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# CRUMBLING CORNERSTONES: THE EVOLUTION OF PREEMPTION LAW IN THE SUPREME COURT'S 2010 TERM

by  
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In the 2008 Term, the U.S. Supreme Court held that state tort claims for drug manufacturers' failure to warn about the potential side effects of medications were not preempted. *Wyeth v. Levine*, 129 S. Ct. 1187 (2009). In so ruling, the Court set out "two cornerstones of \* \* \* pre-emption jurisprudence." *Id.* at 1194. First, "the purpose of Congress is the touchstone in every pre-emption case." *Id.* Second, the Court "start[ed] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 1194-1195.

This last Term (hereinafter "this Term"), those cornerstones began to crumble. First, while the Supreme Court still references congressional intent, the measure of that intent has changed markedly, focusing more on statutory text than purpose. And the presumption against preemption was conspicuously missing in action this Term. This LEGAL BACKGROUNDER describes the trends in preemption doctrine indicated by the Court's decisions this Term.

**The 2010 Preemption Docket.** The Supreme Court decided five preemption cases in the 2010 Term. The Court held that state law was preempted in three cases: *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068 (2011) (state design-defect claim for vaccines preempted); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (state rule that class-action waivers are unconscionable preempted by the Federal Arbitration Act); and *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011) (state failure-to-warn claim against generic drug manufacturers preempted). The Court rejected preemption claims in two cases: *Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131 (2011) (product liability claims related to seatbelts not preempted); and *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011) (state law imposing sanctions for hiring aliens without work authorization and mandating use of E-Verify not preempted).

The cases cross a variety of substantive areas and involve different aspects of preemption law: express preemption (and non-preemption); implied preemption through impossibility, *i.e.* where it is "impossible for a private party to comply with both state and federal requirements," *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); and implied "purposes and objectives" preemption, *i.e.* where state law "creates an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Wyeth*, 129 S. Ct. at 1193. Within that variety, however, notable commonality

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has emerged. First, the same five Justices supported the prevailing judgment in every preemption decision. Second, the Court’s analysis across the board relied more heavily on textual direction, and far less on purposes-and-objectives preemption, than the Court has in the past. Finally, the presumption against preemption barely made an appearance this Term until *PLIVA*, when Justice Thomas led a four-Justice plurality in laying out a doctrinal path for the presumption’s demise.

***The Coalescing Majority.*** In past Terms, preemption cases have often generated lopsided majorities with less-than-predictable voting alignments.<sup>1</sup> This Term, however, a new stable core emerged. The same five Justices—Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito—were in the majority for the prevailing judgment in every preemption case and, in three cases, those five alone determined the outcome. Specifically, *Concepcion*, *Whiting*, and *PLIVA* were decided by votes of five to four or (with Justice Kagan recused) five to three.<sup>2</sup> And, although there was one unanimous judgment (*Williamson*), the remaining case (*Bruesewitz*) saw only one other Justice join that core of five. That means that, with the exception of one unanimous case, the same five Justices largely controlled the preemption docket.

Of course, whether this pattern will hold remains to be seen. The 2008 Term saw just the opposite voting pattern, with Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer composing the majority in two closely divided preemption cases.<sup>3</sup> But the cohesion of the majority across five cases this Term, including the controversial and high-profile immigration (*Whiting*) and class-action arbitration (*Concepcion*) cases remains striking.

***The Waning of Purposes-and-Objectives Preemption.*** Justice Thomas was part of the majority for the judgment in each of this Term’s cases, but he charted his own path. Justice Thomas has become “increasingly skeptical” of purposes-and-objectives preemption, which he views as “inconsistent with the Constitution” because 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.” *Wyeth*, 129 S. Ct. at 1205 (Thomas, J., concurring in judgment). Because of that view, Justice Thomas joined the majority in *Concepcion* only “reluctantly,” in order to make an opinion for the Court, concurred in the judgment in *Williamson*, and did not join those portions of the *Whiting* opinion addressing implied preemption.

While the Court did not renounce purposes-and-objectives preemption this Term, Justice Thomas’s opposition appears to be moving the doctrinal needle.

