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# So Close, and Yet So Far Away: Judge Stephen F. Williams on Federalism

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## So Close, And Yet So Far Away: Judge Stephen F. Williams on Federalism

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Conservative-libertarian federalism theory, advocacy, and lawyering over the past half-century have been driven by two general, somewhat different orientations. The first of these is embodied by the Rehnquist Court's state-protective federalism jurisprudence. It starts, on an oddly functionalist note, with federalism's "numerous advantages."<sup>1</sup> To preserve those advantages, it insists on a federal "balance."<sup>2</sup> 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."<sup>3</sup> To that end, adherents of this jurisprudence have deployed aggressive federalism canons and clear statement rules;<sup>4</sup> curbed congressional or regulatory attempts to expose states to private suit;<sup>5</sup> and operated with state-friendly, often a-textual "postulates" and presumptions.<sup>6</sup>

The second orientation, of course, is textualism and originalism. Its adherents are more inclined than are "balance federalists" to insist on hard constitutional limits to congressional power;<sup>7</sup> less likely to wax about federalism functional advantages; and more skeptical of larding up statutory analysis with substantive federalism canons.<sup>8</sup> Textualism-originalism's federalism lodestar is *Erie Railroad*:<sup>9</sup> either the Constitution or Congress must provide the substantive rule of decision. We judges read and apply the constitutional text and federal statutes and regulations—and, when those materials run out, we dance to the state courts' latest tunes.

To be sure: the decisional universe, and the federal judiciary's decisions and dispositions, are more nuanced and complicated. In some respects, the two orientations just sketched overlap and yield very similar results. (For example, implied private rights of action go by the boards either way.)<sup>10</sup> In other respects, though, the 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?<sup>11</sup> What, conversely,

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<sup>1</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

<sup>2</sup> *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).

<sup>3</sup> *Alden v. Maine*, 527 U.S. at 714–15, 749; *Garcia v. SAMTA*, 469 U.S. 528, 554, 588–89 (1985) (5–4 decision) (O'Connor, J., dissenting).

<sup>4</sup> *See, e.g.*, *Gregory*, 501 U.S. at 460–61, 467; *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 15–17 (1981).

<sup>5</sup> *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).

<sup>6</sup> *E.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

<sup>7</sup> *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).

<sup>8</sup> *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).

<sup>9</sup> 304 U.S. 64 (1938).

<sup>10</sup> *See cases cited supra nn. \_\_\_.*

<sup>11</sup> *See, e.g.*, *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 755, 769 (2002).

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?<sup>12</sup>

I will return to these tensions below, albeit briefly. The point of this upfront exposition is this: over his entire illustrious career as a scholar and judge, Stephen F. Williams made no significant contribution to *either* view of federalism, nor to some synthesis between them. That is no accident. He cared very deeply about federalism, just not about those theories.<sup>13</sup> In a public economist's spirit, 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<sup>14</sup> as to what exactly those advantages might be and how 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. In those two salient respects, Steve's intuitions and articulated views ran orthogonal to the mainstream federalism debate. Still, or perhaps therefore, they make sense, and they might yet provide a basis for a durable, constitutionally grounded, jurisprudentially sound approach to urgent federalism questions. Or so I shall suggest.

*Of course* you will, protests the informed reader. Judge Williams's federalism, as presented by you (Greve), sounds suspiciously like your own.<sup>15</sup> *Of course* it does: after 30 years of countless workshops, dinner conversations, and manuscript exchanges with Steve, how could it be otherwise? My only defense against an understandable charge of mobilizing the great man's authority to peddle my own agenda is to quote and footnote him at length and to drum readers with sufficient patience through somewhat recondite Williams writings and opinions.

Part I sketches Steve'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 sideways glance on the differences between the Judge's thought and (conservative) federalism orthodoxies.

## **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.<sup>16</sup> For another thing, federalism

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<sup>12</sup> Ignore *Chevron*, is one authoritative answer. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

<sup>13</sup> I strongly suspect that he deemed the “balance” view too silly for comment and the originalist-textualist theory inadequate. But I have no evidence—other than personal conversations and the evidence cited and quoted below—to support that surmise.

<sup>14</sup> Put the phrase into contemptuous quotation marks. See, e.g., [cite].

<sup>15</sup> See generally MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (Harv. Univ. Press, 2012).

