

September 2012

# Federal Governmental Power: Preemption from the October 2008 Term

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## Recommended Citation

Kaufman, Eileen (2012) "Federal Governmental Power: Preemption from the October 2008 Term," *Touro Law Review*: Vol. 26: No. 2, Article 8.

Available at: <http://digitalcommons.tourolaw.edu/lawreview/vol26/iss2/8>

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# Federal Governmental Power: Preemption from the October 2008 Term

**Cover Page Footnote**

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## FEDERAL GOVERNMENTAL POWER: PREEMPTION FROM THE OCTOBER 2008 TERM

*Eileen Kaufman*\*

### I. INTRODUCTION

In a stunning trifecta, the Supreme Court ruled in favor of consumers and held that federal law did not preempt state consumer claims. The three cases concerned patients injured by drugs,<sup>1</sup> smokers misled by false advertising,<sup>2</sup> and borrowers victimized by predatory lending practices.<sup>3</sup> These cases represent the latest battle in the ongoing war between consumer advocates and business entities over whether federal laws should be interpreted to erect barriers against state consumer protection laws.

*Wyeth v. Levine* raised the issue of whether approval of a drug by the F.D.A. preempts a state tort claim based on failure to warn.<sup>4</sup> *Altria Group, Inc. v. Good* raised the question of whether the Federal Cigarette Labeling Act preempts a state fraud claim.<sup>5</sup> Lastly, *Cuomo v. Clearing House Ass'n* raised the question of whether the National Bank Act preempted Eliot Spitzer from enforcing New York's fair lending laws against national banks.<sup>6</sup> In each of these cases, the

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<sup>1</sup> *Wyeth v. Levine*, 129 S. Ct. 1187 (2009).

<sup>2</sup> *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008).

<sup>3</sup> *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009).

<sup>4</sup> *Wyeth*, 129 S. Ct. at 1193 ("The question presented . . . is whether the FDA's drug labeling judgments preempt state law product liability claims premised on the theory that different labeling judgments were necessary to make drugs reasonably safe for use.") (internal quotation marks omitted).

<sup>5</sup> *Altria*, 129 S. Ct. at 545 ("Although it is clear that fidelity to the Act's purposes does not demand the pre-emption of state fraud rules, the principal question that we must decide is whether the text of [the Act] nevertheless requires that result.").

<sup>6</sup> *Cuomo*, 129 S. Ct. at 2714-15 ("The question presented is whether the Comptroller's

Court found that the state claim was not preempted—a surprising result given that the Roberts Court had previously consistently found in favor of preemption.<sup>7</sup>

## II. THE PREEMPTION DOCTRINE

The preemption doctrine is deceptively simple. It reflects the principles of the Supremacy Clause, which dictates that federal law trumps conflicting state laws.<sup>8</sup> Determining whether federal law preempts state law is a function of whether Congress *intended* to preempt state law.<sup>9</sup> The oft-quoted maxim that appears in virtually every preemption case is, “Congressional intent is the ‘touchstone’ of preemption.”<sup>10</sup> The determinative question is, “did Congress intend to preempt state law when it legislated?” Thus, theoretically, preemption cases are not about whether Congress should preempt the states, or whether the federal regulation is preferable to state regulation, or whether consumers require additional state protection, or whether the Tenth Amendment is offended by the federal government intruding into areas traditionally regulated by the states. Instead, the sole issue for the Court, at least theoretically, is to determine whether Congress did, indeed, intend to preempt state law.

There are several ways Congress can preempt state law. First,

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regulation purporting to pre-empt state law enforcement can be upheld as a reasonable interpretation of the National Bank Act.”)

<sup>7</sup> See *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008) (holding that a federal regulation of medical devices preempts state tort claims).

<sup>8</sup> Viet D. Dinh, *Regulatory Compliance as a Defense to Products Liability: Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2085, 2088 (2000).

[T]he Supremacy Clause . . . provides that congressional enactments consistent with the Constitution ‘shall be the supreme Law of the Land.’ Although . . . the Supremacy Clause itself does not authorize Congress to preempt state laws . . . [it is] a constitutional choice of law rule, one that gives federal law precedence over conflicting state law.

*Id.* (quoting U.S. CONST. art. VI, cl. 2).

<sup>9</sup> *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 280 (1987).

