Strange Bedfellows: The Politics of Preemption

Linda S. Mullenix

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/caselrev/vol59/iss4/8
PANEL ONE: FEDERAL PREEMPTION OF STATE LAW CLAIMS

STRANGE BEDFELLOWS: THE POLITICS OF PREEMPTION

Linda S. Mullenix†

INTRODUCTION

Underscoring the judicial resurgence of interest in the doctrine of federal preemption, the United States Supreme Court opened its 2008–2009 Term on October 6, 2008 with oral argument in Altria Group, Inc. v. Good,1 followed swiftly in November by argument in Wyeth v. Levine.2 Both these preemption appeals follow in the wake of the Court’s spring 2008 decision in Riegel v. Medtronic, Inc.,3 upholding express preemption of state law claims under the Medical Devices Amendments Act of 1976.

Since the Court’s 1992 decision in Cipollone v. Liggett Group, Inc.,4 federal preemption has been a doctrine of especial scholarly

† Morris & Rita Atlas Chair in Advocacy, The University of Texas School of Law. Thanks to Melissa Bernstein of the Tarlton Law Library of the University of Texas School of Law for research assistance in preparing this Article.
focus, bearing as it does on constitutional questions concerning the allocation of power between the federal and state governments and among the states themselves. Consequently, an entire cottage industry of constitutional law and federal courts scholars have produced a sizeable library relating to preemption doctrine, and in recent years the academic literature has experienced a veritable tsunami of scholarship on federal preemption. Much of this scholarship focuses on purported justifications for the two types of preemption—express and implied preemption—and further close parsing of the rationales for conflict and field preemption.

Several commonly-held generalizations about the Rehnquist and Roberts Courts are implicated in the discussion of preemption doctrine. One sweeping generalization is that the conservative shift in the Court’s personnel has resulted in limiting access to justice, a theme that implicitly underlies this symposium. Another

---


8 See, e.g., Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (rejecting regime of
generalization posits that the Court during the past two decades has consistently favored states-rights claims, illustrated for example by the Court's robust enforcement of Eleventh Amendment sovereign immunity defenses. Preemption doctrine, however, is in tension with these trends, because preemption cuts off a claimant's ability to pursue state-based claims. Thus, federal courts' application of preemption doctrine both restricts access to justice while undermining state sovereignty.

The purpose of this Article is not to analyze the 2008–2009 Court's decisions in the *Altria* and *Wyeth* cases, nor to examine preemption jurisprudence embodied in the Court's decision last Term in *Riegel*. Rather, the focus of this Article is on the politics of preemption, exploring the political and policy bases undergirding the doctrine. This Article attempts to illustrate how preemption doctrine is at war with itself and consequently has engendered strange political bedfellows, arrayed along interesting political fault lines. Moreover, the Article suggests that the preemption landscape is now more complex and uncertain, given the Court's opinions in *Riegel, Altria,*
and Wyeth, complemented by the shift in national political control evidenced by the November 2008 elections.

Preemption doctrine has engendered at least three sets of strange bedfellows. First, preemption doctrine has united the pro-business, states’ rights, and libertarian wings of the conservative movement. Second—and more unusual—preemption doctrine has allied some conservative business interests with some liberal advocates of consumer protection. And, third, preemption doctrine has fractured the plaintiffs’ bar, inspiring a division between advocates of aggregate versus individual litigation. How these doctrinal schisms and shifting ideological alliances have developed is an interesting story.

The first part of this Article explores the business community’s strategies to advance the fortunes of a robust preemption doctrine through legislative and administrative lobbying, as well as judicial activism. This portion of the Article traces current preemption advocacy back to the Republican movement for civil justice reform in the late 1980s and early 1990s, ultimately expressed in the long-term civil justice reform platform articulated in the Republican Contract for America.

The latter portion of this Article then discusses the schism among various groups relating to support for preemption doctrine, focusing on the three sets of strange bedfellows. First, this section traces conservative advocacy of preemption doctrine through various institutional auspices, including advocacy in the Court’s recent consideration of the Riegel, Altria, and Wyeth appeals. Preemption doctrine, it will be seen, has managed to unite disparate wings of conservative thinking. Nonetheless, conservative thinking has consistently supported a pro-preemption stance.

Second, preemption doctrine has made strange bedfellows of both conservative and liberal jurists in some cases. As the Court’s 8–1 decision in Riegel demonstrates, the Court’s cluster of liberal Justices are perfectly willing to unite with the Court’s conservative wing to uphold express preemption of state law claims. The philosophical glue uniting these Justices bears some examination, because this glue can become undone in other preemption litigation, especially implied preemption cases, such as Wyeth and Altria. In addition, given the

---

12 See, e.g., Wyeth v. Levine, 129 S. Ct. 1187, 1204 (2009) (upholding state jury award and rejecting federal doctrine of implied federal preemption; 6–3 decision with Justices Alito, Roberts, and Scalia dissenting; Justice Thomas joining in the majority result but not writing separate opinion); see also Robert Barnes, Court Defies Pro-Business Label, Decisions Reveal More Nuanced Portrait, WASH. POST, Mar. 8, 2009, at A2 ("And after last week’s decision flatly turning down the position of pharmaceutical companies that they were insulated from state
possible political shifts embodied in the November 2008 election results, the future fate of preemption doctrine as an access-control mechanism is now more unclear and muddled than in the past.

Finally, preemption has made strange bedfellows among the plaintiffs’ bar, pitting the interests of aggregate litigation advocates against those of the traditional plaintiffs’ bar. In the concluding sections, this Article explores the development of the plaintiffs’ class action bar’s strategy to advance its interests through judicial, legislative, and lobbying efforts, including advocacy of preemption doctrine. When the plaintiffs’ class action bar was forced to abandon aggregate litigation in state forums as a consequence of the Class Action Fairness Act of 2005 (CAFA), aggregate litigation proponents became ardent champions of the federalization of class action litigation and, consequently, supporters of a robust theory of preemption. Consequently and ironically, these former champions of state law tort forums reversed course and endorsed federalization of tort law. Thus, in an unusual turn of events, the class action plaintiffs’ bar aligned its interests with some of the most conservative business interests in the United States.

The class action bar’s support of federal preemption, however, stands in conflict with the position of the traditional plaintiffs’ bar. Historically, virtually all public interest law groups have advocated against application of preemption doctrine because it denies access to the courts and cuts off the rights of injured tort claimants to a forum for compensatory relief of their claims. As partial evidence of this position, congressional liberals swiftly introduced legislation to undo the preemption consequences of the Court’s Riegel decision. 

lawsuits filed by injured patients, something of a reevaluation of the court is underway.”).


14 See S. 3398, 110th Cong. § 2(a) (2d Sess. 2008) (amending Section 521 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360k at subsection (c) to read: "Nothing in this
As the concluding discussion suggests, while conservative attitudes towards preemption seem at least doctrinally and politically consistent, the liberal approaches to preemption do not. Moreover, support for a robust preemption doctrine has resulted in ideological costs to both conservatives and liberals. For conservatives, robust enforcement of preemption doctrine is in derogation of states’ rights, local police powers, and the ability of state courts to adjudicate the claims of their own citizens. Robust enforcement of preemption also frustrates the ability of state courts to serve as laboratories for experimentation and change.

For liberals, robust enforcement of preemption doctrine has the consequence of depriving claimants’ access to justice in state court forums. While conservatives may comfortably embrace the diminution of states’ rights implicit in preemption doctrine precisely because it does limit access to justice, liberals ought to be uncomfortable with the consequent restrictions on the ability of injured people to obtain compensatory state law tort relief against a background of weak federal or insufficient administrative regulatory oversight.

Moreover, it is disquieting that some purported liberals have embraced and advocated a preemption doctrine that seems so clearly not in the interests of injured parties or small claims consumers. Fundamentally, something seems entirely amiss when purported liberals urge a preemption doctrine that cuts off access to justice for individuals. Even more troubling, in the quest to federalize class action settlements and to achieve global settlements at any price, the class action plaintiffs’ bar has aligned itself with its traditional adversaries, in an unseemly preemption dance.

Thus, the debate over preemption has exposed interesting political alliances and fault lines among advocates for justice. How these political alignments and schisms will play out in ensuing years

section shall be construed to modify or otherwise affect any action for damages or the liability of any person under the law of any State.”); see also H.R. 6381, 110th Cong. (2d Sess. 2008) (related legislation); Press Release, Kennedy, Colleagues Introduce Bill to Reverse Supreme Court Decision, Protect Consumers from Dangerous Medical Devices (July 31, 2008), http://kennedy.senate.gov/newsroom/press-releases.cfm (select “July” and “2008” in dropdown menu; then follow hyperlink of appropriate title). This legislation is sponsored by Senators Kennedy, Reid, Leahy, Dodd, Harkin, Mikulski, Bingaman, Murray, Reed, Clinton, Obama, Sanders, Brown, and Whitehouse. See S. 3398, 110th Cong. (2d Sess. 2008).

remains an open question. Nonetheless, as important as it is to engage in close doctrinal and textual analyses over constitutional federalism, it is perhaps equally important to understand the political alliances influencing the evolution of preemption doctrine.

I. THE ROAD TO PREEMPTION: THE CONSERVATIVE PROGRAM FOR CIVIL JUSTICE REFORM

And ever since John Roberts was appointed chief justice in 2005, the court has seemed only more receptive to business concerns. . . . One thing, however, is certain already: the transformation of the court was no accident. It represents the culmination of a carefully planned, behind-the-scenes campaign over several decades to change not only the courts but also the country’s political culture.15

A. The Development of a Pro-Business Agenda

As Jeffrey Rosen has noted, over the past twenty-five years the conservative, corporate, and business communities have engaged in a concerted, deliberative campaign to reform civil justice in the United States. These efforts have been manifested through an array of institutional initiatives and advocacy efforts. In parallel counterpart to the conservative movement’s efforts to achieve civil justice reform, various liberal constituencies have engaged in similar efforts to achieve a separate vision of civil justice. Nevertheless, the Court’s recent rulings have focused more attention on the pro-business ethos pervading the current Court.

Rosen articulates a particular narrative related to the development of the late twentieth-century business orientation of the Supreme Court. In Rosen’s narrative, the roots of this tectonic shift may be traced precisely back to August 23, 1971, when then-attorney Lewis Powell sent a memo to Eugene Snydor at the U.S. Chamber of Commerce that described an attack on the United States economic system.16 In his memorandum, Powell urged that the U.S. Chamber of Commerce “begin a multifront lobbying campaign on behalf of business interests.”17 According to Rosen, Powell perceived a need to counter the forces of “Naderism” and various established left-leaning

---

15 Rosen, supra note 10, at 40, 41.
16 Id. at 41.
17 Id.
consumer advocacy groups such as Public Citizen. And, as Rosen points out, two months after Powell’s famous memorandum to the U.S. Chamber of Commerce, President Richard Nixon appointed Powell to the U.S. Supreme Court. By implication, the Court acquired a friend of the business community.

In Rosen’s narrative, the pro-business lobbying efforts of the U.S. Chamber of Commerce got off to a slow start in the 1980s, as the Chamber learned and developed various means for influencing decision-making in multiple forums. In the judicial arena, lobbying efforts required the development of institutional means for advocating pro-business positions. Until the mid-1980s, there were few, if any, law firms with specialized practice groups that focused on arguing business cases before the Court, but this would change in the ensuing two decades.

