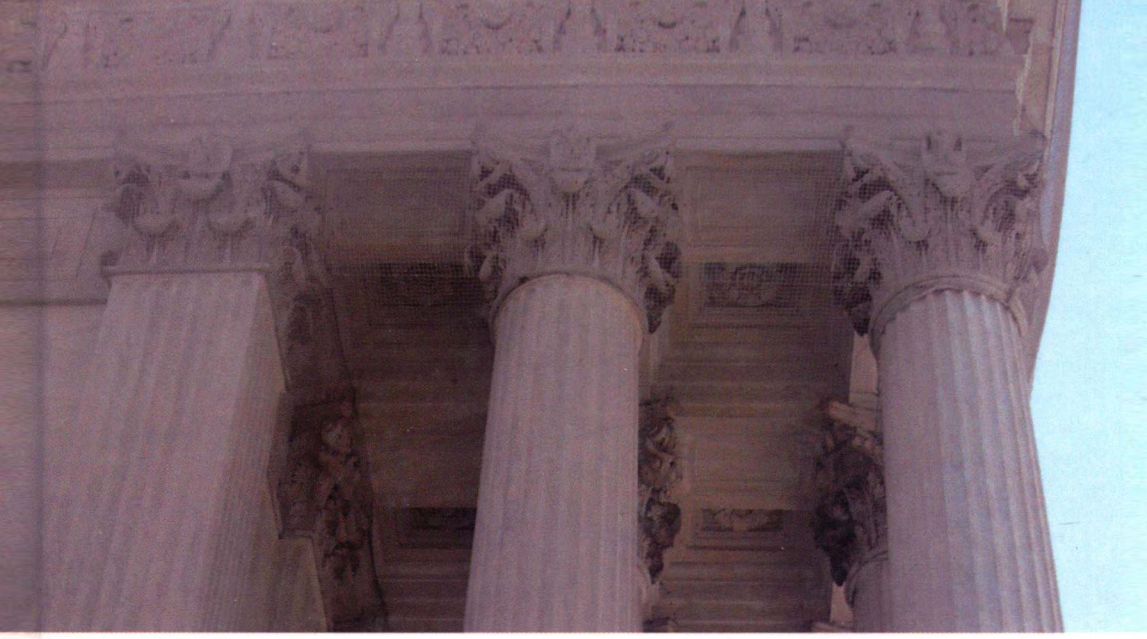
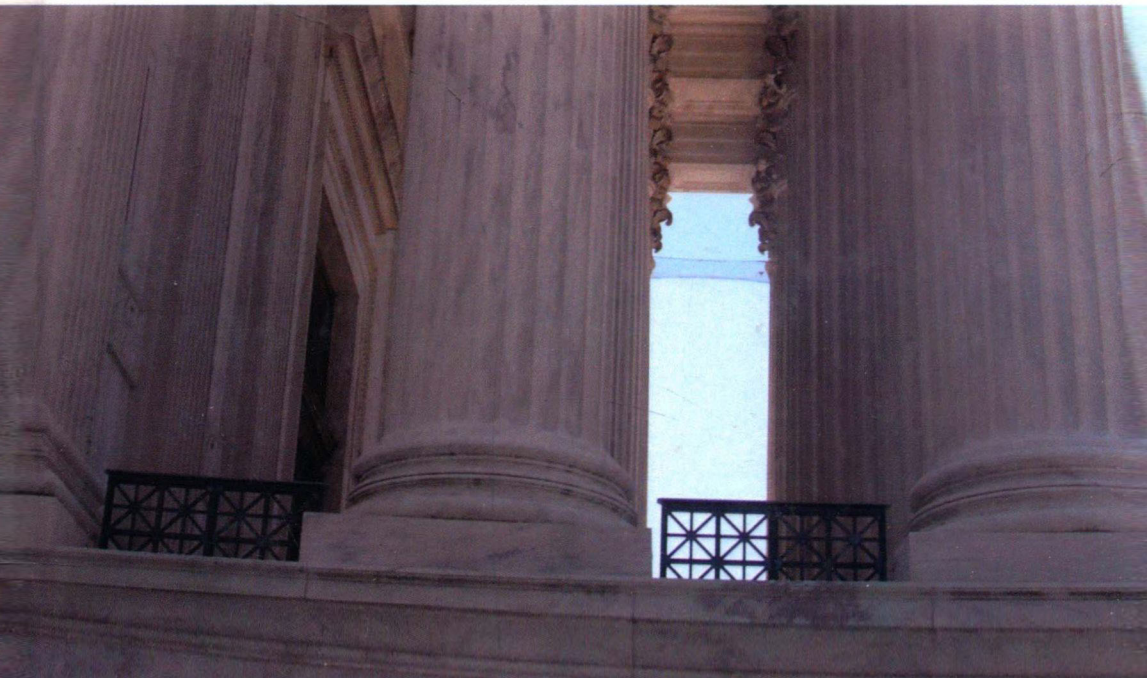


THE U.S. SUPREME COURT AND NEW FEDERALISM

FROM THE REHNQUIST TO THE ROBERTS COURT

CHRISTOPHER P. BANKS AND JOHN C. BLAKEMAN



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From the Rehnquist to the Roberts Court

Christopher P. Banks and John C. Blakeman

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The U.S. Supreme Court and New Federalism

For our mentors,
Professors Henry J. Abraham and
David M. O'Brien

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"A Notably Conservative Court?"