<sup>16</sup> 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 the right kind may serve as a “market for legal rules.”<sup>17</sup> 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.<sup>18</sup> Federalism may have some other virtues; for example, it may help to train citizens and their elected officials in the virtues of self-government.<sup>19</sup> But the initial Hayekian thoughts were deeply ingrained in Steve’s mind, and they begat two further thoughts. One, you will want to minimize the frictional 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 (or perhaps Justice O’Connor) wants it to be and instead think long and hard about *horizontal* federalism rules that organize relations between and among states and their citizens. That is because federalism’s vaunted advantages evaporate when states are free to 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 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.<sup>20</sup> Similarly, six of the Constitution’s nine grants of federal jurisdiction are calculated to 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. 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;<sup>21</sup> and so we don’t teach this stuff in ConLaw, generally. Instead, horizontal federalism questions pop up—piecemeal, and out-of-constitutional-context—in Civil Procedure; Family Law; and Federal Courts. For the most part they have been relegated to a course called, in a somewhat quaint nod to Joseph Story, Conflicts of Law. On good authority (my own, because I have taught that course several times) Conflicts law is an intellectual tohu wa-bohu and a constitutional embarrassment: the rules are whatever some parochial state court may decide. The Supreme Court’s jurisprudence reflects indifference and incomprehension.<sup>22</sup> Most of the Constitution’s horizontal federalism rules are effectively

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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.”).

<sup>17</sup> See Stephen F. Williams, *Property Rules Without Borders*, Yale L.J. (The Pocket Part), Oct. 2005, <http://yalelawjournal.org/forum/property-rules-without-borders>; see generally ERIN O’HARA & LARRY RIBSTEIN, *THE LAW MARKET* (Oxford Univ. Press, 2009).

<sup>18</sup> Stephen F. Williams, *Preemption: First Principles*, 103 NW. U. L. REV. 323, 324 (2009).

<sup>19</sup> *Id.* at 332.

<sup>20</sup> U.S. CONST. Art. I § 10, cl. 1.; *id.* art. IV, §§ 1–2, cl. 1.

<sup>21</sup> See, e.g., [McConnell textbook] [anything about dormant Commerce?].

<sup>22</sup> In this dimension current jurisprudence is anti-Herculean in nature: no Supreme Court Justice has any intention of cleaning out this stable. The Justices are excused by the fact that they do not know that it *is* a stable.

unenforceable;<sup>23</sup> 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.<sup>24</sup>

Still and always, Steve Williams thought these questions matter. 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.<sup>25</sup>

Steve Williams preferred to express his views on the matter in terms of political economy. A splendid encapsulation of his approach is a 2005 book review in the *Yale Law Journal*.<sup>26</sup> The authors of the book under review (which, in candor, I have not read) 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.*<sup>27</sup>

The bad news, Steve 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.”<sup>28</sup> With respect to property rules governing nuisances and the like, owners would opportunistically select favorable rules, and “the competitive chase for favorable rules would make renvoi look like a picnic.”<sup>29</sup> 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:

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<sup>23</sup> See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (due process clause requires no more than “minimum contacts”); See also *Direct Marketing Ass’n v. Brohl*, 575 U.S. 1 (2015) (Commerce Clause); *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452 (1978) (Compact Clause); *Home Loan Bank Bd. 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).

<sup>24</sup> *Erie R.R. v. Tompkins*, 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).

<sup>25</sup> See, e.g., [Scalia, Thomas, Gorsuch opinions].

<sup>26</sup> Williams, *supra* note 17.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* This is the principal reason why in classical Conflicts jurisprudence *in rem* disputes were always governed by the situs. See, e.g., JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 927–31 (Charles C. Little et al. eds., 3rd ed. 1846).

<sup>29</sup> Williams, *supra* note 26. The author supposes, erroneously, that his readers will know a renvoi when they see it.

*[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.<sup>30</sup>*

The seemingly gentle suggestion is actually a somewhat subdued *cri de coeur*, echoed elsewhere in Steve's writings—for example, a slightly exasperated lament about the Supreme Court's stand-offish approach to jurisdictional and choice-of-law questions,<sup>31</sup> and repeated warnings of the insidious dynamics of products liability litigation under the existing rules.<sup>32</sup>

To my knowledge, Steve never explicitly advocated a bold program to rehabilitate a (horizontal) federalism more in line with both constitutional precepts and elementary insight of political economy. He did, however, devote a great deal of thought and attention to two legal issues that fall squarely into this domain. One of them is the “dormant” or “negative” 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 bumbles or “stakeholders” (so called because they would drive a stake through the heart of any recognizably legal order) stage an endrun around the legislative scheme? The following Parts address those questions in turn.