First, in the two cases in which the Court rejected preemption, the Court demanded far more clear and concrete evidence of the impairment of federal law in its purposes-and-objectives analysis than before. In *Williamson*, the Court decided that a federal safety standard did not preempt state tort claims for failure to install seat belts, even though the Court had earlier found preemption of a very similar claim pertaining to airbag installation in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). Unlike *Geier*, this time the Court found that the agency’s decision to leave manufacturers with a choice was not a “significant regulatory objective.” *Compare Williamson*, 131 S. Ct. at 1137 (“[T]he regulation here leaves the manufacturer with a choice,” but “we do not believe that choice is a significant regulatory objective.”), *with Geier*, 529 U.S. at 874-875 (the agency “standard deliberately provided the manufacturer with a range of choices among different passive restraint devices”).

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<sup>1</sup>See, e.g., Daniel E. Troy & Rebecca K. Wood, *Federal Preemption at the Supreme Court*, 2008 CATO SUPREME COURT REVIEW 257, 259 (in the 2007 Term, five preemption cases were decided by lopsided margins).

<sup>2</sup>Justice Kagan was recused in *Bruesewitz* (6-2 vote), *Williamson* (8-0 vote), and *Whiting* (5-3 vote).

<sup>3</sup>See *Wyeth*; *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008).

Even more noteworthy, in *Whiting*, the Court held that an Arizona law sanctioning employers for hiring unauthorized workers did not interfere with the federal government’s immigration enforcement authority, 131 S. Ct. at 1983, notwithstanding the strong opposition of the Executive Branch. This denial of deference is quite unusual because immigration is an area where “executive officials exercise especially sensitive political functions that implicate questions of foreign relations,” and thus the Court has traditionally been very deferential. *Negusie v. Holder*, 129 S. Ct. 1159, 1164 (2009). Going forward, this case thus sets the bar for purposes-and-objectives preemption very high.

Second, perhaps because of a growing (Justice Thomas-fueled) uneasiness with purposes-and-objectives preemption, the Court relied heavily on a textual analysis in *Whiting*. Federal law expressly preempts state laws imposing civil or criminal sanctions on employers who hire unauthorized aliens “other than through licensing and similar laws.” 8 U.S.C. § 1324a(h)(2). The Court focused on “the plain wording” of that savings clause, 131 S. Ct. at 1977, and read the phrase “licensing and similar laws” very broadly to avoid preemption. That approach stands in sharp contrast to *Geier*, in which the Court found preemption even when the relevant Act unambiguously preserved state tort claims. *Geier*, 529 U.S. at 869 (“Nothing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations.”). A strong textual invitation thus may now be the de facto gateway to purposes-and-objectives preemption.

***The Disappearing Presumption.*** Interestingly, despite the purposes-and-objectives skepticism, this Term’s cases do not document a one-way ratchet against preemption. To the contrary, the doctrinal force runs the other direction in favor of preemption—a notable trend away from the Court’s otherwise relatively pro-States’ rights pattern of decisionmaking. The strongest evidence that the Court is trending in favor of preemption is that the States-rights protecting “presumption against preemption”<sup>4</sup> disappeared from the Court’s preemption analysis this Term (other than an occasional fleeting invocation by *dissenting* Justices). And the building blocks for a conclusive rejection of the presumption, spearheaded by Justice Thomas, garnered four votes in *PLIVA*.

In the Court’s first preemption case, *Bruesewitz*, it side-stepped any debate over the relevance of the presumption. In dissent, Justice Sotomayor raised it only in a footnote noting that “the presumption provides an additional reason” not to read the text of the vaccine compensation statute to preempt all design defect claims. 131 S. Ct. at 1096 n. 15 (Sotomayor, J., dissenting). Justice Scalia’s opinion for the Court did not respond directly, acknowledging only a more limited presumption—that the Court has previously “expressed doubt that Congress would quietly preempt product-liability claims without providing a federal substitute.” *Id.* at 1080.

