

Constitutional Law Committee Newsletter

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MESSAGE FROM THE CHAIR

Robin Craig
Chair, Constitutional Law Committee

Happy New Year!

We start this January with a new presidential administration, and there is good reason to expect that environmental and natural resources issues will be playing a more prominent role in national politics than they have been the last few years. In particular, President-elect Obama has indicated that issues of energy policy and climate change will be of high priority.

At the same time, however, constitutional intersections with environmental law are likely to remain important as the nation develops new laws and policies in these and other areas. To address some of these topics, this committee is sponsoring—and Vice Chair Trish McCubbin will be moderating—a panel on “Constitutional Issues in Climate Change” at the ABA Section of Environment, Energy, and Resources’s 38th Annual Conference on Environmental Law (Keystone) in March 2009. Please see Trish’s longer announcement in this newsletter about the panel, which should provide practitioners with a cutting-edge overview of the constitutional aspects of climate litigation and regulation. In addition, at that conference I will be part of a panel on the Supreme Court’s environmental law decisions this term, many of which at least touch on constitutional issues. If you are at the conference, I hope that you will attend both panels!

Also in April, you should be receiving the Section’s annual *The Year in Review* for 2008. Vice Chair Jim May has spearheaded this committee’s contribution to that volume, and I hope you enjoy the summaries and references provided there.

In addition, the committee is proposing two panels for the next Section Fall Meeting, one on federal preemption issues in environmental law and one on First Amendment issues in environmental law. Preemption issues in particular have been coming up in a number of contexts related to environmental law, including climate change, energy issues, and the ability of federal agencies to preempt state law through their regulations (rather than statutes).

The Supreme Court is deciding a number of federal preemption cases this term. Vice Chair Norm Dupont has summarized two of the latest of those decisions, *Riegel v. Medtronic, Inc.* and *Altria Group, Inc. v. Good*, for this newsletter. As he points out, preemption cases can also raise issues of federalism, a fact that complicated the preemption analysis in *Altria* and split the Court.

As always, the committee welcomes contributions to this newsletter and to all other committee business! Please get in touch with Vice Chair Norm Dupont or me if you have an idea for an article or would otherwise like to participate.

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the committee. All persons interested in
joining the Section or one of its
committees should contact the Section
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**UPCOMING CONSTITUTIONAL LAW
PANELS AT THE MARCH 2009
KEYSTONE CONFERENCE**

Trish McCubbin

Several panels at the ABA Section of Environment, Energy, and Resources's 38th Annual Conference on Environmental Law, to be held March 12-15, 2009, will be of special interest to members of the Constitutional Law Committee.

Constitutional Issues in Climate Change. This panel will be held on Friday, March 13, and will discuss several constitutional doctrines that are currently affecting efforts to address climate change, including: (1) the standing of states, citizens, and environmental groups to compel governmental action; (2) the political question doctrine and hurdles for public nuisance suits brought by states; (3) the supremacy clause and federal preemption; and (4) justiciability and the inability of federal courts to supervise long-term remedies. The panel will be moderated by one of our committee's vice chairs and will include some of the attorneys involved in the key cases.

Moderator:

Trish McCubbin, Southern Illinois University School of Law

Speakers:

Ted Boutros, Gibson, Dunn & Crutcher
Matt Pawa, Law Offices of Matthew F. Pawa
Harrison Pollak, California Attorney General's Office

Climate Change Federalism: Fate of Regional and State Climate Change Initiatives. This panel will also be held on Friday, March 13. In the absence of federal action on climate change, state and regional strategies have filled the void. These include regional/international cap-and-trade carbon systems, entirely new approaches, and more traditional regulation. A comprehensive approach to climate change will require regulation in areas traditionally left to state and local governments, such as regulations for utilities, building codes, transportation, and land use. With federal action looking more likely, what should happen to these state

and regional efforts? To what extent should state strategies be incorporated into, encouraged by, or preempted by federal action?

Moderator:

Ross Macfarlane, Business Partnerships, Climate Solutions

Speakers:

David Doniger, Natural Resources Defense Council
Robert McKinstry, Ballard Spahr Andrews & Ingersoll
Mary Nichols, Chair, California Air Resources Board

Supreme Court Update. On Saturday, March 14, come hear our own Robin Craig, chair of our Committee, and several other experts discuss this astonishing Supreme Court term, in which the Court will hear seven environmental cases covering such diverse topics as standing and ripeness, NEPA and injunctive relief, CWA technology-based standards and Section 402/404 permits, CERCLA joint and several liability, and the Department of Interior's trust obligations to Indian Tribes. The panel will discuss the opinions already handed down and make predictions for the remaining cases.