## II. States Amongst Themselves: The Dormant Commerce Clause

In its modern-day formulation, 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 law that pose an excessive burden on such commerce, relative to the putative local benefits.<sup>33</sup> Over the past quarter-century, conservative-originalist judges and justices have articulated grave doubts about the doctrine in that and perhaps any other formulation, and the doctrine has narrowed quite substantially.<sup>34</sup> Steve's academic writings on the subject predate those judicial discontents;<sup>35</sup> they take for granted a doctrine that, prior to modern-day originalism's rigidities, had never

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<sup>30</sup> *Id.*

<sup>31</sup> *cite.*

<sup>32</sup> *Cites.*

<sup>33</sup> *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978); *Pike v. Bruce Church*, 397 U.S. 137, 142, 145 (1970).

<sup>34</sup> See Daniel Francis, *The Decline of the Dormant Commerce Clause*, 94 *DENV. L. REV.* 255, 277 (2017).

<sup>35</sup> 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).

been seriously questioned by any Supreme Court Justice.<sup>36</sup> Instead, Professor Williams's writings probe the doctrine with respect to its 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.<sup>37</sup> 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, Steve cautioned judges against going to town with those shiny econ toys.<sup>38</sup> Courts, he explained, are ill-equipped to get the subtle empirics right; and an overly aggressive deployment of the doctrine might invite unwanted state responses. In short, *Professor Williams* thought and sounded like a judge well before he became one. More important, he thought and sounded like the judge you'd want on your panel.

### ***Severance Taxes, and Such***

In a much-underrated law review article, Professor Williams, then freshly appointed to the University of Colorado Law School, tackled the nasty subject of state severance taxes on resource extraction.<sup>39</sup> The article, an expanded version of a prestigious lecture delivered at the law school, discusses the Supreme Court's then-recent decision and opinions in *Commonwealth Edison Co. v. Montana*.<sup>40</sup> Montana had imposed a severe 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.<sup>41</sup> Reason(ing) being: virtually all of the coal would be exported, and therefore so would the tax. That, the plaintiffs contended, is 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."<sup>42</sup>

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."<sup>43</sup> You will want to see both sides of the problem, not-yet-Judge Williams explains. On one side,

[p]eople 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,

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<sup>36</sup> For empirics and discussion see GREVE, *supra* note 15, at 91–111.

<sup>37</sup> For purposes of this essay, I have refrained from summarizing those parts of the articles.

<sup>38</sup> See *infra* notes \_\_\_ and accompanying text.

<sup>39</sup> Williams, *supra* note 16.

<sup>40</sup> 453 U.S. 609 (1981).

<sup>41</sup> *Id.* at 613, 629, 633.

<sup>42</sup> *Id.* at 281.

<sup>43</sup> *Id.*

the tax may well be excessive; it may impose costs (for example, in stifling valuable coal production) well in excess of the benefits that it generates. It looks like “taxation without representation” (in the Montana legislature), which is both tyranny and welfare-reducing in a federal system.<sup>44</sup>

That, in a nutshell, is 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?<sup>45</sup>

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.”<sup>46</sup> That will not do, Steve Williams notes. 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-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.<sup>47</sup> 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.”<sup>48</sup> The question is, what should it look like?

For one thing, a sensible anti-circumvention rule must not be so expansive as to swallow up state practices that are not forbidden and, indeed, affirmatively contemplated and encouraged under the federal structure. Any state tax or regulation, however configured, will have some effect on outsiders. To mow all that down in the name of non-discrimination, Steve writes, is to undermine federalism’s foundations.<sup>49</sup> For another thing, a sensible anti-circumvention rule should on net do more good than harm, *given the*

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<sup>44</sup> *Id.* (footnote omitted).

<sup>45</sup> *Id.* at 303 (alteration in original).

<sup>46</sup> See, e.g., *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922).

<sup>47</sup> Williams, *supra* note 16, 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.”).

<sup>48</sup> *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).

<sup>49</sup> See *supra* notes \_\_.



*institutional capacity of federal courts.* On Steve William’s account, the *Commonwealth Edison* dissenters, in an opinion by Justice Blackmun, angled for some such rule. Under their approach,

*the 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.”*<sup>50</sup>

That test, Steve writes, “has a conceptual beauty about it.”<sup>51</sup> Still, one should resist the temptation of making seemingly easy cases make bad doctrine. While “[t]he peculiar facts of *Commonwealth Edison* created a deceptive impression of the ease with which a court might identify an ‘exported tax’”,<sup>52</sup> any serious effort to identify discriminatory export taxes would entail “extraordinary factual complexities, line-drawing difficulties, and intrusions into state policy-making.”<sup>53</sup> 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,”<sup>54</sup> 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[.]”<sup>55</sup> At the end, the inquiry “would be similar to rules equating disproportionate impact with unconstitutional discrimination,”<sup>56</sup> 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 legislature must have acted with an intent to discriminate against interstate commerce.*”<sup>57</sup>

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<sup>50</sup> Williams, *supra* note 16, at 289 (footnotes omitted).