<sup>10</sup> Chang Derek Liu, *The Blank Page Before You: Should the Preemption Doctrine Apply to Unwritten Practices?*, 109 COLUM. L. REV. 350, 359 (2009). See also *Montalvo v. Spirit Airlines*, 508 F.3d 464, 471 (9th Cir. 2007) (“[O]ur analysis of the scope of the statute’s preemption is guided by the oft-repeated comment that the purpose of Congress is the ultimate touchstone in every preemption case.”); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (“‘[T]he purpose of Congress is the ultimate touchstone’ of pre-emption analysis.” (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978))).

it can do it expressly.<sup>11</sup> Congress can simply write into the statute a provision that explicitly preempts state law. Although it sounds simple, the Court is often sharply divided on the issue of whether the express preemption provision was meant to apply to the particular state law claim at issue. Indeed, in *Altria Group, Inc.*, last Term's tobacco case, the Federal Labeling Act did contain an express preemption provision, but the Court divided five to four on whether that provision preempted a state law fraud claim.<sup>12</sup>

Congress can also impliedly preempt state law in one of two ways—field preemption and conflict preemption. Field preemption is where Congress regulates the field so pervasively as to give rise to the inference that it intended to leave no room for the states to act. Conflict preemption is where compliance with both federal and state law is impossible, or where state law stands as an obstacle to achieving the federal purpose.

That is the governing framework for analyzing preemption cases. But, last Term's three preemption cases demonstrate that divining congressional intent is not easy. These three decisions were sharply divided, and that is not unusual in preemption cases because congressional intent is not always that transparent.

### III. *WYETH V. LEVINE*

*Wyeth* was the most closely watched preemption case, because it raised the issue of whether federal approval of a drug prevents lawsuits by injured patients.<sup>13</sup> Three years ago, the Bush Administration dramatically reversed long-standing policy and announced that F.D.A. approval protects drug companies from state tort claims. In other words, F.D.A. approval operates as a shield against such claims.<sup>14</sup> Until that time, the agency's position was that

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<sup>11</sup> Dinh, *supra* note 8, at 2098 (“[I]n express preemption cases, Congress has specifically legislated and defined the areas where state laws are displaced.”).

<sup>12</sup> *Altria*, 129 S. Ct. at 543 (“If a federal law contains an *express* pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress’ displacement of state law still remains.”) (emphasis added).

<sup>13</sup> *Wyeth*, 129 S. Ct. at 1191 (“The question we must decide is whether the FDA’s approvals provide Wyeth with a complete defense to Levine’s tort claims.”).

<sup>14</sup> See Terry Carter, *The Pre-emption Prescription*, 94 A.B.A. J. 42, 43 (Nov. 2008) (“FDA approval of labeling . . . pre-empts conflicting or contrary state law.” (quoting Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3933 (Jan. 24, 2006) (to be codified at 21 C.F.R. pts. 210, 314,

F.D.A. approval merely created a floor, not a ceiling, and therefore did not preempt state tort claims.<sup>15</sup> In fact, the state tort claims were seen as complementing the regulatory scheme.<sup>16</sup>

Diane Levine was a professional musician who specialized in children's music. She suffered from a migraine and went to her local clinic where she was given the drug Phenergan, a drug designed to combat nausea.<sup>17</sup> This drug can be administered in a few different methods: (1) intra-muscularly; (2) through an intravenous drip, where it is mixed with saline and descends slowly through a catheter into the patient's vein; or (3) far more dangerously, through what is called an intravenous push, where the drug is injected directly into the patient's vein.<sup>18</sup> The third method was used to administer the drug to Diane Levine.<sup>19</sup>

Directly injecting Phenergan into a vein creates a significant risk of what the Court referred to as "catastrophic consequences" because the drug is corrosive and if it enters an artery it causes irreversible gangrene.<sup>20</sup> That is precisely what happened to Diane Levine.<sup>21</sup> Her right hand and forearm turned black, and within a couple of weeks, the doctors had to amputate first her hand, then her forearm.<sup>22</sup> Her career as a professional guitarist was effectively ended.<sup>23</sup>

Levine sued the drug-manufacturer, Wyeth, on a failure to warn claim.<sup>24</sup> Wyeth had warned consumers about both the dangers

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<sup>15</sup> *Wyeth*, 129 S. Ct. at 1202 (noting that the FDA, prior to 2006, "cast federal labeling standards as a floor upon which States could build and repeatedly disclaimed any attempt to preempt failure-to-warn claims").

<sup>16</sup> *Id.* at 1202 n.10 (referencing Margaret Jane Porter, *The Lohr Decision: FDA Perspective and Position*, 52 *FOOD & DRUG L.J.* 7, 10 (1997)).

<sup>17</sup> *Id.* at 1191 ("Phenergan is Wyeth's brand name for . . . [an] antihistamine used to treat nausea.").

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (noting that Levine initially received an intra-muscular injection of Phenergan that morning, but returned in the afternoon for a second injection, using the intravenous push method, because the initial injection did not provide any relief).

<sup>20</sup> *Wyeth*, 129 S. Ct. at 1190-91.