The presumption was little seen through the next three cases. Even though the Court rejected preemption claims in *Williamson* and *Whiting*, the presumption made no real appearance in the majority’s analyses. In *Williamson*, only Justice Sotomayor—quickly proving to be the presumption’s main defender—mentioned it, and then only glancingly in her concurring opinion.<sup>5</sup> In *Whiting*, in a portion of the opinion discussing implied preemption not joined by Justice Thomas, the Chief Justice made a fleeting allusion to the principle that “a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.” 131 S. Ct. at 1985. But—in keeping with the apparent uneasiness regarding purposes-and-objectives preemption described above—that reference was confined to purposes-and-objectives preemption. *Id.* Finally, the presumption did not feature at all

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<sup>4</sup>*See Reid v. Colorado*, 187 U.S. 137, 148 (1902) (“It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested.”).

<sup>5</sup>Justice Sotomayor’s concurrence noted that both the “majority and dissent in *Geier* agreed that ‘a court should not find preemption too readily in the absence of clear evidence of a conflict.’” *Williamson*, 131 S. Ct. at 1140 (Sotomayor, J., concurring) (quoting *Geier*, 529 U.S. at 885).

in *Concepcion*, not even in the dissenting opinion.

It would be noteworthy enough that a principle once described as a “cornerstone” of preemption jurisprudence largely vanished from this Term’s preemption cases. But in *PLIVA*, the rumblings of an even greater shift were heard. The dissent in *PLIVA*—written by Justice Sotomayor—made the presumption against preemption a centerpiece of her analysis. 131 S. Ct. at 2586. The majority did not explicitly reject the presumption, but also did not feel the need to explain why it was overcome. The Court simply ignored it.

Even more critically, in a portion of the opinion that Justice Kennedy did not join, Justice Thomas, writing for four Justices, reasoned that the Supremacy Clause operates as a “*non obstante*” provision—a specific legislative license for federal law to control notwithstanding any contrary state law. *Id.* at 2579-2580 (plurality). Because it was commonly understood at the time of the founding that a *non obstante* provision displaced any judicial presumption to the contrary, Justice Thomas reasoned that the *non obstante* provision “suggests that courts should not strain to find ways to reconcile federal law with seemingly conflicting state law.” *Id.* at 2580. Moreover, Justice Thomas reasoned, the Supremacy Clause “indicates that a court \* \* \* should not distort federal law to accommodate conflicting state law.” *Id.* It did not escape the dissent’s notice, of course, that the “plurality’s new theory of the Supremacy Clause” was a “direct assault” on the Court’s precedents regarding the presumption against preemption. *Id.* at 2591 (Sotomayor, J., dissenting). But, as the dissent also noted, the plurality did not make clear “the ramifications of its new theory for the longstanding presumption.” *Id.* at 2591 n. 14. The Court has thus not yet engaged in a full-throated public debate on the continuing validity of the presumption against preemption. But the first shots were fired in *PLIVA*, and there are strong signs of a fissure within the Court that will likely become more apparent in upcoming preemption cases.

**Looking Ahead.** One Term does not a jurisprudence make. But if the trends suggested by this Term’s cases hold, they suggest that either a strong textual hook or a plausible claim of impossibility will now be required for a successful claim of preemption, because the standard for successfully invoking purposes-and-objectives preemption has become far more rigorous and exacting. An agency’s claim of impairment alone will certainly not suffice. Of course, the end result of that doctrinal shift may simply be that many of the considerations that previously would have informed purposes-and-objectives analysis will be reformulated into a statutory interpretation dispute over how properly to read a preemption or savings clause. In general, however, if an entity claiming preemption can point to statutory text or plausible impossibility triggering the *non obstante* analysis, the disappearance of the presumption against preemption will make preemption more readily available.

Helpfully, the upcoming Term will provide the Court further opportunity either to strengthen or to chisel away at the old preemption cornerstones. In *National Meat Association v. Harris*, No. 10-224 (to be argued Nov. 9, 2011), the Court will address whether “a ‘presumption against preemption’ requires a ‘narrow interpretation’ of the Federal Meat Inspection Act’s express preemption provision.” Justice Thomas, writing for four Justices, has already rejected the presumption’s application in express preemption cases. *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 557-558 (2008) (Thomas, J., dissenting). If a majority joins him, it will sound another blow to the former “cornerstone” presumption against preemption.