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CONSTITUTION PROVIDES NO SUPPORT FOR OPPONENTS OF PREEMPTION

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The Federalism Accountability Act, by name alone, appears to be a great idea. Beyond the title, however, this well-intentioned proposal includes some troubling provisions, most notably a legislative repeal of the doctrine of implied preemption. That repeal increases the prospect of state tort liability and raises immediate concerns for all those who rely on compliance with federal laws and regulations as a defense to liability under inconsistent state statutes, regulations, and common law. Quite apart from this practical impact, the Act's requirement that the courts apply a virtually irrebuttable presumption against preemption absent explicit statutory text to the contrary is supported by neither constitutional structure nor sound policy.

Preemption in the Constitutional Structure

Whenever Congress enacts a statute, the Supremacy Clause makes clear that the federal law displaces all conflicting state laws. Likewise, when Congress expressly preempts state laws, it displaces all state statutes and common law that fall within the scope of the preemption provision. This dramatic effect naturally raises concerns about the proper balance of state and federal legislative power. Those concerns have led the Supreme Court to articulate a vague presumption against preemption of unspecified weight. However, the Framers of the Constitution expressly and adequately addressed those concerns such that reliance on the federal structure does not give rise to a preference for or against preemption.

The inquiry into the circumstances under which federal law will displace state law is no more and no less than an exploration into the division of state and federal legislative authority. The constitutional structure in this regard is straightforward: Article I, section 8 enumerates the powers of Congress; Article I, section 9 limits the powers of Congress; Article I, section 10 limits the powers of the states; and the Tenth Amendment reserves to the states the legislative powers not delegated to Congress or prohibited to the states. Importantly, clause 2 of Article VI provides that congressional enactments consistent with the Constitution "shall be the supreme Law of the Land." Although the Supremacy Clause makes clear that congressional enactments have an extraordinary displacing effect on state law, the clause itself does not authorize Congress to preempt state laws. On its face, the Supremacy Clause simply specifies a choice of law rule. If the clause were an affirmative grant of authority, it would likely reside in the metropolis of congressional power, Article I, section 8, rather than in the suburbs of Article VI.

The history of the Constitutional Convention supports this reading. The Virginia Plan included among its proposed congressional powers the broad authority "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of the Union." The alternative New Jersey (or Small State) Plan, on the other hand, did not include such authority among the powers of Congress, but rather separately proposed language similar to the current Supremacy Clause. When the competing proposals were debated by the Convention, James Madison, as he had done throughout the debates, warned against the "propensity of the States to pursue their particular interests in opposition to the general interest" and advocated "the negative on the laws of the States as essential to the efficacy & security of the Genl. Govt." 2 *The Records of the Federal Convention of 1787*, at 27 (M. Farrand rev. ed. 1966) [here-

inafter "Farrand"]. Governor Robert Morris of Pennsylvania opposed the congressional power to negative state laws with the telling explanation that "[a] law that ought to be negatived will be set aside in the Judiciary department and if that security should fail; may be repealed by a National Law." 2 Farrand at 28. The Virginia Plan's proposal for a legislative power to negative state laws was defeated by a vote of 3 to 7. The Convention then adopted a revised version of the New Jersey proposal which was almost identical to the current Supremacy Clause. 2 Farrand at 28-29. Consistent with the New Jersey Plan's structure and Morris' explanation, the adopted text does not mention any affirmative authority of Congress, but simply sets forth the hierarchy between federal and state laws.

The power to preempt state law, therefore, must be found elsewhere in the Constitution, most logically in the affirmative grants of power to Congress under Article I, section 8. Thus, for example, should Congress legislate pursuant to its powers under the Commerce Clause and wish to include a provision expressly preempting certain state laws, the authority for the preemption provision must come from the Commerce Clause alone or perhaps from the Commerce Clause with some help from the Necessary and Proper Clause. The Supremacy Clause then makes clear that the preemption provision trumps state laws that conflict with it.

Accordingly, to the extent that there are questions of constitutional policy in preemption -- "the Danger . . . that the national, would swallow up the State Legislatures," 1 Farrand at 160 (Statement of George Mason, June 7, 1787), and the like -- the framers answered them with the specific enumerations and limitations of federal legislative power in Article I and inclusion of the Supremacy Clause in Article VI. To find in this structure some additional substantive reason to disfavor federal preemption of state law, it seems to us, risks rewriting the balance envisioned by the Framers -- a balance that, it bears reminding, James Madison and others thought should have been weighted even more in favor of Congress.

In sum, the Constitution's text, structure, and history provide no support for a presumption against preemption. Indeed, the constitutional provision most frequently invoked in preemption analysis, the Supremacy Clause, evinces, if anything, a presumption favoring preemption. Finding a presumption against preemption in the Supremacy Clause is rather like locating in the Eleventh Amendment a presumption favoring federal jurisdiction over suits against States. Any presumption against preemption therefore must rest on something other than the Constitution's text and structure.