<sup>21</sup> *Id.* at 1191 ("Phenergan entered Levine's artery, either because the needle penetrated an artery directly or because the drug escaped from the vein into surrounding tissue . . . where it came in contact with arterial blood.").

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1191-92. Her claims against the clinic and the physician assistant settled for \$700,000. *Wyeth*, 129 S. Ct. at 1191.

Levine alleged that the labeling was defective because it failed to in-

of Phenergan entering the arteries and accidental arterial penetration, but had not warned against the increased risk of this happening through the intravenous push method of injection.<sup>25</sup> A five-day trial resulted in a verdict for plaintiff of approximately seven million dollars.<sup>26</sup> The Vermont Supreme Court affirmed the verdict<sup>27</sup> and the Supreme Court subsequently granted certiorari.<sup>28</sup>

Wyeth argued that although Congress had not expressly preempted the state tort claim, it had impliedly done so because compliance with both state and federal law was impossible, and because the state failure to warn claim obstructed the purposes of federal law.<sup>29</sup> The Court rejected both arguments.<sup>30</sup> As to whether compliance with both state and federal law was impossible, Wyeth unsuccessfully argued that federal law established both a floor and a ceiling; in other words, that F.D.A. approval of a drug label meant that the manufacturer was disabled from altering it without F.D.A. approval.<sup>31</sup> The Court disagreed, stating that impossibility preemption is a demanding defense<sup>32</sup> and that impossibility was not demonstrated here because the federal regulations actually permitted Wyeth to unilaterally strengthen its warning.<sup>33</sup> As Wyeth began learning of

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struct clinicians to use the IV-drip method of intravenous administration instead of the higher risk IV-push method . . . [and that] the foreseeable risks of gangrene and loss of limb are great in relation to the drug's therapeutic benefits.

*Id.* at 1191-92.

<sup>25</sup> *Id.* at 1191-92 & n.1 (The warning stated, in pertinent part, that: "Reports compatible with inadvertent intra-arterial injection of Phenergan Injection . . . suggest that pain, severe chemical irritation, severe spasm of distal vessels, and resultant gangrene requiring amputation are likely under such circumstances.").

<sup>26</sup> *Id.* at 1192-93.

<sup>27</sup> *Id.* at 1193.

<sup>28</sup> *Wyeth*, 129 S. Ct. at 1193 (granting certiorari based on "the importance of the preemption issue" and the FDA's stance that "the jury's verdict conflicted with federal law because it was inconsistent with the FDA's conclusion that intravenous administration of Phenergan was safe and effective").

<sup>29</sup> *Id.* at 1196, 1199.

<sup>30</sup> *Id.* at 1204 ("We conclude that it is not impossible for Wyeth to comply with its state and federal law obligations and that Levine's common-law claims do not stand as an obstacle to the accomplishment of Congress' purposes in the [Food, Drug, and Cosmetic Act].").

<sup>31</sup> *Id.* at 1199.

<sup>32</sup> *Id.* at 1198-99 ("[A]bsent clear evidence that the FDA would not have approved a change to Phenergan's label, we will not conclude that it was impossible for Wyeth to comply with both federal and state requirements.").

<sup>33</sup> *Wyeth*, 129 S. Ct. at 1196, 1199.

the dangers of this intravenous push method of injection—apparently there were twenty other patients who had lost limbs due to gangrene—it had a duty to provide a warning that described the risk before receiving F.D.A. approval.<sup>34</sup>

Wyeth fared no better on its second preemption argument—that the state tort claim would frustrate the purposes of the federal law.<sup>35</sup> To the contrary, the Court reviewed the history of federal regulation of labeling drugs, and concluded that Congress did not intend F.D.A. oversight to be the exclusive means of ensuring drug safety.<sup>36</sup>

What about the agency's role? What about the fact that the F.D.A., in 2006, amended its regulations and included a preamble that purports to expressly preempt state claims?<sup>37</sup> Should the Court not show deference to the agency? It depends. First, the Court stated that agencies have no power “to pronounce on pre-emption absent delegation by Congress,” and here, there was no such delegation.<sup>38</sup> And, the weight to be given to an agency's position on preemption depends on its thoroughness, its consistency, and its persuasiveness.<sup>39</sup> Using that approach, the Court concluded that the 2006 preamble was entitled to no weight, because: (1) it was not preceded by notice, and (2) it was a marked departure from the longstanding position of both Congress and the agency, which was to treat labeling requirements as minimal requirements, not as standards that displaced more rigorous

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[I]f a manufacturer is changing a label to ‘add or strengthen a contraindication, warning, precaution, or adverse reaction’ or to ‘add or strengthen an instruction about dosage and administration that is intended to increase the safe use of the drug product,’ it . . . need not wait for FDA approval.