By the mid-1980s, this institutional gap began to be remedied as high-profile Washington attorneys moved into law firms that developed such specialized business practices, including litigation of high-profile cases before the Supreme Court and appellate courts. As Rosen suggests, this shift was signaled when Rex Lee, President Ronald Reagan’s Solicitor General, left the government in 1985 to set up a Supreme Court appellate practice at the Washington law firm of Sidley and Austin. In the ensuing years, conservative former law clerks, especially former law clerks of conservative Supreme Court Justices, would either join prestigious Washington practices or the Chamber of Commerce itself. Moreover, the business community advanced its interests through the development of a cadre of experienced Supreme Court advocates and repeat-players, exemplified by such prominent litigators as Ted Olson, another Republican former Solicitor General.

Moreover, Rosen suggests that the Chamber of Commerce’s efforts, and the concomitant institutionalization of pro-business advocacy in the judicial arena, were additionally inspired by the conservative movement’s thwarted efforts at securing a Supreme Court seat for Judge Robert Bork in 1987. After the Bork nomination defeat, the Chamber set up a formal process for endorsing Supreme Court and other federal judicial nominees.

---

18 Id.
19 Id.
20 Id. at 42.
21 Id.
22 Id. at 41–42.
23 Id. at 44–45.
24 Id. at 42.
In addition to its efforts in the judicial arena, the Chamber of Commerce in the ensuing two decades adopted concerted lobbying efforts in both Congress and the Executive branch. As the result of these various lobbying efforts, Rosen concludes that the pro-business advocacy of the Chamber of Commerce and similar conservative advocacy groups has been highly effective in accomplishing an especially favorable track record in recent Court opinions. Among the business community’s successes has been a cutback on consumer lawsuits, restrictive Supreme Court decisions relating to punitive damages, and last Term’s preemption decision in *Riegel*.25

For Rosen, then, the Court’s restrictive views on preemption doctrine, illustrated in the *Riegel* decision, exemplify the Court’s pro-business tilt in recent decades. Rosen’s narrative is compelling, but this narrative is somewhat incomplete in describing the political backdrop that inspired judicial scrutiny of preemption doctrine in the early twenty-first century. In addition, with the political shift in control of government after the November 2008 elections, coupled with the Court’s subsequent decisions in both *Altria* and *Wyeth*, the pro-business narrative of the Court now has become more nuanced and complicated.

**B. The 1980s Civil Justice Reform Critique: The Contract with America and the Roots of a Preemption Strategy**

Rosen’s narrative of the historical development of a pro-business Supreme Court at the close of the twentieth century is both interesting and compelling. In attempting to explain restrictive preemption decisions in recent years, commentators such as Rosen and others tend to focus only on judicial initiatives by the conservative and business communities. However, there is a more complex parallel narrative of reform efforts that supplements and enhances this nearly exclusive focus on developments in judicial lobbying.

This narrative of the preemption story unfolds against a more complicated political back-story with roots in the conservative 1980s movement heralded under the general rubric of “civil justice reform.”26 Properly understood, restrictive preemption doctrine is the lineal and philosophical (as well as instrumental) descendant of the 1980s conservative movement for civil justice reform. This reform movement has endured for over thirty years and embraces efforts by

---

25 Id. at 44–45, 66–71.
multiple actors in multiple forums to reconfigure civil justice delivery in the United States.27

The conservative movement for civil justice reform embodies not only a pro-business ethos but also embraces an array of attitudes about civil litigation and civil justice in the United States. The 1980s movement for civil justice reform embraced a sweeping critique of the delivery of civil justice and inspired a political movement to accomplish wholesale reform of civil justice in the United States.

According to the civil justice critique, the United States is the most litigious country in the world, and Americans are the most litigious people on the planet, willing and encouraged to sue anyone who might conceivably be held responsible for alleged grievances.28 Americans are encouraged to file civil litigation because of easy access to plaintiffs' counsel, lenient rules on client solicitation and attorney advertising, and a contingency fee system that provides little or no risk to potential plaintiffs to bring suit. The attorney fee structure and attorney advertising also encourage "entrepreneurial" plaintiffs' attorneys to seek litigious clients with grievances. As a consequence of this over-litigiousness, courts are flooded with too many lawsuits, many of which are frivolous.29

Among many types of litigation, of particular baneful effect on business interests are frivolous tort suits and vexatious securities class actions. Plaintiffs are encouraged to pursue litigation inspired by the potential for large compensatory damage verdicts as well as large punitive or hedonic damages awards. Tort litigation is plagued by lax evidentiary standards that allow juries to hear "junk science" in support of plaintiffs' claims. The transaction costs of litigating civil suits fall disproportionately on corporate defendants, who often carry the burden of expensive and intrusive civil discovery. In addition to

27 See generally Stephanie Mencimer, Blocking the Courthouse Door: How the Republican Party and Its Corporate Allies Are Taking Away Your Right to Sue (2006); Symposium on Civil Justice Reform, 46 Stan. L. Rev. 1285 (1994) (discussing the ongoing civil justice reform movement); see, e.g., Joseph R. Biden, Jr., Congress and the Courts: Our Mutual Obligation, 46 Stan. L. Rev. 1285, 1285 (1994) ("Across a constitutional divide, Congress and the federal courts share a mutual obligation to ensure that our judicial system offers all Americans justice in civil and criminal matters within a reasonable time and at reasonable expense.").
28 Professor Deborah Rhode has attempted to rebalance the conservative critique of civil justice delivery in the United States. See Deborah L. Rhode, Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution, 54 Duke L.J. 447, 451-52 (2004) (describing all the canards of the conservative civil justice critique, and the various lobbying efforts to achieve civil justice reform).
29 See Mencimer, supra note 27, at 12, 132 (referring to complaints of frivolous lawsuits); Thomas O. McGarity, The Perils of Preemption, Trial, Sept. 2008, at 20, 20 (describing the ""accountability crisis" . . . to shield corporate America from . . . "burdensome and unnecessary" regulatory responsibilities and "frivolous' common law tort liability").
onerous transaction costs, defendants often settle civil lawsuits rather than risk jury trials, participating in what some courts and commentators have labeled “settlement blackmail.”

Finally, the civil justice critique includes criticism of aggregate claims resolution, most notably class action litigation. Hence, the potential for transforming ordinary, traditional one-on-one litigation into a massive class action lawsuit poses the threat of truly calamitous consequences for business or corporate entities. Indeed, all the problems identified with traditional litigation increase exponentially when pursued through class action suits. For corporate and business defendants, the threat of potential class litigation is often enough to precipitate a settlement. Class litigation emboldens plaintiffs and class counsel to file strike suits against corporate defendants in the hopes of a speedy and lucrative class-wide settlement.

This critique of the American civil justice system gained political traction in the mid-1980s and found its political expression during the 1988-1989 presidential campaign when the Republican presidential ticket campaigned on a platform of civil justice reform. The campaign for civil justice reform reached a famous apogee in 1991 when Vice President Dan Quayle issued a wholesale attack on the legal profession. Almost all the grievances that conservatives would...
advance against civil justice delivery in the United States found expression during the Bush-Quayle administration, culminating in a report from the President's Council on Competitiveness delineating obstacles to a competitive economy and outlining proposals for civil justice reform. Although the philosophical roots of the civil justice reform movement were articulated under the Bush-Quayle administration, conservative interests would accomplish scant substantive legislative reforms during this period.

Instead, the only civil reform effort to achieve legislative approval during the Bush-Quayle administration was the enactment of the Civil Justice Reform Act of 1990. Although labeled a "Civil Justice Reform Act," this legislation actually mandated self-examination and docket reform in the ninety-four federal district courts. While each federal district court was required to propose and promulgate measures, programs, and procedures to expedite the procedural resolution of cases on their dockets, the Civil Justice Reform Act did not address the core substantive grievances of the conservative civil justice reform movement identified in the Bush-Quayle report.

References:


4. See § 103(b) (requiring that each federal district court implement a civil justice expense and delay reduction plan within three years after enactment of the legislation); see also 28 U.S.C. § 477 (2006) (requiring the Administrative Office of the United States Courts and the Federal Judicial Center to transmit the model plans and reports to the House and Senate judiciary committees); id. § 479(a) (requiring the Judicial Conference of the United States to prepare a comprehensive report on all plans received from the district courts within four years of enactment of the legislation).

5. See generally Mark Ballard, Bill to Add U.S. Judges Shortchanges Texas by 6; Legislation Would Add 3 New Courts in Southern District, 1 in Western, TEX. L. W., June 18, 1990, at 4 (commenting on earlier version of Senator Biden's bill); David Bauman, Biden Unveils Litigation Bill, Gannett News Service (Jan. 25, 1990) (discussing the Biden bill); Marcia Coyle & Fred Strasser, Senate Sets Its Sights on Delays in Civil Trials, NAT'L L. J., July
The conservative civil justice reform movement ought to have lost political currency with the change in administration effectuated by the election of Democratic President William Clinton in 1992. However, with the 1994 mid-term elections creating a Republican majority in Congress, particularly in the House of Representatives, the civil justice reform movement experienced a startling revitalization. As a consequence of his ascendancy to Speaker of the House, Congressman Newt Gingrich became the chief spokesperson, articulator, and advocate for the conservative civil justice reform movement.

The revitalized movement found expression in Representative Gingrich’s proposed “Contract with America,” a document that


See, e.g., Kevin Sack, Quayle Says Letter Shows Lawyers ‘Own Clinton,’ N.Y. TIMES, Aug. 28, 1992, at A16 (reporting on Vice President Dan Quayle’s efforts to portray candidate Governor Bill Clinton as “in the pocket” of plaintiff trial lawyers and opposing civil justice reform efforts to curb litigation excesses and abuses).

See Adam Clymer, G.O.P. Celebrates Its Sweep to Power; Clinton Vows to Find Common Ground; Committee Chairmanships Are Sure Spills of Victory, N.Y. TIMES, Nov. 10, 1994, at A1 (reporting on Republican sweep of Congressional and gubernatorial electoral races).

Id. (reporting a Republican election landslide resulting in total of 227 seats for Republicans and 199 for Democrats, with eight House races yet undecided, as well as Republicans gaining eight additional seats in the Senate, for a 53-46 Republican Senate majority).

See Adam Clymer, Gingrich Moves Quickly to Put Stamp on House, N.Y. TIMES, Nov. 17, 1994, at A1 (listing Gingrich initiatives for new Congress); Adam Clymer, Republicans All for One, and the One is Gingrich, House Speaker-Designate Sets His Agenda and Issues Challenges for His Party, N.Y. TIMES, Dec. 6, 1994, at A1 (reporting the choice of Gingrich as Speaker of the House of Representatives); Catherine S. Manegold, Gingrich, Now a Giant, Claims Victor’s Spills, N.Y. TIMES, Nov. 12, 1994, at 11 (“Mr. Gingrich said he plans to have his “Contract With America”—the platform on which he tried to get Congressional candidates to run this year—read at the start of business every day in Congress for the first 100 days of the next session”); David E. Rosenbaum et al., New Majority’s Agenda: Substantial Changes May Be Ahead, N.Y. TIMES, Nov. 11, 1994, at A26 (discussing upcoming legislative initiatives based on the “Contract with America”); Katherine Q. Seelye, Republicans Plan Ambitious Agenda in Next Congress, N.Y. TIMES, Nov. 15, 1994, at A1 (reporting that Republican leadership announced measures to “push through Newt Gingrich’s ‘Contract With America’ in 100 days”).

some 300 Republican legislators signed and advocated. Foremost among the contractual provisions were eight reforms directed at Congress itself, specifically the ways in which Congress functioned.41

In addition to the eight fundamental reforms directed to Congress, the "Contract with America" also set forth ten legislative initiatives to be proposed within the first 100 days of the 104th Congress to advance the cause of civil justice.42 These proposed bills included "The Common Sense Legal Reforms Act" (CSLRA).43 The overall spirit animating the CSLRA was to curb the presumed excesses and abuses of the overly-litigious American society.44 Basically, the CSLRA embodied the core principles animating the conservative critique of civil justice in the United States, as refined over a decade.45

To this end, the CSLRA proposed altering attorney fee awards to reflect a loser-pays rule;46 adding additional provisions to assure

---

41 The "Contract with America" enumerated eight fundamental reform proposals, all directed to the reform of Congress, and including provisions that would: (1) "require all laws that apply to the rest of the country also apply equally to the Congress;" (2) "select a major, independent auditing firm to conduct a comprehensive audit of Congress for waste, fraud or abuse;" (3) "cut the number of House committees, and cut committee staff by one-third;" (4) "limit the terms of all committee chairs;" (5) "ban the casting of proxy votes in committee;" (6) "require committee meetings to be open to the public;" (7) "require a three-fifths majority vote to pass a tax increase;" and (8) "guarantee an honest accounting of our Federal Budget by implementing zero base-line budgeting." Id.

