

WHEN UNCLE SAM STEPS IN
THERE'S NO REAL DISHARMONY BETWEEN HIGH COURT DECISIONS
BACKING PRE-EMPTION AND THE FEDERALISM PUSH OF RECENT YEARS

By: Paul D. Clement and Viet D. Dinh

Legal Times
June 19, 2000

Justice John Paul Stevens opened the dissent in *Geier v. American Honda Motor Co.*, the May 22 air-bag pre-emption decision, with a categorical declaration: "This is a case about federalism,' *Coleman v. Thompson* (1991), that is, about respect for 'the constitutional role of the States as sovereign entities.' *Alden v. Maine* (1999)."

By itself, this statement is nothing new. Justice Stevens has equated pre-emption analysis with federalism since his plurality opinion in *Cipollone v. Liggett Group Inc.* (1992). But, upon closer inspection, there is something more going on.

Stevens dissented from both *Coleman* and *Alden*. His provocative citation to those cases reflects less an exposition of principle than an allegation that the *Geier* majority (which includes the authors of *Coleman* and *Alden*) has been hypocritical in its fealty to federalist principles.

What elevates this allegation of hypocrisy above the ordinary is Justice Clarence Thomas' presence among the dissenters. Thomas, who provided the fifth vote in *Alden*, joined the *Geier* dissent without any explanation or, apparently, any protest over the inflated rhetoric. The picture is complicated further by the fact that Justice Stephen Breyer wrote the majority opinion in *Geier*, even though he dissented in *Alden*.

In truth, however-and with all due respect to the author of last week's commentary, "Collision Court"-there is no real tension between the Supreme Court's federalism decisions and its pre-emption cases because the latter, properly understood, are not "about federalism."

At first blush, it does seem odd that the same Court that has revitalized the commerce clause and the 11th Amendment has been singularly unreceptive to claims that Congress has gone too far in pre-empting state law. In a term in which the Court has struck down portions of the Violence Against Women Act (*United States v. Morrison*) and the Age Discrimination in Employment Act (*Kimel v. Florida Board of Regents*), the states have lost all three pre-emption cases (*United States v. Locke*, *Norfolk Southern Railroad Co. v. Shanklin*, and *Geier*) and quite possibly will lose the fourth (*Natsios v. National Foreign Trade Council*).

But there is no actual clash between the Court's true federalism decisions-interpreting the commerce clause, the 10th Amendment, or the 11th Amendment-and its pre-emption decisions. The former involve weighty questions about the Constitution's limits on federal power-questions on which the Court is deeply divided. The latter do not. In other words, the tension between these two lines of cases is illusory because Justice Stevens is wrong: *Geier* is not a case about federalism.

The Supreme Law

The relevant text for pre-emption cases is provided by the supremacy clause. It neither limits federal power nor preserves state authority. To the contrary, it provides a choice-of-law rule in favor of federal law.

No one disputes this. The pre-emption cases feature no long discourses on the historical meaning of the supremacy clause or heated disputes over its scope or justiciability. All nine justices agree that when federal and state law conflict, the former displaces the latter.

Accordingly, the question that divides the Court in pre-emption cases is essentially one of statutory interpretation: Does the federal statute or regulation at issue really conflict with state law?

Even on a question of statutory construction, one might think that the pro-federalism justices would put a thumb on the scale and demand that Congress state its intent clearly before they interpret a federal law to displace state law. Not so. Instead, it is the dissenters, led by Justice Stevens, who emphasize the need to apply a presumption against pre-emption.

The difference between the majority and the dissenters is perhaps best illustrated by what weight they give to a statute's express pre-emption clause.

In *Cipollone*, Justice Stevens, writing for a plurality, argued that an express pre-emption clause precluded more extensive implied pre-emption. Three years later, in *Freightliner Corp. v. Myrick* (1995), the majority backtracked somewhat, stating that there is "at best . . . an inference that an express pre-emption clause forecloses implied pre-emption."

In *Geier*, the majority entirely abandoned the idea that an express pre-emption clause creates even a presumption against greater implied pre-emption. In fact, the majority suggested the exact opposite, observing that "the pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards," and "itself favors pre-emption of state tort suits."