The 2011–2012 term of the U.S. Supreme Court, the seventh under the leadership of Chief Justice John Roberts and the one before the politically divisive 2012 presidential election, promised to be "one that's really for the ages."[1] Even Justice Anthony Kennedy said in front of the media covering a judicial conference right before the new session began that the Court's docket seemed to be changing. Whereas early terms dealt with a fair share of mundane actions litigating the rights of big corporations and finding ways to limit class actions in civil lawsuits, the new term featured several high-profile cases, many of which involved civil rights and liberties and the scope of government's power. The Court, for example, was scheduled to review key First Amendment cases, such as those fixing the scope of government's capacity to regulate nudity and offensive language on television shows, and criminal prosecutions that revisited virtually every aspect of the criminal justice system, including whether the police could attach a GPS tracking device on a suspect's car without a warrant for weeks at a time or if defendants have basic rights to receive competent counsel, and whether they can be protected from arbitrary strip searches when they are put in jail for minor offenses. Also within the Court's sights were petitions involving the constitutionality of affirmative action programs, the rights of same-sex couples to marry, the ability of state governments to control illegal immigration, and, in an lawsuit that "promises to be a once-in-a-generation blockbuster," the right of the government to force individuals to buy health insurance under President Barack Obama's Patient Protection and Affordable Care Act.[2]

While many Supreme Court cases touch citizen's lives in the states in which they live, the federal government's power to control legally what is happening in Ohio, Wisconsin, New York, or California is an ever-present issue as well. The judiciary's role in deciding federalism cases, or issues litigating the proper boundaries of concurrent power between the federal and state governments, is a closely watched and controversial topic of political science and legal scholarship. The way federalism affects ordinary citizens is less obvious but no less powerful. Consider what happened to Diana Levine, in Vermont, when she sought medical treatment for migraine headaches and nausea. Levine, a professional musician, went to a Vermont clinic for help. At the clinic a physician assistant gave her an intramuscular injection of Demerol and Phenergan (promethazinehydrochloride), an anti-nausea drug manufactured by Wyeth, a global pharmaceutical company. After little improvement, she was directly injected with Phenergan through an "IV-push," a riskier method of vein drug delivery than having an "IV-drip." IV-drips are safer because the drug is filtered through a saline solution and an intravenous bag. The option and availability to use either method is significant: since the mid-1950s Phenergan's label has warned that using IV-pushes is more dangerous because of the likelihood that the drug could enter an artery and cause irreversible gangrene, which it did in Levine's case. The onset of gangrene led to amputation and the loss of Levine's arm, a devastating outcome for an accomplished cellist.

Although the way the drug was labeled generally alerted patients and doctors to IV-push risks, Wyeth provided no specific warnings as to the dangers, even though it allegedly had known of the problems it caused, dating back to the 1960s. Moreover, the drug maker did not take advantage of using existing Federal Drug Administration (FDA) rules that clearly allowed manufacturers to change or strengthen their labeling without getting prior FDA approval. As a result, Levine sued Wyeth in state court under Vermont common law negligence and product liability theories, specifically asserting Wyeth's labeling of Phenergan was defective due to its failure to warn patients of the risks connected to using IV-pushes. Wyeth answered that her right to sue in state courts was lost because of federal preemption: FDA's federal regulations eliminated Levine's right to use state tort law because federal rules conflicted with state law. Under "conflict preemption" principles, Wyeth argued that federal labeling rules made it impossible for drug manufacturers to obey any state common law duty to change its labeling and to warn patients of the risks of injecting patients with Phenergan through IV-pushes. Wyeth's interpretation meant that it could only change Phenergan's label in response to new information the FDA had not considered, and in this case, the absence of new data ended its legal duty to warn anyone of the risks

of IV-pushes (which allegedly made it pointless for Wyeth to strengthen its warnings without violating federal labeling guidelines). Regardless, the Vermont trial and appellate courts sided with Levine by upholding a jury's verdict to award her several million dollars for her injuries.