*Id.* at 1196 (quoting 21 C.F.R. § 314.70(c)(6)(iii)).

<sup>34</sup> *Id.* at 1197.

<sup>35</sup> *Id.* at 1199 (finding that there was “no merit in this argument, which relies on an untenable interpretation of congressional intent and an overbroad view of an agency's power to pre-empt state law”).

<sup>36</sup> *Id.* at 1200.

<sup>37</sup> *Wyeth*, 129 S. Ct. at 1200 (“In that preamble, the FDA declared that . . . ‘FDA approval of labeling . . . preempts conflicting or contrary State law.’” (quoting Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3934 (Jan. 24, 2006) (to be codified at 21 C.F.R. pts. 210, 314, 601))).

<sup>38</sup> *Id.* at 1201 (explaining that the Court will not defer “to an agency's *conclusion* that state law is pre-empted,” but will consider the “agency's explanation of how state law affects the regulatory scheme.”).

<sup>39</sup> *Id.*

state requirements.<sup>40</sup>

It is difficult to overstate the significance of this ruling. Some speculate this decision will cost pharmaceutical companies billions of dollars and that it opens the door to tens of thousands of pending legal claims against the drug manufacturers.<sup>41</sup> For example, one month after the decision, twenty-seven claims against Bristol Meyers Squibb, the manufacturer of Plavix, which had been put on hold, were restored to the calendar. Apparently, there are thousands of patients who were allegedly injured by Plavix ready to sue Bristol Meyers Squibb for failing to warn of serious side effects of the drug.<sup>42</sup>

Two days after *Wyeth*, the Supreme Court sent two cases back to the Third Circuit Court of Appeals.<sup>43</sup> One was against Glaxo and the other against Pfizer<sup>44</sup> for failing to warn that their antidepressant drugs carried a significant risk of suicide.<sup>45</sup> In those cases, the Third Circuit had dismissed the claims against Pfizer on preemption grounds.<sup>46</sup> The Glaxo litigation has already settled for an undisclosed amount.<sup>47</sup>

#### IV. *ALTRIA GROUP, INC. V. GOOD*

Altria Group, Inc., is the parent company of Philip Morris

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<sup>40</sup> *Id.* at 1201-02 (finding the FDA's position to be "inherently suspect," due to its failure to provide interested parties the opportunity to comment on the changes in the preamble and the lack of a reasoned explanation for reversing their longstanding policy).

<sup>41</sup> Barry Meier & Natasha Singer, *Drug Ruling Puts Devices in Spotlight*, N.Y. TIMES, Mar. 5, 2009, at B1 (discussing the likely flood of lawsuits following *Wyeth*, and its impact on the liability of medical device makers who are currently still protected from product liability lawsuits in state courts).

<sup>42</sup> Sylvia Hsieh, *Plavix Cases Are Now Back on Track*, MINN. LAW., May 18, 2009, available at 2009 WLNR 9568589.

<sup>43</sup> *Colacicco v. Apotex, Inc.*, 129 S. Ct. 1578, 1578-79 (2009).

<sup>44</sup> *Colacicco v. Apotex, Inc.*, 521 F.3d 253, 256 (3d Cir. 2008) (consolidated on appeal with *McNellis ex rel DeAngelis v. Pfizer, Inc.*, No. Civ. 05-1286(JBS), 2006 WL 2819046 (D.N.J. Sept. 29, 2006)).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 276 ("[B]ased on our own review of the FDCA, the FDA's regulations, and the FDA's actions taken pursuant to its statutory authority, we conclude that the failure-to-warn claims brought by *Colacicco* and *McNellis* conflict with, and are therefore preempted by, the FDA's regulatory actions.").

<sup>47</sup> Jet Feeley & Margaret Cronin Fisk, *Glaxo Said to Have Paid \$1 Billion in Paxil Suits (Update2)*, BLOOMBERG.COM, Dec. 14, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a3uBVGqO4iDk>.