<sup>51</sup> *Id.* at 289–90.

<sup>52</sup> *Id.* at 290.

<sup>53</sup> *Id.* at 298

<sup>54</sup> *Id.* at 293–94. The *Commonwealth Edison* dissenters acknowledged the difficulty. However, Steve 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. v. Montana*, 453 U.S. 609, 652 (1981) (Blackmun, J. dissenting)).

<sup>55</sup> *Id.* at 290.

<sup>56</sup> Williams, *supra* note 16 at 295. Steve notes that the Supreme Court had rejected such a test—for constitutional purposes—even in cases involving race discrimination. *Id.* at 295 n.77 (citing *Washington v. Davis*, 426 U.S. 229, 248 (1976)).

<sup>57</sup> *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.

Without such a test, the author insists, “any rule against express discrimination will be too readily circumvented.”<sup>58</sup> Judge Williams’s conclusion may leave diehard formalists dissatisfied: How do you know what is “extreme enough”? Then again, that difficulty is inherent in any act of judging.

A second Article by Professor Williams, discussing a Supreme Court decision involving a state water embargo, reflects a very similar disposition.<sup>59</sup> The case, *Sporhase v. Nebraska Ex Rel. Douglas*,<sup>60</sup> 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. 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. 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.

Steve’s comment on the decision and opinion welcomes the Court’s willingness to subject water allocation to Commerce Clause scrutiny<sup>61</sup> 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.”<sup>62</sup> 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

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<sup>58</sup> *Id.* at 297.

<sup>59</sup> Stephen F. Williams, *Free Trade in Water Resources: Sporhase v. Nebraska Ex Rel. Douglas*, 2 SUP. CT. ECON. REV. 89 (1983).

<sup>60</sup> 458 U.S. 941 (1982).

<sup>61</sup> The *Sporhase* Court rejected the notion that water resources are owned by the state; therefore not an article of commerce at all; and therefore exempt from Commerce Clause scrutiny altogether. Justice Rehnquist, joined by Justice O’Connor, dissented briefly, arguing that because water was essential to life itself, and because Nebraska allowed only limited property rights in water, it was not an article of commerce. *Id.* at 963 (Rehnquist, J., dissenting).

<sup>62</sup> Williams, *supra* note 59, at 89.

conditions, a positive price 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.<sup>63</sup>

The *Sporhase* article comes close to declaring the Justices economic illiterates: none of the supposed “shortages” make any sense. The first two are wildly unrealistic—just a way of “teasing the arid states of the West.”<sup>64</sup> And, if the Court intended any of the other likely candidates, “the *Sporhase* decision either loses all of its significance or produces perverse results.”<sup>65</sup> On the third theory, states could regiment *anything* that has a positive price (not that they would ever do that). The fourth theory is burble—more politely, “an escape from definition.”<sup>66</sup> And the fifth meaning

would 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.<sup>67</sup>

Evidently, *Professor Williams* did not have the luxury *Judge Williams* enjoyed later in life—a coterie of law clerks to “de-snark” his writings (his term).

“I do not wish to suggest,” the author concludes,

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.<sup>68</sup>

In the end, Steve deemed it impossible to say anything definitive about *Sporhase's* import “until the Court clarifies its concept of shortage.”<sup>69</sup> 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

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<sup>63</sup> *Id.* at 95–96.

<sup>64</sup> *Id.* at 96.

<sup>65</sup> *Id.* at 97.

<sup>66</sup> *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. Unfortunately, it has been in vague terms such as these that westerners commonly have pleaded their case for immunity from the negative commerce clause . . .” *Id.* at 96–97.

<sup>67</sup> *Id.* at 97–98.

<sup>68</sup> Williams, *supra* note 59, at 100. Also: On “conservation”: “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.” *Id.* at 99.

<sup>69</sup> *Id.* at 98.

directly on human survival in the source state,<sup>70</sup> 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.”<sup>71</sup>

To my knowledge, Judge Williams never adjudicated a dormant Commerce Clause case. (Most of those cases, especially cases involving state taxes, arrive at the Supreme Court upon direct review of state court decisions.) Perhaps, that is just as well: he would have been compelled to apply the modern-day Court’s uncomprehending precedents.

### III. Federal Preemption

One need not speculate about Steve’s views on federal statutory preemption, or tease them out of his published opinion. He stated those views in a brief, forceful 2009 article entitled “Preemption: First Principles.”<sup>72</sup> 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*,<sup>73</sup> which committed internet regulation to the tender mercies of the states.