The Contract then set forth ten proposed legislative bills to be proposed in Congress during the legislature's first 100 days. These legislative proposals included "The Common Sense Legal Reform Act," which embodied all the platforms of the Republican civil justice reform program. Id.


44 See H.R. 10 (stating in the preamble that it is a bill "[t]o reform the Federal civil justice system; to reform product liability law"). See, e.g., Peter Passell, Civil Justice System Is Overhaul Target, N.Y. TIMES, Jan. 27, 1995, at B7 (reporting on the introduction of The Common Sense Legal Reforms Act of 1995); see also Anthony Ramirez, Consumer Crusader Feels a Chill in Washington, N.Y. TIMES, Dec. 31, 1995, at F1 (describing interview with Ralph Nader and risks to consumer movement posed by conservative civil justice reform initiatives).

45 H.R. 10 § 101 ("Award of Attorney's Fee to Prevailing Party in Federal Civil Diversity
accountability in the determination of attorney fees;\textsuperscript{47} curbing the use of junk science and other dubious expert testimony in civil litigation;\textsuperscript{48} reforming product liability law;\textsuperscript{49} limiting punitive damage awards;\textsuperscript{50} and enhancing notice and statute of limitations requirements.\textsuperscript{51} Title II of the proposed CSLRA addressed reform of securities class litigation,\textsuperscript{52} and RICO claims against defendants were addressed in Title I.\textsuperscript{53}

Consequently, an embedded value of the conservative reform movement was to restrict access to justice through various means. It is interesting to note, however, that use of preemption doctrine was not among the numerous proposed initiatives of the civil justice reform agenda in the early 1980s and 1990s. Nevertheless, the philosophical roots of this access-limiting concept were latent in this earlier civil justice reform movement.

Preemption doctrine appears for the first time as a strategy to achieve the conservative vision of civil justice reform with the ascendancy of Representative Gingrich in the 104th Congress, the "Contract with America," and the new Republican majority in the House of Representatives. In this regard, the 104th Congress proposed to create sweeping new federal substantive products liability law, and to link new federal tort law to a preemption doctrine that would supersede state law. With regard to preemption of state law in derogation of federal tort law, the proposed CSLRA provided:

\textbf{APPLICABILITY AND PREEMPTION.---}This section governs any product liability action brought in any State or Federal Court against any manufacturer or seller of a product on any theory for harm caused by the product. This section supersedes State law only to the extent that State law applies to an issue covered by this section. Any issue that is not covered by this

\begin{footnotes}
\textsuperscript{47} Id. § 104 ("Attorney Accountability").
\textsuperscript{48} Id. § 102 ("Honesty in Evidence").
\textsuperscript{49} Id. § 103 ("Product Liability Reform").
\textsuperscript{50} Id. § 103(c) ("Limitations on Punitive Damages").
\textsuperscript{51} Id. § 105 ("Notice Required Before Commencement of Civil Action"); id. § 105(d) ("Statute of Limitations").
\textsuperscript{53} Id. § 107 ("Amendment to Racketeer Influenced and Corrupt Organizations Act").
\end{footnotes}
section shall be governed by otherwise applicable State or Federal law.54

Thus, the concept of preemption doctrine as a conservative civil justice reform strategy concretely emerged in 1995. However, during the Clinton presidential years from 1995 through 2001, the Gingrich Congress failed to enact most of its civil justice reform initiatives,55 including various versions of the CSLRA.56 In this period, the only reform initiative that managed to be enacted into law (and not vetoed by President Clinton) was the Private Securities Litigation Reform Act of 1995.57 This inability and failure of the conservative Gingrich Congress to enact sweeping civil justice reform led to what many commentators have characterized as "stealth tort reform" through legislative and administrative means, including new initiatives utilizing preemption doctrine.58

C. The Strategy of the Preemption Campaign

Commentators have well-documented the evolving conservative campaign to achieve tort reform by other means—that is, through preemption doctrine.59 While commentators generally agree that the Supreme Court's 1992 landmark decision Cipollone v. Liggett Group, Inc.60 marked a new judicial receptivity to preemption arguments, commentators also agree that the conservative agenda for civil justice reform became an especially high priority with the election of

54 Id. § 103(a).
57 See supra note 55.
58 See, e.g., MARGARET H. CLUNE, STEALTH TORT REFORM: HOW THE BUSH ADMINISTRATION'S AGGRESSIVE USE OF THE PREEMPTION DOCTRINE HURTS CONSUMERS (Ctr. for Progressive Regulation, White Paper No. 403, Oct. 2004), www.progressivereform.org/articles/preemption.pdf; McGarity, supra note 29, at 25-26 ("Having failed to persuade a reluctant Congress to enact an aggressive civil justice reform agenda, the Bush administration in 2002 initiated an equally aggressive program of stealth tort 'reform' through regulatory preemption.").
59 See, e.g., Louis M. Bograd, Taking on Big Pharma—and the FDA, TRIAL, Mar. 2007, at 30; Chemerinsky, supra note 11, at 62-63; McGarity, supra note 29, at 21-22; Sharkey, Federalism in Action, supra note 6.
President George W. Bush in 2000. A newly-revitalized preemption strategy arose, which was pursued through three institutional means: (1) legislative initiatives, (2) administrative initiatives, and (3) judicial pronouncements.

During the Bush administration, conservative advocates pursued civil justice reform through congressional legislation to add express preemptive language to various federal regulatory schemes. Examples of such statutory initiatives include amendments to the National Highway Traffic Safety Administration ("NHTSA") regulations relating to requirements for vehicle roof strength. A proposed amendment to the final roof crush regulations would expressly preempt all future common law roof strength claims. Moreover, all subsequent safety regulations issued by NHTSA included language to expressly preempt state law claims.

In addition to direct legislative proposals amending statutes to add express preemption language, another notable feature of the Bush-era civil justice reform agenda was for regulatory agencies to insert preemptive language in regulatory preambles as a part of agency rulemaking. This phenomenon has been labeled "preemption by preamble," and has been well-documented by several preemption scholars, most notably Professor Catherine Sharkey.

The second arena in which conservative civil justice reform advocates pursued aggressive preemption doctrine during the Bush years was through the appointment of strong tort reform proponents to the Department of Justice and legal offices of federal regulatory agencies. Not only did these conservative appointees seed federal agencies with civil justice reform advocates, but more importantly these conservative appointees succeeded in shifting agency positions on preemption doctrine. Thus, for example, the appointment of conservative personnel was crucial in accomplishing a reversal of

---

61 McGarity, supra note 29, at 21 ("During his 2000 presidential campaign, George W. Bush complained that 'vexatious litigation' was threatening the economic vitality of the American economy, and he promised to make tort 'reform' a high priority in his presidency.").

62 See id.

63 Id. at 21–22.


65 McGarity, supra note 29, at 22.

66 See Sharkey, Preemption by Preamble, supra note 6 (describing the use of preemptive language in regulatory preambles as "silent tort reform"); describing preemption language in rulemaking by three federal agencies: the Food and Drug Administration, the National Highway Traffic Safety Administration, and the Consumer Product Safety Commission); see also McGarity, supra note 29, at 21–22.

67 See McGarity, supra note 29, at 21 ("Once in the Oval Office, Bush appointed strong proponents of tort 'reform' to key positions in the Department of Justice and the legal offices of many federal agencies.").
policy by the Food and Drug Administration (FDA), which shifted agency support in favor of implied preemption doctrine.\textsuperscript{68} These agency policy shifts would prove to be especially important as agencies, especially the FDA, began to appear as advocates in preemption litigation.\textsuperscript{69}

Finally, conservative preemption strategy has been pursued through advocacy in the litigation arena. During the Bush administration especially, judicial advocacy of a conservative pro-preemption position has been urged against the backdrop of the Court's historical presumption against preemption.\textsuperscript{70} But beginning with the Court's preemption decision in \textit{Cipollone},\textsuperscript{71} the Supreme Court and federal appellate courts have issued a series of preemption decisions largely upholding the preemptive effect of various federal statutes.\textsuperscript{72} The Court's recent \textit{Altria} and \textit{Wyeth} decisions, however,

\begin{footnotes}
\footnote{68}{See James T. O'Reilly, \textit{Drug Review "Behind the Curtain": A Response to Professor Struve}, 93 CORNELL L. REV. 1075, 1076–77 (2008) ("Bush administration appointees include recent FDA Commissioners Andrew von Eschenbach and Mark McClellan—both Bush supporters from Texas—as well as conservative FDA counsel. These and other Bush appointees have led to a shift in FDA policy, which now supports the implied preemption doctrine.") (footnotes omitted)).}

\footnote{69}{See Bograd, supra note 59, at 30–31 (describing the shift in FDA policy with the advent of the Bush administration: "[t]hings began to change shortly after George W. Bush became president. It started with a series of amicus briefs that the FDA filed in pending tort cases. The Bush FDA began to take the position that certain products liability claims seeking to hold drug manufacturers liable for failure to provide adequate warnings of a drug's dangers conflicted with—and were preempted by—federal drug labeling regulations.").}

\footnote{70}{See Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 715 (1985) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).) Professor Chemerinsky has noted that the Court's preemption decisions since 2000 are, at the very least "inconsistent with the Court's oft-stated presumption against preemption." Chemerinsky, supra note 11, at 62; see also Wolfman, supra note 6, at 21 ("[E]ven after Garmon, the prevailing assumption in the courts was that regulatory standards and state compensation schemes occupied separate spheres. Indeed, until the 1990s, the Supreme Court had never held a state law tort claim preempted by federal regulation, at least not where federal law itself did not provide a right of action for damages." (footnote omitted)).}

\footnote{71}{Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).}

may signal a more nuanced or at least more complicated approach to preemption claims.73

II. STRANGE BEDFELLOWS I: THE CONSERVATIVE ALLIANCE

The purpose of the preceding discussion was to provide an historical context in which to appreciate how preemption doctrine engendered a set of strange bedfellow advocates during the first part of the twenty-first century. As the narrative suggests, advocacy in favor of robust federal preemption of state law claims did not suddenly emerge during the Bush-Cheney administration, but rather had philosophical roots extending back at least into the 1980s. And, as recently as the mid-1980s, federal courts maintained a presumption against federal preemption of state law claims.

During the Bush-Quayle administration, pro-business interests developed a conservative critique of civil justice delivery in the United States, along with a comprehensive program for civil justice reform. With the failure to accomplish procedural and substantive civil justice reform through legislative initiatives—during both the first Bush and Clinton administrations—by the year 2000 conservatives had shifted to a strategy of accomplishing civil justice reform through narrowing access to courts. For the pro-business community, these efforts took the form of advocating robust preemption doctrine in various arenas.

However, the shifting sands of preemption doctrine confound ordinary explanation, in part because its proponents seem to embrace politically and ideologically inconsistent positions. For example, the longstanding Supreme Court presumption against preemption of state law claims supports a strong theory of Tenth Amendment rights in areas traditionally reserved to the states, such as police powers and the regulation of the health and welfare of state citizens. Moreover, states’ rights advocates support the ability of local state judges and juries to adjudicate the rights of state citizens. Hence, committed states’ rights advocates ought to embrace a robust position against federal preemption of state law claims and in favor of state autonomy in police, regulatory, and judicial affairs.