#### Preemption in Congress -- The Federalism Accountability Act

The absence of any firm constitutional basis for the presumption against preemption deprives the Federalism Accountability Act of any claim of superior fealty to the Framers. Congress, nonetheless, could prefer as a policy matter to preserve state law. The simplest way for Congress to do so is to recognize the limits on its enumerated powers and decline to legislate. When Congress does legislate, it can preserve state law by including an express savings provision. Finally, Congress can enact background rules to govern how it will preempt state law in the future. The Federalism Accountability Act is in this third category and requires future Congresses to preempt explicitly or not at all. Although Congress has the power to enact such legislation, N1 we question the wisdom of such a background rule based on its effects on the concurrent operation of state and federal regulatory authority.

n1. We do not address here possible challenges to the Federalism Accountability Act based on intrusion into the judicial function in interpreting statutes or on infringement of the prerogative of future Congresses. We have no quarrel with the Act's proposed reporting and assessment requirements, aimed at forcing Congress and the Executive to "take federalism seriously." These well-intentioned provisions are unlikely to cause harm. Anything that forces the federal government to stop and think whether it is the proper forum to address a problem ultimately should produce better policy.

The potential for mischief lies in the Act's background "rule of construction relating to preemption." This section provides: "No statute enacted after the effective date of this Act shall be construed to preempt, in whole or in part, any State or local government law, ordinance, or regulation, unless -- (1) the statute explicitly states that such preemption is intended; or (2) there is a direct conflict between such a statute and a State or local law, ordinance or regulation so that the two cannot be reconciled or consistently stand together." This provision works a sweeping legislative repeal of the doctrine of implied preemption. It forces Congress to preempt in express terms not only state laws, but also local ordinances. One will search the Constitution in vain for any solicitude for the legislative province of a city council.

Nonetheless, the Act creates a presumption in favor of overlapping regulation by multiple jurisdictions. By its terms, the Act's "rule of construction" does not have any operative effect until Congress passes a new statute. At that point, the question is no longer whether the matter to be regulated is appropriate for federal legislation. Instead, the only question is whether federal legislation ought to be exclusive or whether the regulated entity will be subject to overlapping federal, state and local regulation. Thus, the "rule of construction" creates not a presumption against federal

legislation in areas of traditional state concern, but rather a presumption in all areas favoring overlapping and potentially conflicting regulation.

In short, the Federalism Accountability Act creates a presumption favoring regulation by a limitless number of governments at three or four different levels -- one Congress, 50 state legislatures, numerous county boards, and countless city councils. Nothing in our constitutional structure provides any support for such a presumption. Indeed, many of the enumerated powers expressly granted to Congress -- from the power "to borrow money on the credit of the United States," to the power "to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States," to the power "to declare war" -- were meant to be exclusive. The Framers identified the areas in which overlapping state regulations created problems or potential for havoc. They then gave Congress limited, enumerated powers to legislate in those areas and avoided the problem of conflicting regulation by thirteen separate sovereigns. From this perspective, it is more difficult to justify non-preemptive federal legislation than federal legislation that occupies the regulatory field. If there is no need to provide a uniform federal rule, it should be harder -- not easier -- to justify the need for any federal rule at all.

The requirement that Congress must preempt explicitly or not at all creates an additional practical problem: Congress cannot possibly foresee all of the potential conflicts that may materialize when it first enacts a statute. In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), the Court concluded that Congress' explicit preemption of certain laws evidenced an intent not to preempt other laws, a holding much less dramatic than the Act's requirement that Congress always be explicit about preemption. Nonetheless, it was too much for Justice Scalia, who predicted that such a rule of construction would work havoc: "The statute that says anything about pre-emption must say everything; and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power. If this is to be the law, surely only the most sporting of Congresses will dare say anything about preemption." *Cipollone*, 505 U.S. at 548 (Scalia, J., concurring in part, dissenting in part).

The Federalism Accountability Act removes the option of not saying anything about the topic of preemption. It forces every Congress to be sporting, to anticipate and address with clarity every potential conflict that could arise. That task will prove impossible. Even if Congress could somehow divine the myriad ways that extant state and local regulations may frustrate a federal regulatory regime, it simply cannot predict developments in state common law or anticipate the future legislative agendas of States and localities. Whether Congress would react by preempting more or less than necessary is anyone's guess. However, we rather doubt the proposed rule of construction will lead to more intelligent legislation or better consideration of the proper balance between state sovereignty and federal interests.

#### Protecting Legislative Federalism

We respect the principles that preserve and protect the delicate structure of "Our Federalism" against the aggrandizing propensities of the national government. Well-meaning scholars and legislators have lamented the fact that expansive congressional power under Article I, section 8 coupled with the displacing effect of preemption means that the Framers' fear that the national would swallow up the state Legislatures has been realized in the modern regulatory state. The solution, it is advocated, comes in the form of a judicial presumption against preemption or, as in the case of the proposed Federalism Accountability Act, a requirement of a clear statement of preemption in order to counterbalance the awesome effect of the Supremacy Clause. It seems to us that these proposed solutions are supported by neither constitutional theory nor sound legislative policy.

Redefining the proper balance of state and federal legislative powers is better accomplished directly, through an insistence on the limits of Congress' enumerated powers under Article I, rather than circuitously and ineffectually through some ill-conceived presumption against preemption under the Supremacy Clause. When Congress refrains from exercising its power under, say, the Commerce Clause and its attendant authority to preempt state law, it properly recognizes the competency, legitimacy, and authority of states to regulate matters within their legislative jurisdiction. At the same time, Congress remains free to regulate, and displace state law if necessary, in order to protect national interests in areas within its legislative responsibility, as enumerated in the Constitution.

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