#### ***First Principles***

“[A]ll hands currently agree,” Judge Williams begins, “that preemption cases depend on some notion of congressional intent.”<sup>74</sup> 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.”<sup>75</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 105. [add info on later litigation].

<sup>72</sup> Williams, *supra* note 18.

<sup>73</sup> 940 F.3d 1 (D.C. Cir. 2019).

<sup>74</sup> Williams, *supra* note 18, at 323. The Article is entirely devoted to questions of implied preemption, as distinct from statutes containing an express preemption provision. The limitation is of no moment. Cases dealing with express preemption provisions must still delineate the scope or range of those provisions, and that inquiry will of needs be guided by principles and doctrines borrowed from implied preemption cases. [Cite Scalia opinion.](#)

<sup>75</sup> *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 celebrated case examples *see, e.g.*, *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

But that “essential” inquiry is—or rather should be—“often aided by having a broader sense of the statute’s overall purpose and where it fits in our constitutional scheme.”<sup>76</sup> *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.<sup>77</sup> 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.*,”<sup>78</sup> 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 agrees 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.”<sup>79</sup>

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 or against preemption, the court should ask: “What interstate collective action problem did Congress seek to solve?”<sup>80</sup> Judge Williams seeks to anchor this approach in the structure of the Constitution—not the text or history of some individual clause,<sup>81</sup> mind you, but it’s overall *structure*, which teems with clauses that are manifestly intended to vest Congress with powers over matters that “no State [is] separately competent to legislate.”<sup>82</sup> 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,”<sup>83</sup> 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

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drugs, based on a grimly clause-bound reading of the applicable statutes); *id.* at xxx (conceding that the regime makes no sense).

<sup>76</sup> Williams, *supra* note 18, at 323.

<sup>77</sup> See Sharkey, *supra* note 75, at 454. Judge Williams’ Article is sensibly read as an attempt to explain when and why such a presumption should apply, and when and why not.

<sup>78</sup> 331 U.S. 218 (1947).

<sup>79</sup> Williams, *supra* note 18 at 323.

<sup>80</sup> *Id.* at 324.

<sup>81</sup> 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 dreadfully 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).

<sup>82</sup> Williams, *supra* note 18 at 325–26. The quoted language appears in the congressional debates [more]. Judge Williams freely concedes that not all congressional powers fit this description. Most prominently, the Civil War Amendments do not. *Id.* at 326.

<sup>83</sup> *Id.* at 332.

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 more demanding state rules. Here the type of collective action problem involved easily dictates a presumption against preemption.”<sup>84</sup>

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,

*given (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.*<sup>85</sup>

Against that backdrop, statutes governing standards for sales of goods and service 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 *and a ceiling* vis-à-vis conflicting state regulation. No presumption against preemption here.<sup>86</sup>

In the third category one finds national rules that govern air or water emissions but are obviously not addressed to interstate physical externalities. (As it happens, almost the entire Clean Air Act fits that description.)<sup>87</sup> 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 impose excessively lax standards, or because polluters might have greater rent-seeking advantages at the state rather than a 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.<sup>88</sup> However, Judge Williams was deeply skeptical of the “race to the bottom” theory in either version:<sup>89</sup>

*[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*

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<sup>84</sup> *Id.* at 327.

<sup>85</sup> *Id.* at 328.

<sup>86</sup> *Id.* at 327–28.

<sup>87</sup> **Merrill**; See generally Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA L. REV. 2341 (1996).

<sup>88</sup> See *id.* at 329.

<sup>89</sup> 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)).

*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 recognition that a clearly expressed congressional viewpoint would prevail.*<sup>90</sup>

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).”<sup>91</sup> 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, Steve defends his approach against various objections. He cheerfully agrees that his approach “isn't primarily grounded in the text or history of specific clauses” of the Constitution.<sup>92</sup> 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.”<sup>93</sup> 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 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.”<sup>94</sup> Finally, what of the heralded federal-state “balance”? What of it, indeed. “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.”<sup>95</sup>

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.”<sup>96</sup> Conservative jurists were permitted to entertain such heterodox public choice-ish thoughts 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.

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<sup>90</sup> Williams, *supra* note 18, at 331.

<sup>91</sup> *Id.* at 331.

<sup>92</sup> *Id.* at 332.

<sup>93</sup> *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 off 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.”).

<sup>94</sup> *Id.* at 332.

<sup>95</sup> *Id.* at 333.

<sup>96</sup> See generally Frank Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983).

*First*, the author cautions that his approach is not intended as a “how to” guide to deciding preemption cases.<sup>97</sup> 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, among other complications.