Additionally, deference to the parallel state authority to enact local regulatory schemes supports the oft-stated goal of permitting states to

---

serve as laboratories for experiment and change. This applies with equal force to the ability of local judges and juries to interpret, apply, and enforce local regulations. Again, states’ rights advocates ought to eschew the application of federal preemption doctrine to effectively overrule such local control and experimentation.

Finally, federal preemption doctrine enhances the consolidation of federal power in the New Deal administrative state. Precisely because application of federal preemption strengthens the federal regulatory state, conservative advocates who believe in limited government ought to avoid or resist federal preemption.

Notwithstanding these ideological verities, civil justice reform conservatives and pro-business interests instead have proven to be the most ardent advocates for application of federal preemption doctrine. In so doing, conservative arguments have been channeled into endorsing the scope, authority, and probity of the federal regulatory state. The conservative support for robust federal preemption doctrine, therefore, ironically has cloaked conservatives with the unusual mantle of closet federal regulators.

A. Pro-Federal Regulatory Advocacy: A Tale of Pro-Business Friends of the Court

The array of amicus curiae briefs filed in the Court’s last three major preemption cases—Riegel, Altria, and Wyeth—illustrates the seemingly ironic position of pro-business interests in endorsing both express and implied federal preemption. In addition, the amicus curiae briefs also nicely illustrate the tableaux of the usual third-party repeat players that may be expected to appear in all major preemption appellate litigation.

34 In describing this historical shift, Professor Epstein has commented:

Historically, the consolidation of the New Deal administrative state meant the federal government faced few, if any, limitations on the scope of its power given the expansive reading of the Commerce Clause. This rapid expansion of federal power took place in an environment highly sympathetic to regulation at both the national and the state levels. State powers of regulation have never been constrained by the federal constitutional doctrine of enumerated powers. But post-1937, the broad construction of the Commerce Clause gave the federal government total power to regulate in areas formerly reserved to the states, except in the most marginal of cases.

Epstein, supra note 7, at 56 (footnote omitted).

35 Noting this anomaly, Dean Erwin Chemerinsky has suggested that the recent Supreme Court jurisprudence in preemption cases embodies this ideological conflict: “One would expect that a conservative Court, committed to protecting states’ rights, would narrow the scope of federal preemption. After all, a good way to empower state governments is to restrict the federal government’s reach. Restricting preemption gives state governments more autonomy.” Chemerinsky, supra note 11, at 62.
In *Riegel*, four major institutional advocacy groups appeared as *amici* in support of the respondent Medtronic, Inc. The *Riegel* litigation presented the issue of whether the Medical Device Amendments of 1976 provided express preemption of an array of New York state law claims sounding in “strict liability; breach of implied warranty; . . . negligence in the design, testing, inspection, distribution, labeling, marketing, and sale of the [Medtronic] catheter”; as well as a loss of consortium claim. The Supreme Court, in an 8–1 decision, upheld the lower court decisions that had dismissed the litigation based on express preemption grounds.

The *amici* in support of Medtronic’s express preemption defense included the pro-business Chamber of Commerce of the United States, the Product Liability Advisory Council, Inc. (“PLAC”), the Washington Legal Foundation, and the United States (appearing on behalf of the FDA). In addition, two other entities with broad general economic interests in the *Riegel* litigation also appeared as *amici* in support of Medtronic.

The Chamber of Commerce’s amicus brief in *Riegel* sets forth the pro-business interest of the Chamber in preemption cases and states that preemption doctrine protects the Chamber’s members “against the imposition by state and local governments of burdensome, divergent and even conflicting requirements” (in this case relating to

---

79 *See Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of the Respondent, Riegel*, 128 S. Ct. 999 (No. 06-179) [hereinafter Brief of the Chamber of Commerce in *Riegel*].
80 *See Brief of Product Liability Advisory Council, Inc. as Amicus Curiae in Support of the Respondent, Riegel*, 128 S. Ct. 999 (No. 06-179) [hereinafter Brief of Product Liability Advisory Council, Inc. in *Riegel*].
81 *See Brief of Washington Legal Foundation as Amicus Curiae in Support of Respondent, Riegel*, 128 S. Ct. 999 (No. 06-179) [hereinafter Brief of Washington Legal Foundation in *Riegel*].
82 *See Brief for the United States as Amicus Curiae, Riegel*, 128 S. Ct. 999 (No. 06-179).
83 *See Brief of CropLife America, American Chemistry Council, and Consumer Specialty Products Association as Amici Curiae in Support of Respondent, Riegel*, 128 S. Ct. 999 (No. 06-179) [hereinafter Brief of CropLife America et al.]; Brief of the Advanced Medical Technology Association (Advamed), DRI, Medmarc, and the Medical Device Manufacturers Association (MDMA) as Amici Curiae in Support of Respondent, *Riegel*, 128 S. Ct. 999 (No. 06-179) [hereinafter Brief of the Advanced Medical Technology Association et al.].
84 A boilerplate recitation of the Chamber of Commerce’s interests recites that the Chamber “is the world’s largest business federation” and represents “more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent its members’ interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation’s business community.” *Brief of the Chamber of Commerce in Riegel*, *supra* note 79, at 1.
pre-market approved devices). The PLAC similarly identified the problem of inconsistent and conflicting state regulations as a burden on its constituents. In addition, PLAC positioned itself as a strong supporter of the federal government as the primary protector of the public health through the FDA, thereby arguing strongly on behalf of federal preemption in order to enhance the "FDA's ability to fulfill its mandate in furtherance of public health."

In Riegel the Washington Legal Foundation identified itself as a "non-profit public interest law and policy center" that "devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government." Notwithstanding its professed mission of defending individual rights and limited government, the Washington Legal Foundation centered its pro-preemption argument on the concept that individual freedom and the American economy suffer when state law—particularly state tort law—imposes "unnecessary layers of regulation that frustrates the objectives or operation of specific federal regulatory regimes . . . ." As such, the Washington Legal Foundation, similar to PLAC and the Chamber of Commerce, positioned itself as a federal regulatory supporter.

The other business entities filing amici briefs in Riegel urged application of federal preemption in the interests of consumer protection, best achieved through national, uniform regulations.

Amici believe that consumer protection is significantly strengthened by preemption of any type of tort claim that is based on a state-law duty which diverges from, conflicts with, or otherwise undermines federal safety regulation, especially in areas such as product labeling and warnings,

---

85 Id.
86 Id. at 4 ("In enacting the express preemption provision in the MDA, Congress determined that imposition of state requirements in addition to or different from federal regulation would undermine public health. That judgment was correct. As FDA has stated in this Court, in Courts of Appeals, and in the preamble to regulations, allowing state judges and juries to second-guess the FDA's approval of PMAs, or to dictate different requirements than FDA has imposed, impedes FDA's ability to fulfill its mandate in furtherance of public health.").
87 Brief of Washington Legal Foundation in Riegel, supra note 81, at 1.
88 Id. The statement of interest adds: "such as (in this case) the Medical Device Amendments (MDA)." Id.
where nationally uniform regulation is critical to proper usage.\footnote{90} In addition, federal preemption was urged as promoting the interests of medical research and innovative technology.\footnote{91}

In the Court's next term, the Chamber of Commerce,\footnote{92} the PLAC,\footnote{93} and the Washington Legal Foundation\footnote{94} would all appear again as amici in support of Philip Morris USA, Inc. and the Altria Group, Inc. in a preemption action involving the Federal Cigarette Labeling and Advertising Act.\footnote{95} These three amici were joined by another repeat pro-business litigator, the National Association of Manufacturers ("NAM"),\footnote{96} as well as by a group of former federal trade commissioners urging support for application of federal preemption to state statutory claims, and illustrating the aggressive advocacy of conservative agency capture.\footnote{97}

The Altria litigation raised the issue of whether the Federal Cigarette Labeling and Advertising Act expressly or impliedly preempted the ability of a state claimant to pursue a statutory claim.

\footnote{90} Brief of Croplife America et al., supra note 83, at 2.
\footnote{91} The amici joined in the Brief of the Advanced Medical Technology Association urged application of federal preemption to avoid the numerous harmful effects of state-law liability risks. The amici identified the possible harmful effects of the availability of state law claims to include: "(i) forgoing innovation [and] discouraging device development [by medical device companies]; (ii) decreasing the availability of potentially beneficial medical treatments in the United States, particularly those relating to women's health; (iii) increasing medical costs; and (iv) encouraging 'defensive labeling' that interferes with rational prescribing decisions by physicians." Brief of the Advanced Medical Technology Association et al., supra note 83, at 1.
\footnote{94} See Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioners, Altria, 129 S. Ct. 538 (No. 07-562) [hereinafter Brief of Washington Legal Foundation in Altria].
\footnote{95} 15 U.S.C. § 1334(b) (2006); see also ME. REV. STAT. ANN. tit. 5, § 207 (Supp. 2008).
\footnote{96} See Amicus Curiae Brief of the National Association of Manufacturers in Support of Reversal, Altria, 129 S. Ct. 538 (No. 07-562) [hereinafter Brief of the National Association of Manufacturers]. NAM identifies itself as "the nation's oldest and largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states." Id. at 1. In addition, NAM states its mission "is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to the economic growth of the United States and to increase understanding among policymakers, the media, and the public about the vital role of manufacturing in America's economic future and living standards." Id.
\footnote{97} See Brief of Former Commissioners and Senior Staff of the Federal Trade Commission as Amici Curiae in Support of Petitioners, Altria, 129 S. Ct. 538 (No. 07-562) [hereinafter Brief of Former Commissioners and Senior Staff]. The former Commissioners and staff identified their interest in assisting the Court "in understanding the full context and nature of the FTC's comprehensive regulatory control over the conduct at issue in this case." Id. at 2.
under Maine’s Unfair Trade Practices Act. The Court, in a 5-4 decision that relied heavily on the Court’s precedent in Cipollone, held that the plaintiff’s statutory claim was not expressly or impliedly preempted by the federal Act or by the Federal Trade Commission’s actions in regulating cigarette content and advertising.

The amici briefs in support of federal preemption consistently urged a positive federal regulatory argument, thereby rendering these pro-business amici pseudo-federalists. The amici briefs in Altria advanced three basic policy themes that were highly similar to those articulated by the same amici in Riegel. First, national regulation is a good thing. For example, the Chamber of Commerce urged that statutes such as the Federal Cigarette Labeling and Advertising Act “ensure uniform, nationwide standards.” Second, uniform national standards are desirable because “[t]hey promote efficiency, reduce barriers to interstate commerce, and prevent consumer confusion.” In a bid towards consumerism, the amici suggested that non-uniform standards confuse and potentially injure consumers. Third, federal law cannot achieve the goals of uniform nationwide standards if federal requirements can be “second-guessed by different juries under...

98 ME. REV. STAT. ANN. tit. 5, § 207 (Supp. 2008).
100 Altria, 129 S. Ct. at 541, 545-51.
101 Brief of Chamber of Commerce in Altria, supra note 92, at 2.
102 Id.; see also Brief of Washington Legal Foundation in Altria, supra note 94, at 1. Similar to its asserted interest in Riegel, the Washington Legal Foundation stated that the “WLF is particularly concerned that individual freedom and the American economy both suffer when state law, including state tort law, imposes an unnecessary layer of regulation that frustrates the objectives or operation of federal regulatory programs.” Id.
103 The Chamber of Commerce stated:

Congress has repeatedly recognized that, in today’s integrated national economy, uniform standards promote efficiency, avoid waste, and reduce barriers to interstate commerce. Congress has also recognized that consumers would be harmed by the confusion that results if the same products are labeled differently in different States. The decision below cannot be reconciled with Congress’ effort to avoid the injury to the national economy that would result from such nonuniform labeling.