Moderator:

Mark Squillace, University of Colorado School of Law

Speakers:

Kristy Bulleit, Hunton & Williams
Robin Craig, Florida State University College of Law
John Cruden, U.S. Department of Justice
Ted Garrett, Covington & Burling

In addition to these panels, the conference offers presentations from more than seventy leading environmental lawyers, policymakers, and advocates from around the globe.

The conference will be held at the beautiful Keystone Resort in the Colorado Rockies. The registration deadline is Feb. 12. But don't delay: The block of rooms reserved by the ABA usually fills up quickly, so book early! Several different lodging options are available, but Jim May, our past chair, suggests you consider the River Run area for shopping and winter

sports, or to the Lodge for full services and more convenient access to the convention complex. For more information, go to www.abanet.org/enviro/programs/keystone/2009/.

Trish McCubbin is an associate professor at the Southern Illinois University School of Law where she teaches courses in environmental and administrative law.

SUPREME COURT RULES ON FEDERAL PREEMPTION OF STATE UNFAIR TRADE PRACTICES ACT: A RENEWED CONSTITUTIONAL PRESUMPTION AGAINST PREEMPTION

Norman A. Dupont

State environmental laws are often used to sue for public health nuisances created by various pollutants, including among other carcinogenic compounds, cigarette smoke. But, the use of such laws, such as California's Proposition 65, a provision of its Health & Safety Code, have come under increased attack as violative of federal laws or policies, and therefore, preempted by virtue of the Supremacy Clause. This type of federal preemption attack on state laws or jury verdicts was apparently supported just last term in a 8-1 decision by the Supreme Court in *Riegel v. Medtronic, Inc.*, 552 U.S. ___, 128 S. Ct. 999 (2008).

In *Riegel*, a majority of the Court struck down a "failure to warn" negligence case on the theory that the state court jury would in effect be writing a new "requirement" that would directly conflict with a federal statute providing that the Food and Drug Administration's (FDA's) warning was the exclusive warning for the medical device at issue. Only Justice Ginsburg in her dissent in *Riegel* raised the question of whether there was a presumption against finding "preemption" in Supremacy Clause cases. For Justice Ginsburg, it was indisputable that a state jury decision in a common law negligence case involving the safety of a medical device (a catheter) was within the scope

of an area “traditionally occupied” by the states. 128 S. Ct. at 1013-1014. Justice Ginsburg, however, was the sole member of the Court to raise this presumption against federal pre-emption, and one might infer that a majority of the Court in *Riegel* rejected the notion of such a presumption.

But, the Court’s 5-4 decision in *Altria Group, Inc. v. Good*, 555 U.S. ___, No. 07-562, 2008 WL 5204477 (Dec. 15, 2008), demonstrates that a majority of the Court still believes that a presumption against federal pre-emption is alive and well, at least in areas “traditionally relegated” to the states. *Altria* involved the relatively narrow question of whether the state of Maine’s “unfair trade practices act” could be invoked against manufacturers of “light” cigarettes in light of an express federal labeling statute. Nonetheless, the Court majority’s approach suggests larger implications for the environmental practitioner seeking to invoke state law standards against a variety of pollutants.

Altria: Facts and Holding

Altria is the parent of tobacco company Phillip Morris, which manufactured Marlboro “Lights” and Cambridge “Lights” cigarettes. Plaintiffs in the trial court filed suit under Maine Unfair Trade Practices Act (UTP Act), claiming that defendant Phillip Morris fraudulently represented that its “Light” cigarettes contained “lowered tar and nicotine” levels than did regular cigarettes. The truth, plaintiffs argued, was that the tobacco company knew that actual cigarette smokers engaged in practices that resulted in the opposite effect—that the “light” cigarettes delivered more mutagenic tar than regular cigarette and caused smokers to inhale as much tar and nicotine as that consumed by smokers of regular cigarettes. *Altria*, 2008 WL 5204477 at *2. This, plaintiffs alleged, constituted actionable fraud under Maine’s UTP Act. Phillip Morris invoked federal preemption as a defense, citing the Federal Cigarette Labeling and Advertising Act (Labeling Act). The district court agreed and dismissed the case; the First Circuit reversed and found that the Labeling Act did not preclude a state-law based fraud claim. *Good v. Altria Group, Inc.*, 501 F. 3d 29 (1st Cir. 2007). The Supreme Court granted *certiorari*, noting a conflict

between the First Circuit’s opinion and a prior decision in the Fifth Circuit in *Brown v. Brown & Williamson Tobacco Corp.*, 479 F. 3d 383 (5th Cir. 2007).