As a last resort, and because the lawsuit raised issues of federal law, Wyeth sought relief in the U.S. Supreme Court, posing this question: Did federal law preempt Levine's failure-to-warn tort claim in state court? In a stunning verdict against the pharmaceutical industry, in *Wyeth v. Levine* the politically conservative Roberts Court did not think so. Writing for the Court in a 6–3 decision, Justice John Paul Stevens, the leader of the liberal bloc typically consisting of Justices David Souter, Ruth Bader Ginsburg, and Stephen Breyer, explained that Congress did not *expressly* preempt (by its plain language in the law) state tort remedies in the Federal Food, Drug, and Cosmetic Act (FDCA). As a result, there was no conflict between the choice of complying with federal labeling requirements and recognizing failure-to-warn cases based in state law. Furthermore, invoking state law tort remedies in failure-to-warn litigation was not viewed by the six justices as an obstacle to achieving Congress's intent or purposes relating to drug labeling requirements. The Court thus reasoned there was no *implied* preemption.[3]

Levine's victory supports prevailing studies by judicial scholars, which find that courts and judges write their political preferences or attitudes into law. The 6–3 split, which had two conservatives in the majority opinion for different reasons (Justices Anthony Kennedy and Clarence Thomas), notably featured Justice Samuel Alito's dissent, which was joined by Chief Justice John Roberts and Justice Antonin Scalia, a trio from the conservative wing.[4] While the final outcome got some conservative support, the basic ideological differences centered on recurring but contentious issues of federalism and preemption. Pro-liberal justices (like Stevens) are arguably more apt to limit the federal agency power to override state tort judgments without a clear intention by Congress to do so in the text, purposes, or legislative history of regulatory statutes such as the FDCA, whereas conservative justices (like Alito) may be inclined to give federal agencies a wide berth of regulatory discretion, which, if exercised, would disallow contrary state court or jury verdicts favoring plaintiffs. In political terms, the divergence in preemption policy is readily bracketed as an issue of corporate liability and individual rights under tort law. Liberal justices often construe preemption principles to let citizens take advantage of state tort law remedies in lawsuits against big businesses and insurance underwriters. In contrast, conservative justices do the opposite to insulate corporations from tort liability and potentially large jury verdicts.[5]

Similar ideological fault lines are found outside the judiciary. In May 2009, President Barack Obama issued an executive memorandum on

preemption policy to the heads of federal agencies, directing them to promulgate regulations that have statements of preemption only when there is a "sufficient legal basis" to do so, as established by Congress. The memo's purpose is to deter agencies from engaging in "regulatory preemption," a practice sanctioned by the 1999 Clinton administration Executive Order 13132 allowing it and one followed by the G. W. Bush presidency.[6] For conservative critics, Obama's memo "places a premium on express preemption and makes it unlikely that the Administration will argue that any state law claims are impliedly preempted,"[7] the liberal position reflected in Justice Stevens's *Levine* opinion. From another perspective, liberal trial bar organizations have made it a legislative priority to achieve greater corporate accountability, in part by lobbying Congress to enact the Medical Device Safety Act (H.R. 1346/S. 540), a bill to protect patients from defective medical devices by explicitly declaring that federal regulations do not preempt state tort lawsuits in product liability claims. Antiliberals thus counter that the American Association for Justice's (previously, the Association of Trial Lawyers of America) legislative agenda is to overturn *Riegel v. Medtronic*, a Supreme Court ruling immunizing medical device manufacturers from liability on preemption of state tort grounds.[8]

Apart from these developments, the Supreme Court continues to weigh in on preemption in several cases, among them *Bruesewitz v. Wyeth*, holding that federal law preempts state tort lawsuits that sue drug companies for negligently designing childhood vaccines. *Bruesewitz*'s public policy impact and the continuing political relevance of high court federalism cases are clear. With Justice Elena Kagan's recusal, the 6–2 decision to interpret the National Childhood Vaccine Injury Act to foreclose parents from claiming a right to compensation in state law shuts the courthouse door on scores of lawsuits asserting causation between negligently produced vaccines and the emergence of debilitating childhood diseases, such as autism. In making aggrieved parents sue in so-called no-fault Vaccine Courts that Congress created to handle such claims, the Court favored allowing federal agency experts, instead of juries in state courts, to make the epidemiological call to award monies to injured children—a judgment that proved to be decisive for Justice Stephen Breyer in his own decision not to join his liberal colleagues (Justices Ruth Bader Ginsburg and Sonia Sotomayor) in dissent but to side instead with the preferences of drug companies and the conservative bloc of Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito. Notably, a week after *Bruesewitz* was decided, another conflict preemption ruling was delivered in *Williamson v. Mazda Motor of America, Inc.*, but this time with a unanimous bench and an opposite finding allowing a state tort lawsuit claiming that a car manufacturer should have installed lap-

and-shoulder belts, not just lap belts, for the rear inner seats of minivans to proceed on the grounds that it was *not* preempted by federal law.[9]