U.S.A., Inc.,<sup>48</sup> so this is a tobacco case. The case graphically illustrates two points: (1) that preemption analysis lacks “theoretical eloquence,” an observation the Court itself made; and (2) that figuring out what Congress intended is not easy, even when there is an express preemption clause.<sup>49</sup>

*Altria* revisits the issue from *Cipollone v. Liggett Group, Inc.*, a 1992 tobacco case that sharply divided the Court and failed to produce a majority opinion on the meaning of the express preemption provision in the Federal Cigarette Labeling and Advertising Act.<sup>50</sup> In *Cipollone*, the Court employed what some have termed a “hodge-podge approach,” meaning that some state claims were permitted, but others were preempted by federal law.<sup>51</sup>

The question in *Altria* was whether the Federal Cigarette Labeling Act preempts a state law fraud claim.<sup>52</sup> The alleged fraud was that Marlboro Lights delivered less tar and nicotine than regular brands.<sup>53</sup> Long-time smokers of Marlboro Lights contended that they were deceived into thinking that these cigarettes offered a healthier alternative to regular cigarettes.<sup>54</sup> In fact, the tobacco companies allegedly knew that although light cigarettes delivered less tar and nicotine when smoked by machines, the same was not true when smoked by humans.<sup>55</sup> This was because humans compensate by inhaling more deeply and by covering the ventilation holes.<sup>56</sup>

The Supreme Court permitted the fraud claim to proceed, finding no express or implied preemption.<sup>57</sup> Although the federal law

<sup>48</sup> *Altria*, 129 S. Ct. at 541.

<sup>49</sup> See *id.* at 547-48 (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 529 (1992) (plurality opinion)).

<sup>50</sup> *Cipollone*, 505 U.S. at 531 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>51</sup> *Id.* at 543 (“I can perceive no principled basis for . . . [the] asserted distinctions among the common-law claims, and I cannot believe that Congress intended to create such a hodge-podge of allowed and disallowed claims when it amended the pre-emption provision in 1970.”).

<sup>52</sup> *Altria*, 129 S. Ct. at 541.

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

<sup>54</sup> *Id.*

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

<sup>56</sup> *Id.* at 541-42 (“‘Light’ cigarettes are in fact more harmful because the increased ventilation that results from their unique design features produces smoke that is more mutagenic . . . than the smoke of regular cigarettes.”).

<sup>57</sup> *Altria*, 129 S. Ct. at 541. In permitting the fraud claim to proceed, the Court explained:

We conclude, as we did in *Cipollone*, that the Labeling Act does not pre-

expressly preempts state requirements based on smoking and health, the Court interpreted the express preemption provision as not encompassing the duty not to make fraudulent statements.<sup>58</sup> Therefore, a claim based on a state Unfair Trade Practices Act was permitted to proceed.

This was a five to four decision<sup>59</sup> with Justice Thomas writing a lengthy dissent<sup>60</sup> in which he argues that the Court's claim-by-claim approach is unworkable, creates mischievous results, and has wreaked havoc in the lower courts.<sup>61</sup> Justice Thomas also criticizes the Court for its reliance on a presumption against preemption, which he concludes has been or should be abandoned in express preemption cases.<sup>62</sup> We will see that his position is quite different in cases of implied preemption.

*Altria* opens the door to a new wave of tobacco litigation based on fraudulent advertising with regard to light, ultra light, or low-tar cigarettes, which are reportedly smoked by approximately eighty-five percent of the forty-five million Americans who smoke.<sup>63</sup> So, while federal law preempts state lawsuits against tobacco companies based on failure to warn, it does not bar claims based on false advertising.<sup>64</sup> Proof of the potential impact of this decision is that five years ago, a ten billion dollar verdict against Philip Morris,

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empt state-law claims . . . that are predicated on the duty not to deceive. We also hold that the FTC's various decisions with respect to statements of tar and nicotine content do not impliedly pre-empt [the smokers'] claim. . . . [N]either the Labeling Act's pre-emption provision nor the FTC's actions in this field prevent a jury from considering that claim.

*Id.* at 551.

<sup>58</sup> *Id.* at 547 (“[T]he phrase ‘based on smoking and health’ fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements.” (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 529 (1992) (plurality opinion))) (internal quotation marks omitted).

<sup>59</sup> *Altria*, 129 S. Ct. at 540-41 (Justice Stevens' majority opinion was joined by Justices Kennedy, Souter, Ginsburg, and Breyer).

<sup>60</sup> *Id.* at 551 (Thomas, J., dissenting).

<sup>61</sup> *Id.* at 555 (“[T]he mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great.” (quoting *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965))).

<sup>62</sup> *Id.* at 554.

<sup>63</sup> Manatt, Phelps & Phillips, L.L.P., *High Court Green-Lights “Light” Cigarette Cases*, Feb. 5, 2009, [http://www.martindale.com/litigation-law/article\\_Manatt-Phelps-Phillips-LLP\\_607158.htm](http://www.martindale.com/litigation-law/article_Manatt-Phelps-Phillips-LLP_607158.htm).

<sup>64</sup> *Altria*, 129 S. Ct. at 551.

U.S.A., Inc. based on its marketing of light cigarettes<sup>65</sup> was reversed on grounds of preemption.<sup>66</sup> Presumably, given the decision in *Altria*, that verdict would stand today. However, recovery in those cases is unlikely to be high because the damages sought are not damages associated with health effects; rather, these are fraud claims so what is being sought are damages for overpaying for a product that turned out to be less valuable than advertised.