The Supreme Court, in a 5-4 opinion authored by Justice Stevens, affirmed the First Circuit and held that Maine’s UTP Act claim was not pre-empted. The Court first analyzed whether the statute itself, which contained an express pre-emption provision, barred the state proceeding. The federal Labeling Act precludes any “requirement based on smoking and health” imposed under state law “with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity . . . [with the Labeling Act].” 2008 WL 5204477 at *5. Noting that the legislative purpose of the Labeling Act would not be frustrated by allowing actions pursuant to state fraud claims, the Court then considered whether the text of the Labeling Act mandated that result. 2008 WL 5204477 at *5-*9.

The Court then reviewed its fractured plurality opinion in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and a subsequent opinion in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). For the *Altria* majority, the prior cases mandated pre-emption only of those state law requirements based expressly upon a requirement derived from a “smoking and health” claim. In *Altria*, Justice Stevens, writing for the majority, held that a state fraud claim was not a “smoking and health” requirement, and therefore, not preempted under *Cipollone*. The Court rejected an invitation to reconsider the *Cipollone* holding, even though conceding that the distinction set forth in that earlier opinion lacked “theoretical elegance.” 2008 WL 5204477 at *7. Inelegant as *Cipollone* might be, however, for the majority, it remained a “fair understanding” of “congressional purpose” in the federal Labeling Act. *Id.*

In response to criticism by the dissenting justices that the practical effect of a suit under Maine’s UTP Act would be to compel a new warning about so-called “Light” cigarettes that would constitute a warning different than the one approved under the federal Labeling Act, Justice Stevens pointed out that this was not necessarily the legal outcome of a suit under Maine’s UTP Act. Rather, Justice Stevens noted that a

jury verdict under the state act would simply prohibit defendants from selling “light” cigarettes that in fact did not deliver less tar and nicotine than a regular cigarette. Defendants could, according to the Court, continue to sell cigarettes labeled as “light” that in fact actually did produce less tar and nicotine and still comply with Maine’s UTP statute. 2008 WL 5204477 at *6, n.10.

Finally, the majority opinion gave very short license to Altria’s alternative argument that the Maine statute would “conflict” with a longstanding policy of the Federal Trade Commission (FTC) supporting the concept of “light” cigarettes. This argument was premised not upon express preemption under the federal Labeling Act but under an alternative theory of “obstacle” preemption. The majority opinion disposed of this alternative argument in very short order. First, it phrased the argument in a subjunctive tense that raises doubts about the legal basis for any agency’s policy position to preempt state law: “*Even if such a regulatory policy could provide a basis for obstacle pre-emption*, petitioners’ description of the FTC’s actions in this regard are inaccurate.” 2008 WL 5204477 at *9 (emphasis added). This subjunctive wording suggests that the Court majority considered but chose not to rule on the First Circuit’s suggestion that a mere “statement” of agency policy, absent express rulemaking, might not be sufficient to have a constitutional preemptive effect. *See Good v. Altria Group, Inc.*, 501 F. 3d at 51-52. Rather, the Court relied upon the current statement of the United States, as expressed in the brief of the Solicitor General, that the federal government “disavows” any policy authorizing the use of the adjective “light” in connection with cigarettes. 2008 WL 5204477 at *9.

In response to Altria’s reliance upon an “industry guidance” document issued by the FTC which stated that in the Commission’s view a “factual statement of the tar and nicotine content. . . of the . . . smoke from a cigarette” would not violate the act, Justice Stevens for the Court then noted that this FTC guidance document contained an extraordinarily limited safe harbor. The Commission agreed not to challenge a “factual” statement of tar and nicotine yields from cigarettes. Here, of course, the plaintiffs in the underlying lawsuit were challenging precisely the accuracy of claims that “light” cigarettes in fact delivered less tar and nicotine.

