequency involving the Affordable Care Act, seem to require it.[142] Judge Williams advocated, and exercised, *actual* judicial modesty.

Finally, and on the federalism theme explored here: ours would be a very fine time to attend to federalism's "horizontal" dimension. That dimension disappears from sight so long as one thinks of "the states" as a cohesive front of unitary actors and benign despots. Beholden to that view, the U.S. Supreme Court has barely cast a sideward glance at federalism's actual dynamics. Surely, the Justices are aware of class actions that migrate now here, now there in search of a favorable home; still, they have done next to nothing to curb that peculiar product of our federalism.[143] Surely, they are aware of some

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[141] *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

[142] *See, e.g.*, King v. Burwell, 576 U.S. 473 (2015).

[143] *See, e.g.*, Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743 (2019) (holding that a general federal removal statute did not permit a third-party counterclaim defendant to remove a class action claim to federal court). *But see* Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773 (2017) (holding that California state courts could not exercise specific jurisdiction over nonresidents' claims that involved out-of-state injuries, even though the injuries were similar to those suffered by residents in California).

states' attempts to govern affairs in other states, or for that matter foreign countries: they cannot deny *certiorari* in those cases—as routinely they do[144]—without at least flipping through the petitions. And surely, they comprehend that in cases involving climate change, immigration, or the Affordable Care Act, our sisterly states litigate against one another as blocs, for partisan ends and economic advantage.[145] Yet, not one Supreme Court case or opinion on record reflects any recognition of those realities. They appear in sharp relief when viewed through Judge Williams's federalism lens.

I am no expert on the forms of action at common law. But there must be *some* form of mandamus that brings Stephen F. Williams back to this planet. With or without the shoes he so casually and often left under his desk; but ideally in his robe.

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[144] *E.g.*, Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070 (9th Cir. 2013), *cert. denied* 573 U.S. 947 (2014); S&M Brands, Inc. v. Caldwell, 614 F.3d 172 (5th Cir. 2010), *cert. denied*, 562 U.S. 1270 (2011).

[145] *See* Michael S. Greve, *Bloc Party Federalism*, 42 HARV. J. L.& PUB. POL'Y 279 (2019).