## V. *CUOMO V. CLEARING HOUSE ASS'N, L.L.C.*

This case questioned whether then-Attorney General Eliot Spitzer, the so-called “sheriff of Wall Street,” had overstepped his authority when he tried to enforce New York’s fair lending laws against national banks.<sup>67</sup> More specifically, he was investigating whether banks were making a disproportionately large percentage of high-interest loans to minorities.<sup>68</sup>

The banks refused to comply with Spitzer’s demand for information, and a consortium of them filed suit to stop Spitzer’s investigation.<sup>69</sup> The case was combined with a lawsuit brought by the Office of the Comptroller of the Currency, who argued that Spitzer’s actions were preempted by the National Bank Act, which gave the Comptroller the exclusive power—the “visitorial power”—to examine national banks.<sup>70</sup> Both the district court and circuit court agreed with the Comptroller, holding that the federal law preempted Spitzer’s action.<sup>71</sup>

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<sup>65</sup> *Price v. Philip Morris, Inc. (Prince I)*, No. 00-L-112, 2003 WL 22597608, at \*29 (Ill. Cir. Mar. 21, 2003).

<sup>66</sup> *Price v. Philip Morris, Inc. (Prince II)*, 848 N.E.2d 1, 6 (Ill. 2005).

<sup>67</sup> *Cuomo*, 129 S. Ct. at 2714 (“[The Attorney General] sent letters to several national banks making a request ‘in lieu of subpoena’ that they provide certain non-public information about their lending practices . . . to determine whether the banks had violated the State’s fair-lending laws.”).

<sup>68</sup> *Clearing House Ass’n v. Cuomo*, 510 F.3d 105, 109 (2d Cir. 2007) (“[D]ata appeared to indicate that a significantly higher percentage of high-interest home mortgage loans [were] issued to African-American and Hispanic borrowers than to white borrowers.”).

<sup>69</sup> *Cuomo*, 129 S. Ct. at 2714.

<sup>70</sup> *Id.* at 2714-15. The applicable provision of the National Bank Act states, in pertinent part, that: “No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress . . . .” 12 U.S.C.A. § 484(a) (West 2009).

<sup>71</sup> *Cuomo*, 129 S. Ct. at 2714.

The Supreme Court reversed, in a five to four decision,<sup>72</sup> siding with New York plus the forty-nine other states and the District of Columbia, which had supported New York in the litigation.<sup>73</sup> The issue in the case was whether a federal regulation that purported to preempt state law enforcement was a reasonable interpretation of the National Bank Act.<sup>74</sup> The majority said it was not, and therefore, that agency position was not entitled to deference.<sup>75</sup> Justice Scalia wrote the majority opinion, joining with the four so-called “liberal” Justices, a rather unusual lineup.

The upshot of this case is that federal oversight of national banks is not exclusive; states have a role to play in regulating national banks, particularly when it comes to enforcing their own consumer protection laws and laws that prohibit discrimination in lending practices. The decision served to reverse a long trend of states losing battles with federal officials over banking regulatory oversight.<sup>76</sup> Needless to say, the decision was condemned by many in the financial sector who said it would be very hard for national banks to conform to a patchwork of different state requirements.<sup>77</sup> Consumer advocates, just as predictably, praised the decision as putting “more consumer cops on the consumer crime beat.”<sup>78</sup>

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<sup>72</sup> *Id.* Justice Scalia’s majority opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer. *Id.*

<sup>73</sup> *Id.* at 2722; John Schwartz, *Bank Regulation Case Pits U.S. Against States*, N.Y. TIMES, Apr. 29, 2009, at B3 (“A brief filed by the 49 other state attorneys general argue[d], ‘The recent (and continuing) fallout from the subprime lending debacle demonstrates the need for more oversight and consumer protection enforcement in the area of mortgage lending.’”).

<sup>74</sup> *Cuomo*, 129 S. Ct. at 2714-15 (stating that although the Court usually “defer[s] to an agency’s reasonable interpretation of a statute it is charged with administering,” ambiguity and uncertainty as to the meaning of a specific term does not expand that “deference to cover virtually any interpretation of the National Bank Act”).

<sup>75</sup> *Id.* at 2715, 2721 (“When . . . a state attorney general brings suit to enforce state law against a national bank . . . [it] is not an exercise of ‘visitorial powers’ and thus the Comptroller erred by extending the definition of ‘visitorial powers’ to include ‘prosecuting enforcement actions’ in state courts.”).