There are a number of reasons that the Court that brought us *Morrison* and *Kimel* might decline to apply a presumption against pre-emption.

First, and most obviously, the constitutional text provides no basis for it. Although the Court has applied presumptions or clear-statement rules in the context of the 10th and 11th Amendments, those rules are supported by constitutional text that clearly preserves state authority. There is no comparable provision to justify a presumption against pre-emption.

To the contrary, the supremacy clause displaces state authority. It makes no more sense to root a presumption against pre-emption there than it would to base a presumption in favor

of abrogating state immunity in the 11th Amendment. Indeed, if the supremacy clause supports any presumption, it supports one in favor of pre-empting state authority.

Second, the presumption against pre-emption finds no support in the structure of the Constitution. The question in pre-emption cases is not whether Congress has the authority to enact a law, but simply whether federal legislation ought to be exclusive. Thus, a presumption against pre-emption would not be a presumption against federal laws in areas of traditional state concern, but rather a presumption in favor of overlapping and potentially conflicting regulations at federal, state, and local levels. Nothing in the Constitution indicates any particular solicitude for federal laws that duplicate state laws without displacing them.

Indeed, many of the enumerated powers expressly granted to Congress—from the power "to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies" to the power "to declare war"—were meant to be exclusive. The Framers identified areas in which overlapping regulations of 13 separate sovereigns created problems or potential for havoc. They gave Congress limited, enumerated powers to legislate in those areas.

From this perspective, it is more difficult to justify a federal law that does not displace state regulation than one 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.

Whose Arena

This analysis points to why the Court favors pre-emption. The majority's willingness to strike down federal law that invades a state prerogative (Kimel) or exceeds Congress' enumerated powers (Morrison) may paradoxically make it more willing to find that legitimate federal law displaces state law. The Constitution grants Congress legislative powers in areas where disparate state laws have created substantial tension. A Court that limits Congress to its enumerated powers, therefore, has less reason to be solicitous of state interests within this restricted sphere.

On the other hand, justices who espouse a broad conception of Congress' powers or a narrow judicial role in enforcing the safeguards of federalism may have more reason to dislike pre-emption. If Congress can legislate on any subject, including those where overlapping state laws pose no difficulty, it may be best to require Congress to note clearly when it intends to displace state law.

This would explain the other superficial anomaly in the Court's pre-emption cases: the concern for state laws from the federalism dissenters. To the extent that they would leave enforcement of the federal structure to the political process, they might reason that efforts to displace state authority should be explicit enough to give notice to those legislators who would defend the states.

One final issue: If the tension between the majority (and dissenting) opinions in *Geier* on the one hand, and *Alden*, *Kimel*, and *Morrison* on the other, is more apparent than real, then the votes of Justices Thomas and Breyer still need some explanation. We venture a pair of guesses.

First, Justice Thomas has expressed the narrowest view of the commerce clause of any sitting justice. In *Morrison*, he wrote that "the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers." Accordingly, he may well think that much of what Congress passes under the commerce clause exceeds its delegated powers. From this perspective, a presumption against pre-emption may make sense as a second-best alternative to outright invalidation of such laws.

Justice Breyer, on the other hand, may simply be adopting a strong pro-federal-government position. He has been in dissent in the past when the Court imposed limits on federal authority. Nor has Breyer required Congress to make clear its intent to pre-empt state law. The net result is that the federal government enjoys virtually plenary power. From Breyer's perspective (expressed in his dissenting opinion in *Morrison*), this robust vision of federal power "does not reflect a jurisprudential defect, so much as it reflects a practical reality" of our national economy.

In any event, for the majority of the Court, the tension between pro-federalism and pro-pre-emption (and between anti-federalism and anti-pre-emption) is overstated. In the end, *Geier* is a case about congressional intent. Views about the nature of Congress' enumerated powers may influence that statutory interpretation question, but not in a way that suggests any schizophrenia about federalism.

Paul D. Clement is a partner in the D.C. office of King & Spalding and head of the firm's appellate practice. He is also an adjunct professor at the Georgetown University Law Center and former chief counsel to the Senate Subcommittee on the Constitution, Federalism and Property Rights. Viet D. Dinh is professor of law at the Georgetown University Law Center and author of the forthcoming book *Judicial Authority and Separation of Powers*.