Brief of Chamber of Commerce in Altria, supra note 92, at 3. The former Commissioners and staff of the FTC, in their amicus brief, similarly attempted to position their argument as a pro-consumer stance: “In particular, amici are intimately familiar with the FTC’s decades-long efforts to ensure that consumers receive useful and accurate information about the tar and nicotine smoke content of competing brands of cigarettes.” Brief of Former Commissioners and Senior Staff, supra note 97, at 2. The Washington Legal Foundation also cast itself as a protector and defender of First Amendment free speech values, asserting that upholding preemption of statutes, such as the Federal Cigarette Labeling and Advertising Act, which promote uniform regulation, helps “to promote . . . First Amendment values and, consequently, commercial free speech rights by limiting state and local power to restrict commercial speech.” Brief of Washington Legal Foundation in Altria, supra note 94, at 1–2.
state tort law in different States," a decidedly anti-states' autonomy position.

In Altria, the National Association of Manufacturers asserted one of the strongest pro-federal regulatory positions in its amicus brief, predicting near-catastrophic results in the absence of federal preemption of state law claims:

If allowed to stand, the ruling below would subvert the functioning of a carefully crafted federal regulatory regime, thwarting the federal government's goal of maintaining a uniform national policy in the subject industry—with the likely result being the regulatory destabilization of a myriad of other industrial sectors under comprehensive federal regulation and oversight.105

Finally, in perhaps the most closely watched preemption case of the 2008–2009 Term, Wyeth v. Levine,106 eight groups filed amicus briefs on behalf of the Wyeth company. The amici can be clustered into five groups: (1) the usual pro-business repeat players, the Chamber of Commerce,107 PLAC,108 and the Washington Legal Foundation109; (2) two specialized pharmaceutical industry groups110; (3) the United States government111; (4) economic professors112; and (5) a defense bar advocacy coalition.

104 Brief of Chamber of Commerce in Altria, supra note 92, at 2; see also Brief of Product Liability Advisory Council, Inc. in Altria, supra note 93, at 2 ("Further, many PLAC members belong to heavily-regulated industries, and PLAC has a compelling interest in ensuring that express preemption provisions are interpreted in a way that does not frustrate the purposes of federal regulations and subject its members to conflicting requirements set by individual juries applying the laws of 50 states."); Brief of the National Association of Manufacturers, supra note 96, at 2 ("Manufacturers need the assurance of the Court that in relying upon the guidance of federal regulators, they will not expose themselves to state law liability in different courts across the country."); Brief of Former Commissioners and Senior Staff, supra note 97, at 6 ("The imposition of state-law liability for such conduct would therefore interfere with and frustrate the accomplishment of the FTC's considered policy objectives in this area.").

105 Brief of the National Association of Manufacturers, supra note 96, at 1.


107 See Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, Wyeth, 129 S. Ct. 1187 (No. 06-1249) [hereinafter Brief of the Chamber of Commerce in Wyeth].


110 See Brief of the Generic Pharmaceutical Association as Amicus Curiae in Support of Petitioner, Wyeth, 129 S. Ct. 1187 (No. 06-1249) [hereinafter Brief of the Generic Pharmaceutical Association]; Brief for PhRMA and BIO as Amici Curiae Supporting Petitioner, Wyeth, 129 S. Ct. 1187 (No. 06-1249) [hereinafter Brief for PhRMA and BIO].

111 See Brief for the United States as Amicus Curiae Supporting Petitioner, Wyeth, 129 S.
In *Wyeth*, the third of the preemption cases, the Supreme Court was presented with the issue of whether a plaintiff’s state common law failure-to-warn claim, for injuries resulting from administration of the anti-nausea drug Phenergan, was impliedly preempted by FDA labeling provisions. The Supreme Court, in a 6–3 decision, upheld the Vermont Supreme Court’s decision that federal law did not preempt the plaintiff’s claim.

Similar to the briefing in *Riegel* and *Altria*, the *Wyeth* amici asserted policy themes identical to those articulated in the earlier preemption cases, additionally focusing on constitutional and federalism issues relating to the allocation of authority between federal and state governments, as well as the appropriate deference to be accorded to federal regulatory agency decision-making.

Thus, in *Wyeth*, the Supremacy Clause was urged as the “fountainhead of the doctrine of implied conflict preemption,” a doctrine that “serves a vital structural role in our Nation’s government by protecting federal law and programs against encroachment and interference by subordinate governments.” Again, the amici jointly and severally argued that the Supremacy Clause—enforced through
the implied preemption doctrine—"helps to create unified and rational markets for nationally distributed goods and services by ensuring that uniform federal regulation is not undermined or subverted by state and local law, including state tort law as applied by lay juries."\textsuperscript{119} Moreover, the PLAC advanced a Supremacy Clause argument to lie to rest use of the presumption against federal preemption in implied conflict cases such as \textit{Wyeth}.\textsuperscript{120}

Several \textit{Wyeth} amici positioned themselves as consumer champions. Thus, these \textit{amici} urged the Court to apply federal preemption to protect consumer interests, suggesting that state failure-to-warn lawsuits posed a threat to public health by encouraging unduly risk-averse drug labeling, inducing manufacturers to withdraw medicines from the market or not to introduce them at all, or discouraging physicians from prescribing and using beneficial medicines because of warnings about unsubstantiated risks.\textsuperscript{121} The conservative economists writing on behalf of \textit{Wyeth} further suggested that additional labeling requirements, as a consequence of state litigation, would "lead to a host of distortions in drug marketing and availability that have adverse consequences for public health and wellbeing."\textsuperscript{122} Thus, "[p]reemption provides an important safeguard against expected FDA Type II errors by countering the exacerbating impact of state tort lawsuits for failure to warn."\textsuperscript{123}

\textbf{B. The Conservative Preemption Conundrum}

The theme of this Article has been to tease out the strange relationships that preemption doctrine has engendered among various actors across the political spectrum. The previous section has illustrated the muscular pro-federal regulatory position repeatedly asserted by the major pro-business advocates before the Supreme Court.

In addition to this incongruity, the preemption debate also has highlighted how preemption doctrine has bridged an internal divide among conservatives, uniting ideologically disparate wings of the conservative movement. Thus, preemption doctrine has managed to unite pragmatic free-market conservatives (who favor business interests), ideological states-rights conservatives (who favor local

\textsuperscript{119} Id. at 2.
\textsuperscript{120} Brief of PLAC in \textit{Wyeth}, supra note 108, at 11–19. PLAC concludes that the Vermont decision rejecting preemption was not only fundamentally unfair, but "impedes interstate commerce and threatens the proper functioning of the federal regulatory system." Id. at 4.
\textsuperscript{121} See Brief for PhRMA and BIO supra note 110, at 2.
\textsuperscript{122} Brief of John E. Calfee et al., supra note 112, at 5.
\textsuperscript{123} Id. at 5–6.
autonomy and no federal-interference with state power), and libertarians (who favor individual rights, limited government, and free speech protections). \(^{124}\)

Ironic arguments abound. For example, in defense of federal preemption, conservative lobbyists turn Supremacy Clause arguments on their head. Rather than urging an interpretation of the Supremacy Clause that protects and ensures states’ rights, the pro-business preemption advocates instead embrace a robust theory of the Supremacy Clause to defend and protect federal regulatory programs “against encroachment and interference by subordinate governments.” \(^{125}\) Conservatives have thus positioned themselves, in the preemption debate, as the guardians of the proper functioning of the federal government and of the appropriate deference to be paid to federal agency decision-makers.

Rather than urging a preemption doctrine that preserves and protects local law and the use of local juries, the conservative coalition instead decries the harmful influence of local justice. In the preemption realm, pro-business interests find themselves defending First Amendment speech protections against local constraints on commercial speech. In defense of federal preemption, pro-business interests have represented themselves as the true defenders, advocates, and protectors of consumer interests, particularly in advancing medical research and innovative product development. And in the strange, inverted universe of preemption doctrine, conservative pro-business interests make common cause with libertarian defenders of individual rights.

III. STRANGE BEDFELLOWS II: THE CONSERVATIVE-LIBERAL PREEMPTION ALLIANCE

While the narrative of the conservative coalitions in support of federal preemption is unusual, yet entertaining, the narrative of the liberal-conservative alliance in support of federal preemption is perhaps more confounding, if not more confusing. Nonetheless, as will be discussed below, the Riegel decision instructs that it is possible for liberal and conservative interests to align in support of preemption doctrine. However, this is a fragile alignment, as the Court’s decisions in both Altria and Wyeth demonstrate. In the end, all three decisions make plausible political (if not jurisprudential) sense.

---

\(^{124}\) See Rosen, Supreme Court Inc., supra note 10.

\(^{125}\) Brief of the Chamber of Commerce in Wyeth, supra note 107, at 1–2.
A. Liberal Friends of the Court Against Preemption

As predictable as the conservatives are as repeat-player amici in support of federal preemption, it should come as no surprise that an opposite coalition of liberal causes has marshaled against express and implied federal preemption of state law claims. This section surveys the various groups that appeared before the court in Riegel, Altria, and Wyeth, and the nature of the liberal arguments against federal preemption.

Similar to the groups writing in support of preemption, the entities urging the Court to reject federal preemption in Riegel,126 Altria,127 and Wyeth128 may be grouped into several categories: (1) public justice advocacy groups129; (2) states130; (3) consumer rights coalitions131; (4) industry specific associations132; (5) the United

126 Six amicus briefs were filed on behalf of the Petitioner Riegel.
127 Eight amicus briefs were filed on behalf of the Respondent Good.
128 Twenty-two amicus briefs were filed on behalf of Respondent Levine.
132 See Brief of Amici Curiae Tobacco Control Legal Consortium et al. in Support of Respondents, Altria, 129 S. Ct. 538 (No. 07-562) [hereinafter Brief of Tobacco Control Legal
States government, agency officials, and Congressmen; and (6) professors. Although the amici advanced various nuanced statutory, constitutional, textual, and jurisprudential arguments in opposition to federal preemption (both express and implied), the amici also articulated an array of fundamental policy reasons against the application of federal preemption in these cases.

The American Association for Justice ("AAJ") and Public Justice set forth the broadest arguments for limiting preemption,
which the numerous amici appearing in these cases repeated. In essence, these public interest lobbying groups framed the preemption debate as embracing an access-to-justice and consumer protection problem. In this view, tort law and the tort system serve two fundamental purposes: to compensate injured persons harmed by wrongful conduct, and to deter bad actors from future similar conduct. To the extent that preemption doctrine was applied to eliminate access to state courts and state causes of action, the purposes of the tort system would not be served and innocent victims of wrongdoing would go un-remediated. In addition, the application of federal preemption to displace state product liability suits imperiled the safety and health of consumers.

The public interest law lobbyists sought to locate federal regulatory power alongside state tort law remedies, arguing that Congress never “intended to rely exclusively on FDA regulation to ensure the safety of potentially dangerous medical devices” or drugs. Thus, the liberal advocates neither whole-heartedly embraced nor eschewed federal regulatory power. These advocates instead recognized the concurrent roles of the federal government in providing national regulatory standards to safeguard products on the market, and of the state courts in compensating citizens for injuries. In this view, “courts have traditionally viewed regulation and liability as complementary approaches to product safety.” Moreover, some amici challenged the presumption that regulatory agencies possess singular expertise in their areas of regulatory control.