*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 of needs be governed by some set of second-best, judge-made, quasi-constitutional rules that cannot come from the 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, instead, 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, precisely 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,

*are 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.*<sup>98</sup>

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* Steve 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 regardless of what Congress might have intended.<sup>99</sup> 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 Steve’s acute interest in and 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 Steve’s

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<sup>97</sup> See Williams, *supra* note 18, at 323–24, 332–33.

<sup>98</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 17-18 (1824) (transcript of argument) (emphasis in original).

<sup>99</sup> Judge Williams wistfully observed that “it wasn’t always so.” Williams, *supra* note 18, at 323, n.1.



meticulous attention to the details of the congressional schemes and the nuances of the administering agencies' regulations, I shall highlight the overarching theme: you'll want to understand 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. Also, they make sense.

### **Application (1): The Natural Gas (Policy) Act**

One of Steve's early academic writings tackles the preemption question just sketched in the context of—what else?—energy regulation.<sup>100</sup> More specifically, it addresses the preemptive effects of a then-recent congressional decision to *de*-regulate certain aspects of the natural gas market.

Under the 1938 Natural Gas Act,<sup>101</sup> the Federal Power Administration (FPA), later renamed FERC, broadly regulated the generation and 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*<sup>102</sup> (a 6-3 opinion penned by Justice William Brennan), that the Act affirmatively preempted enforcement of state “ratable take” orders against an interstate pipeline.<sup>103</sup> Such orders, the majority opinion 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),<sup>104</sup> which eliminated federal ratemaking control over natural gas (with some transitional grandfathering arrangements). So the question naturally arises, or in any event it naturally occurred to Steve: what does that reform do to the broad, states-can't-do-nuthin' preemption holding of *Northern Natural*?

Steve's Article turns on subtle statutory nuances, as well as some arcane points about the economics of energy regulation. Even my bowdlerized summary will take readers deeper into the weeds, or wells, than they might care. The starting point, however, is straightforward.

Anticipating a key point of *First Principles*, Steve 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 serves “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.”<sup>105</sup> However, “some reformulation of these purposes is required”:<sup>106</sup> why? Because this, like *Sporhase's* “scarcity,” is New Deal burble. Or, as Steve put it more gently, “‘exploitation’ and ‘excessive rates’ are terms with little or no cognitive meaning, particularly given the absence of monopoly [in the

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<sup>100</sup> *Federal Preemption of State Conservation Laws After the Natural Gas Policy Act: A Preliminary Look*, 56 *COLO. L. REV.* 521 (1985).

<sup>101</sup> At the time of Steve's writing, 15 U.S.C. § 717 (1982).

<sup>102</sup> *N. Nat. Gas Co. v. State Corp. Comm'n*, 372 U.S. 84 (1963).

<sup>103</sup> 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.

<sup>104</sup> 15 U.S.C. §§ 3301–3342 (1982).

<sup>105</sup> Williams, *supra* note 100, 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*, 360 U.S. 378, 388 (1959)).

<sup>106</sup> *Id.* at 522.

wellhead market].”<sup>107</sup> So then what *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 [FPA] hold wellhead natural gas prices below market levels, in the name of consumer interests; rightly or wrongly, it imputed such a purpose to Congress.”<sup>108</sup>

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.<sup>109</sup> 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.”<sup>110</sup> 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, in a case pending at the time of Steve’s writing.<sup>111</sup> And 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.”<sup>112</sup>

It is not obvious, however, that this form of preemption should work both ways in this scenario. The natural gas market at the wellhead may 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 did not think so. To squeeze the problem into the Supreme Court’s conventional preemption categories (which Steve was never fond of, and which the Article under discussion eschews): 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 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.”<sup>113</sup> “[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.”<sup>114</sup>

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<sup>107</sup> *Id.* at 524 (alteration in original).

<sup>108</sup> *Id.* (footnote omitted).

<sup>109</sup> *See id.* at 524–25 n.25.

<sup>110</sup> *Id.* at 526.

<sup>111</sup> *See Transcon. Gas Pipe Line Corp. v. State Oil and Gas Bd.*, 474 U.S. 409 (1986) (5–4 decision).

<sup>112</sup> *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).

<sup>113</sup> Williams, *supra* note 100, at 522.

<sup>114</sup> *Id.* at 526.

The Supreme Court’s global presumptions gloss over all of this—and, in the process, vitiate congressional objectives. That, to Steve’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 primary standard should now be whether the state action is congruent with development of the sort of market that Congress sought to achieve.*<sup>115</sup>

For good or ill but mostly for ill, the U.S. Supreme Court declined to heed his suggestion.<sup>116</sup>

### ***Application (2): FERC, Dam It***

Title I of 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.”<sup>117</sup> A 200x case, *Albany Engineering*,<sup>118</sup> presented the question whether § 10(f) preempts state law or rather allows states to mandate compensation for costs *other than* “interest, maintenance, and depreciation.” (The upstream

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<sup>115</sup> *Id.* at 536.

