

WHOSE CALL IS IT?
SUPREME COURT SHOULD RETHINK PRE-EMPTION LAW

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Pre-emption is among the more sensitive questions in our federal system: how to determine when exactly the big foot of national legislation stamps out the clamoring mandates of state law. The Supreme Court's answer to this question has lately been a bit confusing.

On Dec. 7, the Court hears argument in two cases that could dispel that confusion. The justices can start the clarification-and indeed go a long way toward completing it-by renouncing the general presumption against pre-emption that has been stated, but not faithfully applied, in several cases of recent vintage.

Let's begin with first principles by recognizing the distinction between pre-emption and its cousin, supremacy.

Whether federal law displaces state law depends on the division of federal and state 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 10th Amendment reserves to the states the powers not delegated to Congress or prohibited to the states.

Importantly, Article VI, clause 2 provides that congressional enactments consistent with the Constitution "shall be the supreme Law of the Land." Although it makes clear that congressional enactments in effect displace conflicting state law, the supremacy clause itself does not authorize Congress to pre-empt state statutes. It simply specifies a choice-of-law rule. If the clause were an affirmative grant of authority, it would likely reside in that metropolis of congressional power, Article I, section 8, rather than in the suburbs of Article VI.

The record of the Constitutional Convention further illustrates the point. 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 New Jersey Plan, on the other hand, did not include such authority, but separately proposed language similar to the current supremacy clause. When the proposals were debated, Gov. Robert Morris of Pennsylvania opposed such congressional power with the telling explanation that a "law that ought to be negatived will be set aside in the Judiciary departmt and if that security should fail; may be repealed by a Nationl Law."

The Virginia proposal of an explicit congressional power to negative state laws was voted down. The convention then adopted a revised version of the New Jersey proposal that was almost identical to the current supremacy clause. Consistent with the New Jersey

Plan and Morris' explanation, the adopted text does not mention any affirmative authority of Congress, but simply sets forth the hierarchy of federal and state laws.

Accordingly, to the extent that there are questions of constitutional policy in pre-emption, the Framers answered them by listing specific federal legislative powers in Article I and including the supremacy clause in Article VI. To the extent that other policy questions remain-the wisdom of national regulation, the balance between uniformity and innovation, etc.-these are, by constitutional design, to be answered by Congress. To find in this structure any presumption either in favor of or against pre-emption risks disrupting the constitutional division of power between federal and state governments and/or rewriting the laws of Congress-both illegitimate expansions of the judicial function.

LOOK TO 'PURPOSE OF CONGRESS'

A court can find that federal law pre-empts state law through a number of doctrinal avenues. Sometimes, the path to pre-emption is relatively straight. In a typical conflict pre-emption case, a state law that directly conflicts with a federal law is displaced by operation of the supremacy clause-i.e., the federal statute trumps. In an express pre-emption case, Congress has written an explicit pre-emption provision into a statute. The supremacy clause again makes clear that state laws falling within the ambit of the pre-emption provision are displaced.

But the conflict between laws need not be so pronounced. In an obstacle pre-emption case, a state law may be displaced if it frustrates the purposes of Congress in enacting a regulatory regime. Likewise, in a field pre-emption case, all state laws concerning an area in which either Congress has regulated pervasively or there exists a unique federal interest are displaced because the federal government has occupied the field.

Because of its dramatic breadth and effect, courts are understandably wary of finding pre-emption too easily. In an oft-quoted passage, the Supreme Court in *Rice v. Santa Fe Elevator Corp.* (1947) stated the traditional "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."

This assumption is a perfectly legitimate recognition of the background against which Congress legislates. For instance, when Congress acts in areas traditionally governed by the states through their police powers, it stands to reason that Congress should proceed more cautiously. The Supreme Court, therefore, would seek evidence of a clear congressional purpose to displace state law.

But this background assumption is not an overriding presumption. Thus, where the congressional action occurs in an area of pervasive federal regulation or uniquely federal interests, for example, the background changes and the Court would more easily find that Congress has occupied the field.

Things went awry when the Court in *Cipollone v. Liggett Group Inc.* (1992) transformed this sensible background assumption into a broader presumption against pre-emption. The Court interpreted the presumption to mean that express pre-emption provisions must be narrowly construed. The problem with this rule is obvious from the lower court opinion in *Geier v. American Honda Motor Co.*, No. 98-1811, one of the cases the Supreme Court will hear this week.