137 Id. at 1, 26–27.
138 See, e.g., Brief for the States of New York et al., supra note 130, at 1; see also Brief of New England Journal of Medicine, supra note 132, at 5 (“Without the tort system, the FDA would be stripped of an essential source of information that the agency has consistently relied on when making its regulatory decisions, and the American public would be deprived of a vital deterrent against pharmaceutical company misconduct.”); Brief of Kim Witzak, et al., supra note 132, at 3–4 (noting inability of FDA to protect public health and the danger of eliminating the valuable check of state tort litigation); Brief of DES Action, supra note 132, at 3–4 (same); Brief of Former FDA Commissioners, supra note 133, at 2 (arguing that preemption “threatens to undermine, not advance, the underlying goal of nation’s drug safety laws, which is ‘to protect consumers from dangerous products’” (quoting United States v. Sullivan, 332 U.S. 689, 696 (1948))).
139 Brief of the AAI in Riegel, supra note 129, at 4.
140 Id.; see also Brief of Torts Professors, supra note 134, at 4–17 (arguing that FDA regulatory and state law tort systems are complementary).
141 See, e.g., Brief of the Citizens Commission on Human Rights in Support of Respondent, supra note 129, at 1 (“However, substantial public record information indicates that this presumption of the FDA’s singular expertise is neither accurate nor warranted. And, upon this inaccurate presumption, the health and the lives of literally millions of persons hang in the balance.”); see also Brief of the Senior Citizens League, supra note 131, at 3 (questioning FDA agency expertise as insufficient to protect consumers); Brief of AARP et al. in Wyeth, supra note 132, at 2–3 (questioning FDA regulatory expertise); Brief of David B. Ross, supra note 134, at 3–4 (commenting on deficiencies and abuses in FDA drug approval process).
Thus, the *amici* urged that Congress enacted its regulatory statutes to protect the public from unsafe medical devices and drugs, but did not at the same time eliminate, or intend to eliminate, state-law remedies for injuries.\(^{142}\) Several Congressmen joined as *amici* to clarify the intent of Congress in enacting the Medical Device Amendments of 1976 (MDA) and the Food, Drug, and Cosmetic Act (FDCA).\(^{143}\) "For good reasons Congress and, until recently, the FDA viewed state tort liability as an important complement to federal regulation in ensuring safe and effective drugs."\(^{144}\) The complementary roles of federal regulation and state tort law adjudication worked in tandem to ensure both *ex ante* review of medical devices and drugs prior to market distribution, but also permitted *ex post* adjudication in products liability suits based on real individuals' actual experiences with medical devices and drugs under real world conditions.\(^{145}\)

In *Altria*, the states as *amici* centered their public policy arguments on the state police powers in protecting the health and safety of its citizens. As such, the states as *amici*, joined by various consumer groups,\(^{146}\) advanced strong Tenth Amendment states' rights arguments against the preemption doctrine. The states forcefully urged that federal and state governments had enjoyed longstanding

---

Consumer advocates were joined in the argument over agency competency by several former Commissioners of the FTC, who advocated for complementary systems of regulation and adjudication. See Brief of Former Commissioners of the FTC, *supra* note 133, at 3–4, 6. In addition, the United States government also joined on behalf of Respondent in *Altria* opposing application of preemption, based on misapprehension of how the FTC had received and reviewed information from tobacco companies regarding tar and nicotine content. Brief for the United States in *Altria*, *supra* note 133, at 15–16.

\(^{142}\) E.g., Brief of the Senior Citizens League, *supra* note 131, at 3.

\(^{143}\) See, e.g., Brief of Members of Congress, *supra* note 133, at 3–4 (arguing that the intent of Congress was to deliberately preserve state law damage claims); Brief of Senator Edward M. Kennedy, *supra* note 14 (same).

\(^{144}\) Brief of the AAJ in *Wyeth*, *supra* note 129, at 2; see also Brief of Maine et al., *supra* note 130, at 2 (commenting on the complementary roles of the FTC and State Attorneys General in enforcing laws and regulations against deceptive trade practices); Brief of Consumers Union in *Riegel*, *supra* note 131, at 3 (noting the comfortable fit of the FDA’s regulatory scheme with state-created common law aimed at protecting the health and safety of American consumers, and providing compensation to injured parties); Brief of AARP et al. in *Wyeth*, *supra* note 132, at 3 (commenting on the complementary partnership of tort system and federal regulatory roles).

\(^{145}\) See, e.g., Brief for the States of New York et al., *supra* note 130, at 1; see also Brief of AARP et al. in *Riegel*, *supra* note 131, at 5–6 (noting that the pre-market approval system of the FDA supplemented, but could not supplant the traditional functions of state tort liability, and stating that "[the] traditional state tort system provides manufacturers with safety incentives, the public with information about defective devices, and victims with compensation for their injuries"); Brief of Daniel Paul Carpenter et al., *supra* note 134, at 6 (noting that "[s]tate-law failure-to-warn litigation play[ed] an essential role in promoting drug safety").

\(^{146}\) See, e.g., Brief of the Senior Citizens League, *supra* note 131, at 2 (arguing on a Tenth Amendment basis for opposition to preemption doctrine).
cooperation in combating deceptive trade practices, which dual authority would be undermined by application of implied preemption under statutes such as the Federal Cigarette Labeling and Advertising Act.147 Thus, federal preemption "would foreclose actions by the Attorneys General and other state law enforcement agencies against tobacco companies under state laws prohibiting deceptive or misleading advertising—not only those related to 'light' cigarettes. The result urged by Petitioners, therefore, would be a serious blow to state law enforcement."148

The National Conference of State Legislatures articulated the strongest version of a states' rights theory in regard to authority for state tort law, attacking the issue of preemption by preamble.149 Construing recent regulatory attempts to create preemption by preamble, the state legislature lobbyists challenged this practice as an assault on federalism and states' rights.150 In addition, the National Conference decried preemption by preamble for its significant fiscal implications for state governments.151

In the *Wyeth* implied preemption litigation, liberal public interest lobbyists joined with the states' cause in highlighting that almost every state and Congress had declined "to elevate compliance with FDA requirements into a dispositive defense."152 The *amici* therefore urged the Court not to create "a national FDA compliance affirmative defense under the guise of implied conflict preemption."153 More broadly, the states as *amici* and various constitutional scholars urged the Court to repudiate so-called "obstacle" or "frustration" preemption—a variant of conflict preemption—as a potentially

---

147 See, e.g., Brief of Maine et al., *supra* note 130, at 1.
148 Id.
149 See Brief of the National Conference of State Legislatures as *Amicus Curiae* Supporting Respondents, *supra* note 130, at 1 ("State governments, and their legislatures, as independent branches of co-equal States in our system of Federalism, are deeply involved in the creation of State tort laws. As such, State Legislatures have been on the front line of the policy decisions about 'Tort Reform.'").
150 Id. (viewing preemption by preamble as "that attempt to seize, without the involvement of Congress and the normal legislative process, and through circumvention of Executive Order 13132 'Federalism' (8/4/1999), entire areas of State authority").
151 Id. at 2; see also Brief of Anju Budhwani, M.D., et al., *supra* note 132, at 1–2 (noting the fiscal impact on labor unions' abilities to recoup expenses unreasonably associated with unsafe medication). The Brief of Anju Budhwani, M.D., et al., *supra* note 132, included several labor union *amici*.
152 Brief of the AAJ in *Wyeth*, *supra* note 129, at 2 ("[Congress and the states] recognize that such a defense would be difficult to apply, place excessive reliance on the FDA, undermine incentives for drug companies to strengthen their warnings, and leave injured persons remediless.").
153 Id.
boundless doctrine of implied preemption based on alleged frustration of federal purpose.\textsuperscript{154}

Consumer protection advocates similarly advanced forceful states' rights positions based on Tenth Amendment police powers reserved to the states.\textsuperscript{155} In their briefing these advocates sought to ensure the full enforceability of state consumer protection laws and to ensure that state consumer protection laws were not "inappropriately limited by overbroad interpretation and application of preemption provisions in federal law."\textsuperscript{156} The amici asserted their belief that the public could not be adequately protected against dangerous medical devices and other products without effective state law tort remedies.\textsuperscript{157} In a similar vein, consumer advocates also made common cause with physicians' groups, who argued that preemption of pharmaceutical claims would serve to obstruct physicians' access to complete and truthful information about prescription drug safety, which would force physicians to have to uncover such information of their own.\textsuperscript{158}

Regarding doctrinal arguments, liberal advocates who appeared as amici in the case strongly urged application of the Court's historical canon of construction, the presumption against preemption in both express and implied preemption cases.\textsuperscript{159} Moreover, the liberal advocates argued that the Supremacy Clause was not implicated in

\textsuperscript{154} See, e.g., Brief of the Constitutional Accountability Center, \textit{supra} note 129, at 2–3. The Constitutional Accountability Center identified itself as a "think tank, law firm and action center dedicated to fulfilling the progressive promise of our Constitution's text and history." \textit{Id.} at 1. It further stated that it assisted "[s]tate and local officials in upholding valid and democratically enacted measures and historic common law remedies." \textit{Id.; see also} Brief of Vermont et al., \textit{supra} note 130, at 3–4 ("Congress's authority . . . gives it vast opportunities to preempt state law. If the political process is to serve as a genuine check on that power, states must be give notice when their authority is at risk. Implied frustration preemption undermines that check.").

\textsuperscript{155} See, e.g., Brief of the Senior Citizens League, \textit{supra} note 131, at 2 ("By its misstatement of Congressional authority, Wyeth sidesteps the presumption against preemption of the police powers reserved to the states, as secured by the Tenth Amendment.").

\textsuperscript{156} Brief of Maryland Consumer Rights Coalition, \textit{supra} note 131, at 2; \textit{see also} Brief of American Medical Association et al., \textit{supra} note 132, at 2 (urging that the litigation involved in \textit{Altria} was about the defendant's alleged fraudulent conduct, and not its failure-to-warn).

\textsuperscript{157} See, e.g., Brief of the Public Health Advocacy Institute et al., \textit{supra} note 131, at 2; \textit{see also} Brief for the Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc., \textit{supra} note 131, at 2 ("The Center is concerned that an aggressive program of preemption of state laws by federal regulatory agencies will result in inadequate protection of consumers under state product liability and consumer protection laws."); Brief of Tobacco Control Legal Consortium et al., \textit{supra} note 132, at 4 (stating that preemption finding could seriously undermine states' ability to enforce consumer protection and anti-fraud statutes concurrently with FTC enforcement efforts).

\textsuperscript{158} See, e.g., Brief of the California Medical Association, \textit{supra} note 132, at 1–2; Brief of the Texas Medical Association et al., \textit{supra} note 132, at 2–4; \textit{cf.} Brief for the National Coalition Against Censorship, \textit{supra} note 131, at 3 (arguing that Wyeth had a First Amendment right to issue supplemental warnings and therefore no conflict preemption applied).

\textsuperscript{159} See, e.g., Brief of Constitutional and Administrative Law Scholars in \textit{Wyeth, supra} note 134, at 4–14.
preemption cases permitting state court juries to award compensatory damages.\textsuperscript{160}

\textit{B. Making Sense of Riegel, Altria and Wyeth}

Earlier sections of this Article have illustrated how preemption doctrine has united various conservative ideological strains in support of robust federal preemption of state law claims, transforming conservative ideologues into pseudo-federal regulatory enthusiasts. In a similar fashion, preemption doctrine has aligned disparate and sometimes seemingly inconsistent liberal causes in opposition to preemption. It is of course logical that the States themselves would advocate strong states' rights positions in the preemption debate. However, in the cause of consumer protection, liberal activists have been transformed into ardent states' rightists. Thus, liberal advocates who might be expected to strongly support encompassing federalization schemes have made common cause with states' rights lobbyists.