<sup>116</sup> See *Transcon. Gas Pipe Line Corp. v. State Oil and Gas Bd.*, 474 U.S. 409 (1986) (5–4 decision), [discuss Transco case.](#)

422: That FERC can no longer step in to regulate directly the prices at which pipelines purchase high-cost gas, however, has little to do with whether state regulations that affect a pipeline’s costs and purchasing patterns impermissibly intrude upon federal concerns. Mississippi’s action directly undermines Congress’ determination that the supply, the demand, and the price of high-cost gas be determined by market forces. To the extent that Congress denied FERC the power to regulate affirmatively particular aspects of the first sale of gas, it did so because it wanted to leave determination of supply and first-sale price to the market.

<sup>117</sup> 16 U.S.C. § 803(f) (2006). The full 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.

<sup>118</sup> 548 F.3d 1071 (D.C. Cir. 2008).

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.)<sup>119</sup>

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.”<sup>120</sup> However, it insisted that its own reading of the ambiguous statute was also not unreasonable, and thus deserved *Chevron* deference.<sup>121</sup> 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.”<sup>122</sup>

Several things are noteworthy.

*First*, it is quite unusual for a federal court—at least for the U.S. Supreme Court—to find preemption in a case where the federal agency disclaims it.<sup>123</sup> 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 (barring, perhaps, a crystal-clear statute mandating preemption, and an contrary agency position that borders on dereliction or abdication). *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 then-recent **four-justices dissent** in an important preemption case, insisting (with some vehemence) that *Chevron* should not extend to agency preemption determinations.<sup>124</sup> Judge Williams briefly noted that extant Circuit precedent was to the contrary<sup>125</sup>--and then deftly sidestepped the issue: we reject the agency’s position even under *Chevron*.<sup>126</sup> 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.<sup>127</sup> Thus, the Court noted, “FERC’s position . . . must be that although Congress would not allow it to

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<sup>119</sup> The facts are considerably more involved. See *Albany Eng’g* at 1073–74, 1077–78; see also [later case]. However, the complications are immaterial for present purposes.

<sup>120</sup> Br at xx. [twice at least].

<sup>121</sup> *Id.* at 1074–75, 1077.

<sup>122</sup> *Id.* at 1073. Judge Brown... Complicated remedial issue. I’ll ignore.

<sup>123</sup> I haven’t systematically examined appellate decisions. However, two empirical studies of Supreme Court preemption decisions over a combined period of xx years failed to discover a single case in which the Court rejected the Solicitor General’s “no preemption” position.

<sup>124</sup> *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007).

<sup>125</sup> See *Albany Eng’g Corp. v. FERC*, 548 F.3d 1071, 1074 (D.C. Cir. 2008) (citing *Okla. Nat. Gas Co. v. FERC*, 28 F.3d 1281, 1284 (D.C. Cir. 1994).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1075.

mandate collection of other types of costs, it meant to allow the states to do so freely.”<sup>128</sup> And this, the Court continued, made no sense at all: “[N]either the overall function of the FPA, nor the sense of § 10(f), allows us to infer such a meaning.”<sup>129</sup> 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.<sup>130</sup>

The key paragraphs of the opinion neatly encapsulate the concerns that animate Steve’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.*<sup>131</sup>

### **Application (3): Net Neutrality Free-For-All**

The question of federal non-regulation surfaces in a third permutation in *Mozilla v. Federal Communications Commission*,<sup>132</sup> a central episode in the long-running and apparently interminable battle over “net neutrality.” Initially, the FCC classified certain internet service providers (“ISP’s”) as “information services.” Under Title I of the 1996 Telecommunications Act, such entities are by and large 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—upon the President’s direct instruction—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: ISP’s fall under Title I and therefore “light touch” regulation.

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at. 1078 (“[E]ven though Albany currently pays the exact same amount as it did before this change in District policy, it will have to take on the expense of proving that the district’s charges are at least in part “really” for interest, maintenance, and depreciation. . . . [T]he burden would likely be heavy – far beyond anything . . . Congress might have approved.”) *Id.*

<sup>131</sup> *Albany Eng’g Corp. v. FERC*, 548 F.3d 1071, 1074 (D.C. Cir. 2008).

<sup>132</sup> 940 F.3d 1 (D.C. Cir. 2019).