When seen in this light, federalism rulings cannot be understood as simple conflicts of power between federal and state sovereigns—although admittedly the law books are filled with precedents from the high court that take full advantage of the type of rhetoric that makes federalism case rationales memorable, but also at times disingenuous.[10] A more complete understanding of the U.S. Supreme Court and federalism speaks to defining judicial behavior in political terms. That knowledge can be reached by achieving an appreciation for the underlying law, attitudes, and strategies of those occupying the bench[11] or, in conjunction or apart from such explanatory models, by linking the work of courts in the context of broader developments and specific factors, including history, political regimes, institutional dynamics, interest group activity, or popular support.[12] Regardless of the research methodology used, the analytical framework for expressing the Court's political views begins with federalism litigation. The precedents the judiciary creates necessarily reflect ideological struggles over the force of precedent as well as the policy parameters buried deep inside *Wyeth v. Levine*—namely, corporate liability, consumer safety, and tort reform.[13] While all judicial outcomes cannot be explained by politics, *Riegel, Levine, Bruesewitz,* and *Williamson* are potent reminders that political ideology is the touchstone for comprehending internal judicial conflict, as well as exogenously shaping interest group, congressional, and executive agendas that substantively affect agency regulatory practices and consumer safety.

While scholars, interest group advocates, and pundits have acknowledged the political importance of preemption in the U.S. Supreme Court,[14] other topics in the legal and social science federalism literature are germane and deserve further study. One concerns the constitutional scope and public policy impact of the "federalism revolution" in the Rehnquist Court (1986–2005). William H. Rehnquist, a Nixon appointee and a staunch conservative jurist, first established his reputation as the "Lone Dissenter" as an associate justice on the politically moderate Burger Court (1969–1986).[15] In time, his stature grew as a champion and consensus builder of states' rights, especially after President Ronald Reagan tapped him for chief justice in 1986, the same year Antonin Scalia, another conservative and spokesperson for originalism, was elevated to the high court.[16] By 1986, he was already the colleague of Sandra Day O'Connor, and the confirmations of Scalia, Anthony Kennedy, and Clarence Thomas positioned the Court to implement the kind of judicial restraint that characterizes Rehnquist's judicial writings. As the conservatives coalesced into a majority, the Rehnquist Court gained a reputation for boldly curtailing Congress's power under the commerce clause and

the Tenth Amendment. Those decisions were accompanied by others that revitalized the Eleventh Amendment as a means to limit federal judicial power, sometimes in conjunction with a series of subsequent far-reaching Fourteenth Amendment, Section 5 cases that also had the effect of restricting federal authority.[17]

Notably, a strident bloc of liberal opposition fought the Rehnquist Court's "federalism five" and its "federalist revival."[18] The division's intensity is captured by studies showing that the Court's liberal activists were more inclined than conservatives to write their preferences into law in federalism cases, regardless of whether the challenged law came from the federal or state government.[19] Perhaps that is why the Court's drive to construct a new federalism is often perceived against a backdrop of 5–4 splits replete with "vigorous dissents." It may also explain why some critics assail Rehnquist Court federalism as an aggressive but illegitimate assault on national power, bordering on becoming judicial supremacy. Not all scholars agree, however, with many flatly asserting that the Rehnquist Court's impact on federalism is overstated and hardly revolutionary.[20]

After Chief Justice Rehnquist's death, court watchers turned their attention to the Roberts Court to see if it would be identical to the Rehnquist Court and perhaps continue its federalism revolution. While the issue is far from settled, critics observe that *Heller v. District of Columbia* and *Citizens United v. Federal Election Commission*, rulings that overturned precedents by affirming a Second Amendment right to own guns and declaring a virtually unrestricted First Amendment right of corporations to spend freely in political campaigns, only prove the Roberts Court is an activist bench favoring corporate interests.[21] Still, Robert Alt, a Heritage Foundation conservative, claimed in his testimony at Elena Kagan's 2010 confirmation hearings that it is fanciful to say the Roberts Court always sides with corporate interests or, more significantly, to deny that its liberal-leaning justices never do so. Law professor Jonathan Adler agrees, reporting that there was little business bias in a study of Roberts Court environmental cases, a finding echoed by law professor Robin H. Conrad in another review of business litigation. In contrast, other law academics discover a correlation between the participation of the Chamber of Commerce of the United States as a party or a third-party amicus and its litigation success, winning thirty of forty (nearly 70 percent) business cases in the Roberts Court's first three terms. Also, liberals counter that the Supreme Court's decision-making displays a pro-business slant that is empirically confirmed by the hard science of academic studies.[22] *New York Times* columnist Adam Liptak thus reasons that academics using "widely accepted political science data tell an unmistakable story about a notably conservative court."[23]