Perhaps even stranger, an unusual coalition of conservative and liberal Justices aligned last Term in the Court's decision in \textit{Riegel}, causing some commentators to speculate whether this unusual coalition augured further restrictive preemption decisions in the future.\textsuperscript{161} This forecast turned out not to be true in the Court's subsequent \textit{Altria} and \textit{Wyeth} decisions, where the Court rejected preemption defenses in the implied preemption context.

Is it possible to reconcile the Court's confounding preemption decisions in \textit{Riegel}, \textit{Altria}, and \textit{Wyeth}? While constitutional and administrative law scholars no doubt will devote much time to parsing various statutory interpretations of the preemption language at issue in each of these cases, it is possible to make some coherent sense of this trilogy if viewed through purely political and ideological lenses.

In \textit{Riegel} the Court, in an 8-1 decision, upheld express federal preemption of state common law tort claims, holding the claims preempted by the express language of the Medical Device Amendments Act of 1976.\textsuperscript{162} As Dean Erwin Chemerinsky has noted, the \textit{Riegel} litigation united both the liberal and conservative wings of

\textsuperscript{160} Id.

\textsuperscript{161} See Chemerinsky, supra note 11, at 64 ("Preemption cases create the opportunity for an unusual coalition of the more liberal justices, like Justice Stephen Breyer, who favor more expansive national power, and the conservative justices, like Scalia and Chief Justice John Roberts, who are strongly pro-business. That is exactly what happened in \textit{Riegel}, and that is what will probably happen in future cases.").

the Court, with Justice Ginsburg as the lone dissenting Justice. The Riegel opinion, authored by Justice Scalia, united not only the other three conservative Justices, but also captured Justices Breyer, Kennedy, Stevens, and Souter. Justice Scalia’s opinion in Riegel relies heavily on the Court’s previous preemption ruling in Medtronic, Inc. v. Lohr. In Lohr, Justice Breyer had aligned with four conservative Justices to uphold federal preemption of common-law causes of action for negligence and strict liability under the MDA. More than a decade after Lohr, the other liberal-leaning Justices (excepting Justice Ginsburg) now aligned with Justice Breyer and the conservative wing of the Court in Riegel.

Justice Scalia’s majority opinion is entirely consistent with conservative canons of judicial construction. Thus, in addition to reliance on Lohr precedent, Justice Scalia grounds his preemption conclusions on the express language of the MDA statute, which he finds clear and unambiguous. Futhermore, Justice Scalia eschews recourse to congressional intent in construing the statutory language and meaning concerning an additional “requirement.” Finally, because Justice Scalia believes the MDA statute to speak clearly on the issue of “requirements,” he refuses to accord any deference to the FDA’s agency position, instead suggesting that no deference be paid to the agency at all because of its prior inconsistent positions on agency preemption.

163 Chemerinsky, supra note 11, at 64; see also Riegel, 128 S. Ct. at 1013–20 (Ginsburg, J., dissenting).
164 Justices Alito, Roberts, and Thomas.
165 See, e.g., Riegel, 128 S. Ct. at 1011–13 (Stevens, J., concurring).
167 Justices Rehnquist, Scalia, Thomas, and O’Connor.
168 Riegel, 128 S. Ct. 999 at 1009. Justice Stevens, in his concurrence, indicates that “I am persuaded that its [the MDA’s] text does preempt state law requirements that differ.” See id. at 1011 (Stevens, J., concurring in part and concurring in the judgment).
169 Id. at 1008 (majority opinion). Having indicated that he would not probe into Congressional intent, Justice Scalia then proceeded to do precisely that:

It is not our job to speculate upon Congressional motives. If we were to do so, however, the only indication available—the text of the statute—suggests that the solicitude for those injured by FDA-approved devices, which the dissent finds controlling, was overcome in Congress’s estimation by solicitude for those who would suffer without new medical devices if juries were allowed to apply the tort law of 50 States to all innovations.

Id. at 1009.

In his separate concurrence, Justice Stevens disputes this policy argument. See id. at 1012 (Stevens, J., concurring in part and concurring the judgment).
170 Id. at 1009.
In *Altria*, the Court split 5–4, with the liberal-leaning Justices who opposed preemption of a state statutory fraud claim under the Federal Cigarette Labeling and Advertising Act aligning against a block of conservative Justices. The majority held that the plaintiff’s statutory claim under the Maine Unfair Trade Practices Act was neither expressly nor impliedly preempted by the federal law.

The *Altria* decision failed to unite liberal and conservative Justices in favor of preemption (as in *Riegel*). Perhaps the best political and ideological explanation for this is that *Altria* essentially was a replay—or a do-over—of the Court’s earlier *Cipollone* litigation; that is, cigarette litigation pursued under the exact same statutes as in *Cipollone*. The chief difference between *Cipollone* and *Altria* is that the former case posed the preemption issue of state common law fraud claims, while *Altria* posed the preemption issue of state statutory fraud claims. Given the array of opinions in *Cipollone*, the fact that *Altria* revisited *Cipollone* perhaps doomed any liberal-conservative coalition from the outset.

The *Cipollone* case famously did not produce a majority decision, but instead produced three different opinions, none of which reflected the views of a majority of the Court. In 1992, four Justices (Rehnquist, White, O’Connor, and Stevens) joined in a plurality opinion setting forth a test to determine whether a particular common law claim was preempted under the Federal Cigarette Labeling and Advertising Act. Justices Blackmun, Kennedy, and Souter filed separately; Justices Scalia and Thomas dissented.

Based on the plurality test set forth in *Cipollone*, the *Altria* majority concluded that the duty not to deceive codified in the Maine statute was like the state common law rule at issue in *Cipollone*, and that neither rule had anything to do with smoking and health. The majority’s opinion was authored by Justice Stevens, who joined the *Riegel* majority and who would also write the majority opinion in *Wyeth*, rejecting preemption. In *Altria*, Justice Stevens concluded that just as the state common law fraud claim was not barred or preempted

---

172 *Id.* The five Justices supporting the majority opinion were Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer. The dissenting Justices included Justices Thomas, Roberts, Scalia, and Alito.
173 *Id.* at 541.
175 *Altria*, 129 S. Ct. at 553 (Thomas, J., dissenting) (discussing the disparate opinions in *Cipollone*).
176 *Cipollone*, 505 U.S. at 517–18.
177 *Altria*, 129 S. Ct. at 545, 551.
in *Cipollone*, the Maine statutory fraud claim could not be preempted in *Altria*.\(^{178}\)

The liberal-conservative split in *Altria* reflects the simmering sixteen-year conservative discontent and dismay with the plurality opinion in *Cipollone*.\(^{179}\) Both Justices Scalia and Thomas dissented in *Cipollone*.\(^{180}\) In *Altria*, Justice Thomas dissented against the majority’s reliance on the plurality opinion in *Cipollone*, instead urging that the Court adopt an alternative analytical model suggested by Justice Scalia in *Cipollone*.\(^{181}\) In the intervening sixteen years since *Cipollone*, the Court’s conservative wing had added Justices Alito and Roberts, who joined in Justice Thomas’s dissent.\(^{182}\)

If anything, the 5–4 split in *Altria* may represent a significant fracture in the *Cipollone* line of cases under the Federal Cigarette Labeling and Advertising Act. Four Justices of the Court now express criticism of the *Cipollone* plurality opinion—especially directed at the plurality’s test for preemption. Moreover, the dissenting Justices attempted to reposition the preemption debate by extensively detailing the trend of moving away from a presumption favoring preemption since *Cipollone*.\(^{183}\) In advancing this argument, the dissenting Justices noted that Justice Stevens failed to invoke the presumption in his majority opinion in *Altria*, and that the Court had eschewed reliance on the presumption in *Riegel*.

The *Wyeth* decision, a 6–3 split, further solidified the Court’s liberal coalition in opposition to implied preemption,\(^{184}\) this time joined in the judgment by Justice Thomas (a conservative strange bedfellow). Relying in part on the presumption against preemption,\(^{185}\) the Court rejected *Wyeth*’s “frustration of purpose” argument.\(^{186}\) And, in a scathing criticism of the agency’s failure to give notice, the

\(^{178}\) Id. at 546.
\(^{179}\) Id. at 552–53 (Thomas, J., dissenting) (discussing the problems in interpreting and applying the plurality opinion test in *Cipollone*).
\(^{180}\) *Cipollone*, 505 U.S. at 544–56 (Scalia, J., dissenting).
\(^{181}\) *Altria*, 129 S. Ct. at 551–63 (Thomas, J., dissenting). In response, Justice Stevens, writing for the majority noted that “Justice Scalia’s approach was rejected by seven Members of the Court, and in the almost 17 years since *Cipollone* was decided Congress has done nothing to indicate its approval of that approach. Moreover, Justice Thomas fails to explain why Congress would have intended the result that Justice Scalia’s approach would produce—namely, permitting cigarette manufacturers to engage in fraudulent advertising. As a majority of the Court concluded in *Cipollone*, nothing in the Labeling Act’s language or purpose supports that result.” Id. at 545 n.7 (majority opinion).
\(^{182}\) Id. at 551–63 (Thomas, J., dissenting).
\(^{183}\) Id. at 555–58.
\(^{185}\) Id. at 1195 n.3.
\(^{186}\) Id. at 1199–1204.
majority seized an opportunity to challenge the rulemaking in which
the preemption preamble was included and declined to accord any
deferece to the FDA’s 2006 preamble providing for state law
preemption. Instead, the Court relied on its understanding of
congressional purposes in enacting the FDA, as well as the prior FDA
position, and endorsed the view that FDA oversight and state tort
law remedies worked as complementary forms of drug regulation.
Justice Thomas concurred in the judgment because he found that
Wyeth, consistent with FDA regulations, could have supplemented its
label warnings, and, therefore, the Vermont court’s judgment did not
conflict with federal law.

Although united with the majority’s conclusions in Wyeth, Justice
Breyer, writing in concurrence, left open the possibility that in future
cases he could uphold preemption based on other statutory language
or agency determinations. Thus, Justice Breyer reaffirmed his
position in Lohr that preemption might be appropriate in certain cases
where the FDA might seek to determine whether state tort law acted
as a help or hindrance to achieving safe drug-related care. “It [the
FDA] may seek to embody those determinations in lawful specific
regulations describing, for example, when labeling requirements serve
as a ceiling as well as a floor.”

Similarly, although concurring in the Court’s judgment, Justice
Thomas sought to distance himself from the Court’s sweeping
pronouncements in Wyeth. Consistent with his conservative ideology
and jurisprudence, Justice Thomas wrote separately because he could
not join the majority’s “implicit endorsement of far-reaching implied
pre-emption doctrines.” In particular, Justice Thomas indicated that
he had become increasingly skeptical of the Court’s “purposes and
objectives” preemption jurisprudence:

Under this approach, the Court routinely invalidates state
laws based on perceived conflicts with broad federal policy
objectives, legislative history, or generalized notions of
congressional purposes that are not embodied within the text
of federal law. Because implied pre-emption doctrines that
wander far from the statutory text are inconsistent with the Constitution, I concur only in the judgment.\textsuperscript{194}

Finally, dissenting Justices Alito, Roberts, and Scalia grounded their objections to the majority’s decision in a constitutional Supremacy Clause argument: “But turning a common-law tort suit into a ‘frontal assault’ on the FDA’s regulatory regime for drug labeling upsets the well-settled meaning of the Supremacy Clause and our conflict pre-emption jurisprudence.”\textsuperscript{195} The dissenters again sought to bring the Wyeth litigation within the ambit of Riegel, suggesting that state juries were ill-equipped to perform the FDA’s cost-benefit balancing function in drug labeling.\textsuperscript{196}

When viewed together, the Court’s decisions in Riegel, Altria, and Wyeth make rough political and ideological sense. The Court was able to unite eight Justices in Riegel, when faced with an express statutory preemption provision. In Riegel, true to ideology, the conservative Justices hewed to a jurisprudence of strict statutory construction unaided by resort to legislative intent. The Altria litigation revealed the Court’s fault lines with regard to the peculiar preemption niche occupied by Cipollone; conservative antipathy to the plurality’s Cipollone test for the preemptive effect of a state claim may now be endangered by an increasingly fragile majority. Finally, Wyeth also evidences a fragile majority, with Justice Breyer signaling adherence to his position in the Lohr decision, and Justice Thomas at the ready to return to the conservative preemption camp. It is sobering for preemption opponents to realize that these two Justices would have altered the result in Wyeth, a realization that ought to give pause to commentators who might believe that Altria and Wyeth signify an end to unfavorable preemption decisions.