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 ISP’s. Undoubtedly, the Court held, Title II regulations have preemptive force and preclude states from imposing rival or conflicting controls: the statute says so.<sup>133</sup> In contrast, Title I grants the agency no express preemption authority. Thus, once the FCC parked ISP’s under Title I, states were set free to regulate them to their hearts’ content, subject only to a minor proviso.<sup>134</sup>

Judge Williams dissented in here-relevant part. While agreeing with the majority’s “arbitrary and capricious” holding and opinion, he was—what’s the polite word? Mystified? Dumbfounded?—by the preemption holding. He explained his reasons in a lengthy and to my mind compelling dissenting opinion. The regulators, he noted (after a splendid Shakespeare quote),<sup>135</sup> are being

*told 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.*<sup>136</sup>

Judge Williams readily conceded that Title I does not expressly authorize the FCC to preempt contravening state regulation. But the notion that preemption authority must be express hasn’t been the law since 1789 or thereabouts (my snark, not the Judge’s). Preemption authority may be implied;<sup>137</sup> 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.”<sup>138</sup>

On the majority’s theory, Judge Williams continued, the consequence of the Commission’s choice of Title I was “little more than flick the federal regulatory switch into the off position . . . . On that view, the

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<sup>133</sup> Stat cite.

<sup>134</sup> See *infra* notes \_\_\_.

<sup>135</sup> “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. v. FCC, 940 F.3d 1, 118 (2019) (Williams, J., **dissenting**) (quoting *Shakespeare* and *Macbeth*).

<sup>136</sup> *Id.* (alteration in original) (citation omitted).

<sup>137</sup> 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 121 (Williams, J. dissenting), *expressio unius* is an easily trumped canon in this setting.

<sup>138</sup> *Mozilla Corp.*, 940 F.3d at 120.

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.”<sup>139</sup> 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.”<sup>140</sup> 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.”<sup>141</sup> We all agree, Judge Williams concludes,

*that the 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 preemptive power to protect an agency’s regulatory choices, they vacate 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.*<sup>142</sup>

Steve was sufficiently exasperated to send 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 obligation to avoid absurd results,<sup>143</sup> and when, as here, non-preemption would produce the very result that the agency seeks to forestall, I’d 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, Steve did not go there; he did not need to. Quite plainly, however, that’s 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, three concluding thoughts.

One: over the past four decades, spanning Steve’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, neo-Madisonian thought about institutional actors and their incentives. That way lies law school tenure—but no serious insight concerning our public affairs, or for that matter a sensible jurisprudence.

Two, and relatedly: political economy has likewise disappeared from the dominant strands of more doctrinally oriented scholarship and adjudication. Judge Williams was never doctrinaire about his approach: as I hope to have illustrated, he deemed it a useful first-cut framework of organizing a mess of

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 122.

<sup>142</sup> *Id.* at 130 (citation omitted).

<sup>143</sup> See, e.g., *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014).

cases and empirics. Always and everywhere, however, he insisted that the first cut isn't the final (judicial) answer: *that* will 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 orthodoxy that clouds itself in neutrality and to that end resorts to hyper-textualism<sup>144</sup>—only to turn it upside-down when certain cases, with dismayingly frequency involving the Affordable Care Act, seem to require it.<sup>145</sup> Judge Williams advocated, and exercised, *actual* judicial modesty.

Third, and on the federalism theme here explored: ours would be a *very* fine time to attend to federalism's "horizontal" dimension. It drops out of sight so long as one thinks of "the states" as a cohesive front of unitary actors and benign despots. As illustrated above, it comes into sharp view on Judge Williams's political economy account. And yet the U.S. Supreme Court has barely cast a sideward glance. 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.<sup>146</sup> Surely, they are aware of some 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<sup>147</sup>--without at least flipping through the petitions. And surely, they comprehend that in cases involving climate change, immigration, the Affordable Care Act, and other such matters, our sisterly states litigate against one another as blocs, for partisan ends and economic advantage.<sup>148</sup> Not one Supreme Court case or opinion on record reflects any judicial recognition of that reality. Judge Williams always saw it, and he viewed federalism problems through that lens.<sup>149</sup>

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

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<sup>144</sup> See, e.g., *Bostock v. Clayton Cnty*, 140 S.Ct. 1731 (2020).

<sup>145</sup> See, e.g., *King v. Burwell*, 576 U.S. 473 (2015).

<sup>146</sup> Cites etc.

<sup>147</sup> *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), *cert. denied* 573 U.S. 946 (2014); *S&M Brands, Inc. v. Caldwell*, 614 F.3d 172 (5th Cir. 2010), *cert. denied*, 562 U.S. 1270 (2011). Both cert petitions were relisted several times.

<sup>148</sup>

<sup>149</sup> See, e.g., *Mozilla Corp. v. FCC*, 940 F.3d 1 (2019) (Williams, J., dissenting) [cite/quotes].