<sup>76</sup> *See, e.g.*, *First Nat’l Bank in St. Louis v. Missouri*, 263 U.S. 640, 656 (1924) (explaining that “national banks are subject to the laws of a state in respect of their affairs”).

<sup>77</sup> Schwartz, *supra* note 73, at B3 (“That argument appeared to resonate with Justice Stephen G. Breyer, who pictured 51 regulators—one from each state and the federal government—poring over a bank’s books for statistical patterns of differentiation in setting interest rates.”).

<sup>78</sup> Jim Puzzaghera, *States Gain More Power Over Banks: Supreme Court Says Local Governments Can Enforce Some of Their Consumer Protections Against National Financial Institutions*, L.A. TIMES, June 30, 2009, at 2 (quoting Edmund Mierzwinski, consumer program director at the U.S. Public Interest Research Group).

This is hardly the last chapter in the story of financial regulation, particularly given the current realities facing the banking industry and the overall financial sector. President Obama has proposed creating a consumer financial protection agency, which would regulate not only mortgage lending practices but also credit card practices and a whole host of other financial practices.<sup>79</sup> His proposal is for the national agency to create rules that would provide a national floor but would permit states to enact tougher requirements.<sup>80</sup> In other words, the federal law that President Obama is proposing would not preempt the states. What ultimately emerges from Congress remains to be seen.

## VI. PRESUMPTIONS, AGENCY PRONOUNCEMENTS, AND FEDERALISM IN PREEMPTION

Last Term's preemption cases raise three issues that deserve at least brief mention: 1) what role do presumptions play in preemption cases; 2) what role do agency pronouncements play in preemption; and 3) what role does federalism play in preemption cases, particularly with respect to Justice Thomas' opinions.

The first issue is the role of presumptions. Should there be a presumption against preemption, particularly when Congress is regulating in areas that have traditionally been seen as within the states' police powers? The Court's answer last Term in *Wyeth*, was "yes,"<sup>81</sup> which seems to breathe new life into the presumption in an implied preemption case. If preemption is all about congressional intent, it seems logical to imply a presumption against preemption when Congress has failed to include an explicit preemption provision.

If there is such a presumption, should it apply not only in implied preemption cases, but also in express preemption cases? The Court's answer last Term in *Altria* was, again, "yes."<sup>82</sup> When the text

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<sup>79</sup> American Bankruptcy Institute, *Legislative Highlights: Financial Services Reform Reaches Critical Stage on Hill*, 28 AM. BANKR. INST. J. 8, 111 (2009).

<sup>80</sup> Kathryn Reed Edge, *Bank On It: Financial Regulatory Reform, Obama Administration Proposal To Rebuild Financial Supervision and Regulation*, 45 TENN. B.J. 26, 27 (2009) ("This is a dramatic shift in states' rights under the proposal. The CFPA would coordinate enforcement efforts with the states.").

<sup>81</sup> *Wyeth*, 129 S. Ct. at 1204 ("[I]t is not impossible for Wyeth to comply with its state and federal law obligations and that Levine's common-law claims do not stand as an obstacle to the accomplishment of Congress' purposes in the FDCA.").

<sup>82</sup> *Altria*, 129 S. Ct. at 551 ("[T]he Labeling Act does not pre-empt state-law claims . . .

of an express preemption provision is susceptible to more than one plausible reading, courts should accept the reading that disfavors preemption.

I think it is fair to say that last Term's preemption decisions help to resuscitate the presumption against preemption in both express and implied preemption cases, and that plaintiffs arguing against preemption will increasingly try to rely on that presumption. However, I should hasten to add that, when one reviews the Court's preemption cases, there is very little consistency over time in the Court's use of presumptions. Sometimes, as in last Term, the Court will emphasize the presumption against preemption, yet in other cases, the Court fails to even acknowledge the existence of any presumption.<sup>83</sup>

Second, how much deference should the Court afford agency pronouncements on preemption? Last Term's decisions say, "not much," at least when Congress has not delegated that power to the agency. If it has, then *Chevron* deference applies; but in the absence of the delegation, the amount of deference due is based on such factors as the consistency of the agency's position, its persuasiveness, and whether it was preceded by notice and comment.<sup>84</sup>

The last issue to address is federalism and Justice Thomas, who played an important role in last Term's preemption cases. He wrote an opinion in all three cases, joining customary allies in dissent in the tobacco case and in the banking case,<sup>85</sup> but somewhat surprisingly, aligning himself with the four liberal Justices in the drug

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that are predicated on the duty not to deceive[, and] . . . neither the Labeling Act's preemption provision nor the FTC's actions in this field prevent a jury from considering that claim.").