Id. As to Altria’s argument that the FTC had consistently refused to prosecute it and others who marketed “light” cigarettes, the Court held that “agency nonenforcement of a federal statutes is not the same as a policy of approval,” citing *Sprietsma v. Mercury Marine*, 537 U.S. 51, 67 (2002). *Altria*, 2008 WL 5204477 at *10. The Court also noted that it would be “inappropriate” to read a policy of implied authorization into the FTC’s inactions when that inaction was in part the result of Altria’s alleged concealment of the actual facts of tar and nicotine consumers inhaled from “light” cigarettes. 2008 WL 5204477 at *10, n.14.

The Court affirmed the decision of the First Circuit that the underlying lawsuit was not preempted by the Labeling Act, and remanded the case for further proceedings. The Chief Justice, and Justices Scalia, Thomas, and Alito dissented, with Justice Thomas authoring the dissent.

Altria: The Debate Over a Presumption Against Preemption of Areas “Traditionally Relegated” to the States

For the environmental lawyer, the most interesting part of *Altria* is not the debate between the majority and dissenters over the meaning of the Court’s prior ruling in the *Cipollone* case, or the exact meaning of the federal Labeling Act. Rather, *Altria* is likely to be cited in future briefs on environmental issues for its reaffirmation of the judicial presumption against the preemption of state laws in an area that is “traditionally relegated” to the states. In *Altria*, the Court majority identified this traditional area as “advertising,” and concluded that the implication of the presumption was that: “Thus, when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.” 2008 WL 5204477 at *4.

The Court’s citation to this “presumption” against preemption of state laws drew the scorn of Justice Thomas in his dissent. Justice Thomas suggests that the Court’s “reliance on the presumption against pre-emption has waned in the express pre-emption context.” 2008 WL 5204477 at *16 (Thomas, J., with whom Roberts, CJ., Scalia and Alito, JJ. join,

dissenting). For the dissenters, if any “doubt remained” about the viability of the presumption, it was eliminated in the *Riegel* decision decided earlier in 2008. Justice Thomas pointed out that only Justice Ginsburg in dissent invoked the presumption against pre-emption, and that the majority opinion in *Riegel*, which did not invoke such a presumption was “necessarily a rejection of any role for the presumption in construing the statute.” 2008 WL 5204477 at *17-*18.

While Justice Thomas’ inference from what was not specifically stated in a majority opinion in *Riegel* may have been a fair comment before Dec. 15, when the Court issued its opinion in *Altria*, his inference is now clearly rebutted by what the majority did expressly state in the later case. In *Altria*, the majority of the Court clearly invoked a “presumption” against pre-emption of traditional state law fields.

Justice Thomas closed this portion of his dissent by claiming that in light of *Riegel*, “there is no authority for invoking the presumption against pre-emption in express pre-emption cases.” 2008 WL 5204477 at *18. But the majority opinion in *Altria* now clearly constitutes “authority” for the proposition that the presumption against federal law pre-emption of state laws is alive and well, even in the case of a claim of express pre-emption based upon the text of a federal statute.

The list of matters “traditionally regulated” by the states to which the anti-pre-emption presumption applies is a broad list. Such “traditionally regulated” areas includes not just regulation of advertising and common-law fraud as in *Altria*, but medical practices as in *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996), and state concerns about air pollutants impacting citizens within its jurisdiction. See *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), cited with approval in *Massachusetts v. EPA*, 547 U.S. 497, ___, 127 S. Ct. 1438, 1454 (2007).

For the prospective environmental lawyer considering a state court action on a pollution claim, there will still be federal laws to evaluate as possible sources of express (or other types) of pre-emption under the Supremacy Clause. But, that lawyer can breath a bit

easier knowing now that after *Altria* she can once again vigorously invoke the constitutional presumption against “pre-emption,” at least in an area of law traditionally regulated by states. Indeed, one recent district court case has already cited *Altria* for this very point in rejecting a federal pre-emption challenge against a state court tort suit challenging drug manufacturer’s use of a generic drug that had an FDA-approved ingredient. *Kellogg v. Wyeth, Inc.*, 2008 WL 5272715 at *5 (D. Vt. Dec. 17, 2008).

Mr. Dupont is of counsel to the California firm, *Richards, Watson & Gershon* where he practices environmental law. He is currently counsel to a plaintiff in a California Proposition 65 case involving a defense of federal preemption.

**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

Calendar of Section Events

27th Annual Water Law Conference
Feb. 18-20, 2009
San Diego, California

**38th Conference on Environmental
Law**
March 12-15, 2009
Keystone, Colorado

17th Section Fall Meeting
Sept. 23-26, 2009
Baltimore, Maryland

***For more information, see the Section
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