At issue in *Geier* is whether the federal airbag standard (giving auto makers a choice between airbags and other passive restraint systems) pre-empts state tort liability for failure to install airbags. After concluding that a pre-emption clause and a saving provision in the applicable statute cancel each other out, the U.S. Court of Appeals for the D.C. Circuit opined, "[T]he presumption against pre-emption counsels against finding express pre-emption when the purpose of Congress is not clear from the statute's language." But in the next breath and without reference to any presumption, the circuit concluded that state tort liability is pre-empted because such liability stands as an obstacle to the full achievement of the purpose of the statute.

Whatever the merits of the D.C. Circuit's textual interpretation or its divination of congressional purpose, it makes little sense to rely on the presumption in express pre-emption analysis but not in obstacle pre-emption analysis. Both determine whether federal law displaces state law, and any presumption worth its name would apply to both or neither.

That the presumption has no role in either is evident from the case that the Supreme Court hears immediately before *Geier*—*United States v. Locke*, No. 98-1701 (and its companion case, *International Association of Independent Tanker Owners v. Locke*, No. 98-1706).

Locke is a field pre-emption case about the staffing and operation of oil tankers. At issue is whether the federal regime regulating oil tankers, in furtherance of international treaty obligations and U.S. foreign affairs, displaces concurrent state regulation. Simply stating the question presented betrays the illogic of a presumption against pre-emption. It is logically bankrupt to recognize that state law can be displaced simply by the pervasiveness of congressional actions or the presence of uniquely national interests, and still to insist on a narrow construction or clear statement rule of pre-emption.

The Court in *Cipollone* attempted to patch this analytical flaw with a second interpretation of the presumption against pre-emption: that an express pre-emption provision ends any inquiry into implied pre-emption doctrines (such as conflict, obstacle, or field pre-emption). Thus, the petitioner in *Geier* argues that the D.C. Circuit erred by engaging in obstacle analysis at all: The court should have confined its decision to reconciling the text of the express pre-emption clause and the saving provision.

In *Freightliner Corp. v. Myrick* (1995), a conflict pre-emption case, the Supreme Court rejected a similar argument. "At best," the Court said, "*Cipollone* supports an inference

that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule."

LIMIT POWERS OF CONGRESS

The confusion engendered by *Cipollone*, however, is not merely a matter of distinguishing an inference from a rule. It rests on a fundamental misconception about the nature of pre-emption and its relationship to the supremacy clause.

Conflict pre-emption is not implied pre-emption. It is not even pre-emption at all. Rather, it is the quintessential application of the supremacy clause to resolve conflicts between state and federal law. If anything, express pre-emption is a special case of conflict analysis, whereby the supremacy clause confers supreme status to a federal pre-emption provision where a state law conflicts with it.

Thus, while the *expressio unius* logic of *Cipollone* arguably applies to field pre-emption, it fits uneasily with obstacle pre-emption (which can be seen as a loose application of the supremacy clause) and not at all with conflict pre-emption (which, in fact, is the core of supremacy). And any presumption against pre-emption has no relevance in this logic.

The ultimate disposition of *Geier* and *Locke*, like all other pre-emption cases, depends on the intricacies of the particular statutory regime at issue. At bottom, pre-emption analysis is simply a matter of statutory construction. And there is no justification in constitutional structure or jurisprudential logic to support a special presumption for or against pre-emption in the interpretive task.

Although ill-conceived, the presumption against pre-emption was nobly intended. Scholars and judges have lamented that the modern expansion of congressional power coupled with federal pre-emption means that the Framers' fear of the national legislature swallowing up the states has been realized.

Redefining the proper balance between state and federal legislative powers, however, is better accomplished directly-through an insistence on the limits of Congress' enumerated powers under Article I-rather than circuitously and ineffectually-through a pre-sumption against pre-emption under the supremacy clause. Respecting the limits of congressional power under, say, the commerce clause means also respecting the authority of states to regulate matters within their jurisdiction. At the same time, Congress remains free to regulate, and displace state law if necessary, in order to protect national interests within its areas of constitutional responsibility.

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