IV. STRANGE BEDFELLOWS III: THE PLAINTIFFS’ BAR AND THE PREEMPTION SCHISM

The third strange bedfellow in the preemption debate is represented by advocates for the plaintiffs’ class action bar. To date, the views of the class action bar on preemption have played virtually no discernible role in preemption litigation, and none of the usual class action advocates have appeared as amici in the leading preemption cases. However, the class action bar’s idiosyncratic

\textsuperscript{194} Id.
\textsuperscript{195} Id. at 1218 (Alito, J., dissenting) (citing Brief for the United States in Wyeth, supra note 111, at 21).
\textsuperscript{196} Id. at 1229.
perspective on preemption jurisprudence is worthy of momentary pause not for its effects on preemption litigation, but for its attempt to hijack preemption jurisprudence for another purpose altogether. Because the plaintiffs' class action preemption argument is itself politically motivated, and because it is in conflict with the preemption position of individual tort plaintiffs, the thesis concerning the federalization of preemption law is explored below.

A. The Backdoor Federalization Argument and Preemption

The class action plaintiffs' bar's views on preemption doctrine find expression in a 2006 law review article by Professors Samuel Issacharoff and Catherine M. Sharkey, entitled Backdoor Federalization. In their article, Professors Issacharoff and Sharkey posit that the Supreme Court's and lower appellate courts' robust enforcement of federal preemption is one skein of jurisprudential threads resulting in a tapestry of the federalization of law more globally. The Professors' thesis is normative: "Our main argument is that the U.S. Supreme Court has, in preemption and forum allocation cases, attempted to capture the considerable benefits that flow from national uniformity and to protect an increasingly unified national (and international) commercial market from the imposition of externalities by unfriendly state legislation."

As such, the Professors position themselves squarely with the pro-federal regulatory proponents (the conservative wing of the preemption debates), and in opposition to their natural allies (the plaintiff's traditional tort bar). Professors Issacharoff and Sharkey base their "backdoor federalization" thesis on four elaborate pillars. First, the Professors argue that federal courts in recent years have enhanced or expanded the application of federal question jurisdiction under 28 U.S.C. § 1331 to adjudicate state-based claims, in derogation of diversity lawsuits. Second, the Professors argue the saliency of Swift v. Tyson to support the position that the business

197 Professor Issacharoff is the Reiss Professor of Constitutional Law at New York University School of Law. During the 1990s and throughout the twenty-first century, Professor Issacharoff has served as plaintiffs' class counsel and testifying expert witness on behalf of plaintiffs' class actions. He has been a leading proponent of various choice-of-law theories that courts may apply unitary law in nationwide class actions. Among the theories Professor Issacharoff has endorsed, in support of class certification in multistate actions, is that the court may apply (1) one state's law (usually the state of the defendant's incorporation), (2) multiple states' laws grouped by similarity, or (3) some version of federal common law, based on the theory that all states' laws are virtually identical.

198 Issacharoff & Sharkey, supra note 6.
199 Id. at 1353–54.
200 Id. at 1409–14.
201 41 U.S. (16 Pet.) 1 (1842).
of the Supreme Court historically was to address “national market cases.”

Third, the Professors point to a federalization of punitive damage law, exemplified by the Supreme Court’s recent decisions in *BMW of North America, Inc. v. Gore* and *State Farm Mutual Automobile Insurance Co. v. Campbell*. Finally, the Professors suggest that Congress’s enactment of the Class Action Fairness Act of 2005 (CAFA) manifested a congressional intent to federalize tort law.

Having cobbled together these exemplars of the increasing trend towards federalization of law—particularly what Professor Issacharoff designates as “national market cases”—the authors add to this analysis the Court’s preemption decisions as additional evidence of congressional and judicial intent to federalize tort, product liability, and consumer protection law.

The problem with the Issacharoff-Sharkey thesis is that it is wrong as a matter of legislative history, judicial interpretation, and empirical evidence. First, there is scant support for the suggestion that federal question jurisdiction pursuant to 28 U.S.C. § 1331 has expanded to embrace state tort and consumer protection litigation. The Professors base their theory largely on one anomalous case—*Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*—in which the Supreme Court determined that federal question jurisdiction for a state-based tax issue was permissible under the so-called “ingredient test,” where the resolution of the underlying issue turned on a question of federal tax law of general applicability. However, as the professors acknowledge only in a footnote, the Supreme Court in the very next Term limited its holding in *Grable* to a “‘special and small category’ of cases involving ‘a nearly ‘pure issue of law,’ one ‘that could be settled once and for all and therefore would govern numerous tax sale cases.’”

While the *Grable* decision is interesting for its momentary resuscitation of the Holmesian ingredient theory of federal question jurisdiction, *Grable* is nonetheless a judicial outlier. It can by no means support the sweeping contention that federal courts have

---

202 Issacharoff & Sharkey, *supra* note 6, at 1399–1410.
203 Id. at 1420–28.
208 Id. at 1365–96.
expanded federal question jurisdiction to entertain more state-based tort, product liability, and consumer claims. There is virtually no empirical evidence to support this claim.

Second, while it is interesting to investigate the back story of *Swift v. Tyson* to demonstrate that the business of the Supreme Court historically has been business and commercial cases, this history proves too much (or perhaps too little). While it may (or may not) capture the nineteenth century Supreme Court docket, this is historical exegesis in search of evidence. Moreover, this analysis completely ignores the second half of the twentieth century, when the business of the Supreme Court turned primarily to protecting individual civil rights and liberties. It takes a high degree of interpretive license to attempt to shoehorn twentieth-century civil liberties litigation into the historical mold of "national market cases." Finally, it is nothing short of scholarly chutzpah to argue the primacy of *Swift*, when its precedent has been so thoroughly and repeatedly repudiated for over seventy years.\(^{211}\)

Third, it is a strange interpretation to suggest that the Supreme Court’s recent punitive damages case line extending through *BMW of North America, Inc. v. Gore* and *State Farm Mutual Automobile Insurance Co. v. Campbell* demonstrates a trend towards federalization. Rather, the Court’s punitive damages decisions in these cases reflect a conservative ideology that would enforce state limitations on punitive damages awards by curbing the types of permissible jury instructions or limiting punitive damages to multipliers of compensatory damages. If anything, these punitive damages decisions have consistently favored corporate defendants appearing in state court litigation, while upholding the province of state juries to make such determinations.

Finally, it is simply incorrect to suggest that Congress, in enacting CAFA, intended to federalize class action law. Like preemption doctrine itself, CAFA had its philosophical roots in the Republican Contract with America and the conservative civil justice reform movement of the 1980s and 1990s. Reform of class action litigation has long been a platform of conservative advocates. CAFA was first proposed in 1998 under the Clinton administration, but it was not enacted into law until the second Bush administration in 2005.

The express purpose of CAFA was to deal with the problem of abusive class litigation in state courts.\(^{212}\) The centerpiece of the

\(^{211}\) See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

CAFA statutory scheme is the provision for removal of state class action litigation into federal court.\(^2\) Conservative advocates and business interests lobbied for CAFA’s passage in the belief that federal courts, with more restrictive class certification jurisprudence, would curb the volume of alleged frivolous state court class litigation. It was never the express or implied intent of Congress to either federalize class action law or to federalize the substantive law that applies to class actions.\(^2\)

**B. Making Sense of the Plaintiffs’ Class Action Position on Preemption**

Why, then, would academics aligned with the plaintiffs’ bar urge an interpretation of preemption doctrine that characterizes emerging decisions as backdoor federalization? One answer is grounded in the politics of post-CAFA aggregate class action litigation and settlements. With the passage of CAFA, plaintiffs’ class action attorneys essentially have been forced, for the most part, out of favorable state forums and into the federal class action arena. In federal court, the major impediment to class certification of nationwide class actions has been the choice-of-law issue, which essentially frustrates the ability of federal courts to certify such cases.

Consequently, the plaintiffs’ class action bar and its academic advocates have advocated the theory that CAFA intended to federalize both procedural and substantive law. If the plaintiffs’ class action bar can prevail on the theory of federalized substantive law as applied to national class actions—a return to *Swift v. Tyson*—then class action attorneys may make inroads on the ability to certify such classes, or to coerce settlements from defendants. In this quest, the ability to convince federal courts that recent Supreme Court jurisprudence manifests a trend in favor of federalization will substantially advance class action plaintiffs’ interests. To this end, the Court’s preemption jurisprudence has been impressed into service as an additional exhibit in support of the federalization thesis.

\(^2\)CAFA statute to remove abusive state class actions into federal court.


Just as the four pillars articulated by Professors Issacharoff and Sharkey are weak support for the edifice of backdoor federalization, so too is the argument for preemption jurisprudence. If nothing else, this Term’s decisions in *Altria* and *Wyeth* refute the thesis that the Court consistently favors federal preemption of state law claims. Instead, similar to the jurisprudence relating to federal court jurisdiction, choice-of-law issues, punitive damages theory, and CAFA, the evidence suggests an alternative narrative: that conservative deference to state courts and local law is still very much alive and robust.

**CONCLUSION**

The Court’s decisions in *Riegel*, *Altria*, and *Wyeth* will no doubt inspire a wealth of close jurisprudential analysis, as preemption scholars seek to illuminate the Court’s shifting positions on express and implied preemption, “frustration” preemption, congressional “purposes,” the presumption favoring preemption, and appropriate deference to agency actions, among many other textual and doctrinal issues.

This Article has merely attempted to divine how the preemption cases have engendered some unusual political alignments, confounding ordinary appreciation. The cases suggest that conservative advocates have remained the closest to their ideological roots, notwithstanding their purported support for the federal administrative and regulatory state. The Court’s conservative coalition may be counted upon to adhere to strict statutory construction in express preemption cases and to repudiate recourse to legislative history as an interpretive tool; to challenge the doctrinal incoherence of the *Cipollone* plurality opinion in the hopes of repudiating it; and to eschew the power of state juries to second-guess federal regulatory decisions in implied preemption cases. In the end, the conservative position on preemption is entirely consistent with the goals of the civil justice reform movement, a position that consistently seeks to limit access to justice, to curb frivolous litigation, and to contain state tort litigation.

Liberal advocates in the preemption debate present a more complicated picture. At one and the same time, liberal lobbyists argue in favor of federal regulatory authority, in favor of state juries, in favor of states’ Tenth Amendment police powers, and in favor of nuanced interpretations concerning when preemption may or may not be appropriate. These seeming contradictions are rationalized by the theory that consumer protection may be achieved by complementary
systems of regulation, at least in some cases. The liberal dilemma, at the current moment, seems concentrated in the conflicted jurisprudence of Justice Breyer, who would have it all ways.

Finally, the somewhat attenuated theory posited by class action advocates—that preemption doctrine is another strong example of a trend towards backdoor federalization—places class action attorneys in opposition to individual tort lawyers who oppose application of federal preemption to foreclose state tort litigation. As indicated above, this federalization "trend" argument has been rendered additionally dubious by the Court's decisions in Altria and Wyeth.