<sup>83</sup> Compare *Cuomo*, 129 S. Ct. at 2720 (noting that States, for over eighty-five years, have enforced their own banking laws against national banks, thus federal banking laws do not preempt the States from enforcing their own banking laws), *Wyeth*, 129 S. Ct. at 1194-95 (applying the presumption against preemption), and *Altria*, 129 S. Ct. at 551 (holding that "the Labeling Act does not pre-empt state-law claims"), with *Haywood v. Drown*, 129 S. Ct. 2108, 2115 (2009) (finding that a New York law preventing lawsuits against corrections officers for damages when such damages arose from conduct that was within the scope of the officer's employment is preempted by the Supremacy Clause because "[t]he State's policy, whatever its merits, is contrary to Congress' judgment that all persons who violate federal rights while acting under color of state law shall be held liable for damages" without mention of any presumption) (emphasis in original).

<sup>84</sup> *Wyeth*, 129 S. Ct. at 1201.

<sup>85</sup> See *Altria*, 129 S. Ct. at 551 (Thomas, J., dissenting); *Cuomo*, 129 S. Ct. at 2722 (Thomas, J., dissenting).

case.<sup>86</sup> What explains that seeming inconsistency?

Actually, it is not as inconsistent as it appears. What is consistent is that typically, the conservative wing of the Court—the wing most fiercely protective of states’ rights—tends to find in favor of preemption, which of course defeats states’ rights.<sup>87</sup> The liberal wing of the Court—the wing that is ordinarily not overly concerned with issues of federalism—tends to find no preemption.<sup>88</sup> What seems to be trumping the Justices’ normal ideological stance on federalism is their ideological stance on issues involving regulation—issues that pit consumers against business interests. Conservatives are generally associated with an anti-regulation position, and liberals are generally associated with a pro-regulation position and that is what, to a large extent, explains the results in the preemption cases.

But what about Justice Thomas? What explains his position in the drug case? I think it reflects his fervent belief in states’ rights, his deep respect for state authority, and his insistence on textualism, which overcomes what natural anti-regulatory position he might otherwise hold. He, more than his equally conservative brethren, remains true to his devotion to state sovereignty.<sup>89</sup> That is what his concurring opinion in *Wyeth* is all about. He writes, “I have become ‘increasing[ly] reluctan[t] to expand federal statutes beyond their terms through doctrines of implied preemption.’ ”<sup>90</sup> He relies on his belief in textualism to argue that courts should not go beyond the text of the statute to figure out whether the state claim obstructs the purpose of the federal law, and courts certainly should not rely on what he refers to as “agency musings” emanating from Washington.<sup>91</sup> To Justice Thomas, the way the Court has been broadening its implied preemption doctrine is inconsistent with the system of dual sovereignty created by the Constitution, and it is inconsistent with the dic-

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<sup>86</sup> *Wyeth*, 129 S. Ct. at 1204 (Thomas, J., concurring).

<sup>87</sup> Michael C. Dorf, *Do the Supreme Court’s Current Justices Hold Sincere Views About States’ Rights? A Failure-to-Warn Case Reveals an Apparent Inconsistency*, FINDLAW.COM, Mar. 9 2009, <http://writ.news.findlaw.com/dorf/20090309.html>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Wyeth*, 129 S. Ct. at 1207 (alterations in original) (quoting *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 459 (2005) (Thomas, J., concurring in judgment in part and dissenting in part)).

<sup>91</sup> *Id.* at 1205, 1207 (“Congressional and agency musings, however, do not satisfy Art. I, [section] 7 requirements for enactment of federal law and, therefore, do not pre-empt state law under the Supremacy Clause.”).

tates of the Tenth Amendment.<sup>92</sup> So Justice Thomas concurs that F.D.A. approval of a drug should not preempt state tort claims, not because he is eager to subject pharmaceutical companies to tort liability, but because a contrary result interferes with states' rights.<sup>93</sup>

## VII. CONCLUSION

In conclusion, please note that the major preemption case of the last Term—the *Medtronic* case—that held that F.D.A. approval of a medical device preempts state tort claims, may be legislatively overruled by Congress.<sup>94</sup> Legislation was introduced last spring, and since preemption is all about Congressional intent, when the Supreme Court gets it wrong, Congress has the ability to set it right by simply amending the law to try again to make its intent clear.

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<sup>92</sup> *Id.* at 1205 (“[T]he States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause” (quoting *Tafliin v. Levitt*, 493 U.S. 455, 458 (1990))).

<sup>93</sup> *Id.* at 1217 (“[S]uch a sweeping approach to pre-emption leads to the illegitimate—and thus, unconstitutional—invalidation of state laws . . .”).

<sup>94</sup> *Riegel*, 552 U.S. at 330.

