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Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority?: Hearing Before the S. Comm. on the Judiciary,, 110th Cong., Sept. 12, 2007 (Statement of Viet D. Dinh, Geo. U. L. Center)

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Testimony of Viet Dinh

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Mr. Chairman and Members of the Committee,

Thank you for the invitation to appear before you today on the issue of regulatory preemption. The question of preemption in our constitutional structure is an important but often misunderstood concept with significant consequences to ordinary Americans. Given the growth of federal legislation and regulation into virtually all aspects of human endeavor beginning in the second half of the last century, it is understandable that some policymakers, scholars, and judges would look to curb the effect of such federal activity by revamping preemption doctrine to circumscribe the preemptive effect of federal law and regulations. I think this effort, although very well-intended, is a mistake.

The Supremacy Clause, Article VI, cl. 2, of the Constitution provides that "the Laws of the United States * * * shall be the supreme Law of the Land." The practical effect of this declaration is that federal law displaces conflicting state laws or local ordinances. Although this clause makes clear that federal enactments trump (or "preempt") conflicting state law, the Supremacy Clause itself does not authorize Congress, or federal agencies through regulations, to preempt state statutes. Instead, the Supremacy Clause simply provides a choice-of-law rule that favors federal law over state law in the event of a conflict.

Thus, to the extent that there are constitutional policy questions raised by federal preemption of state law, the Framers have answered them in favor of the federal government through inclusion of the Supremacy Clause. Solicitude for the regulatory province and sovereign prerogatives of the states-a sentiment that I share-must find constitutional expression elsewhere, apart from a disdain for or presumption 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. 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." 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." 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. 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. 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," 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 me, 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.

The lack of support for a presumption against preemption is equally apparent in the context of regulatory preemption. It is of no moment that the federal enactment displacing state law is one promulgated by a federal agency through regulations rather than a statutory provision enacted by Congress. Consistent with traditional administrative law principles, validly promulgated regulations authorized by the agency's organic statute have the force of law and thus also trump state law by operation of the Supremacy Clause, because "[t]he phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization. Indeed, federal agencies are given a great degree of latitude to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes, even absent express authorization from Congress: "A pre-emptive regulation's force does not depend on express congressional authorization to displace state law ...

The absence of any firm constitutional basis for the presumption against preemption deprives any attempts to limit regulatory preemption 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. This third category would require future Congresses to preempt explicitly or not at all.

Although Congress has the power to enact such legislation, I question the wisdom of such a background rule based on its effects on the concurrent operation of state and federal regulatory authority. I do not address here the possible challenges to such legislation based on intrusion into the judicial function in interpreting statutes or on infringement of the prerogative of future Congresses. I have no quarrel with an enactment aimed at forcing the Executive Branch to consider the implications of displacing state law-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. However, it bears noting that regulatory agencies are already required to do so, under Executive Order 12612, first issued by President Reagan in 1987 and reaffirmed by every successive chief executive.

Any Congressional action that would limit preemption to only those cases where Congress

explicitly states that preemption is intended or where there is a direct conflict between state and federal law would work a sweeping legislative repeal of the doctrine of implied preemption. It would compel 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.

Such legislation would upend constitutional supremacy and create a presumption in favor of overlapping regulation by multiple jurisdictions. It would favor 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 actually 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 US. 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 US. at 548 (Scalia, J., concurring in part, dissenting in part).

To establish a presumption against preemption in the regulatory field would be to remove from Congress the option of not saying anything about the topic. 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, I rather doubt that such an enactment will lead to more intelligent legislation or better consideration of the proper balance between state sovereignty and federal interests.

Federal agencies exist to coordinate areas of national public concern. To allow state law to preempt or even coexist with certain areas of federal regulation undermines the very existence of these agencies and Congress's objectives in delegating specific authority to the agencies. These agencies have expertise in regulatory areas and are attune to the national problems in those areas, allowing them to balance national needs and public concerns with the need for innovation and public protection in a realistic manner.

Courts and juries applying state law in ex post situations are not in a vantage point to adequately take into account the nation's needs or the far-reaching effects of their decisions. When lawsuits under state law are brought - indeed, encouraged by other such successful lawsuits - in an area of regulation that has previously been regulated by an executive agency, the implication is that the plaintiff is in a better position to assess the safety determinations made by experts in federal agencies. Few would argue that this is the case.

Federal agencies are uniquely positioned to promulgate rules with wide-sweeping national effects precisely because regulation in these areas on the state level may negatively impact that field. When a state regulates, it does so with its own citizens, circumstances, and particular needs in mind. Although Madisonian republicanism aims to utilize states as "experimental laboratories," in some areas of governmental concern namely, those areas in which federal agencies exist - regulation at the state level will be done without adequate information and feedback on the overall efficacy and effects of a governmental program.

Such state regulation in these spheres may be inefficient in other ways. States may expend time and money formulating and enforcing rules and regulations which are duplicative. Those who are regulated will also feel the effects of duplicative, confusing or conflicting state regulations. For example, regulation at the state level for national (or international) companies will result in a single company being subject to many different or even conflicting laws. As a result, a company will expend time and money researching and ensuring compliance with the laws of various jurisdictions-time and money that could be spent on research and development. Inevitably, the added costs of compliance will be passed down to the consumer - the American public. Concerns about liability and confusion over jurisdictional differences may deter companies from engaging in the development of new innovations. This confusion will also result merely from allowing state regulations to coexist alongside federal regulations.

Regulation at the federal level also helps prevent nationwide market failures. For example, the federal government is in a better position to constrain monopoly pricing and to remedy "externality problems" that result when costs do not fall on those making decisions. States will

be placed in a position where they may be able to "free ride" off the investments of other states. Because costs will spill over to other jurisdictions, the actual effects of local regulations will not fully be accounted for when decisions are made. The same is true at the international level. Regulations created in the United States - particularly in areas such as U.S. capital markets - affect both the national and international growth of the country, and thus its position in the global arena. The national government, the repository of diplomatic and foreign affairs powers, is better situated to deal with such considerations.

Independent federal agencies in particular are able to capably perform their jobs better than state regulators because they are also more insulated: agencies such as the SEC and Federal Reserve are subject to terms of office that do not fully correspond to presidential elections and are able to issue rules without review by the White House. Furthermore, all federal agencies promulgate rules according to the Administrative Procedure Act. This requires that, before an agency issues a rule, the proposed rule be subject to "notice and comment" procedures. This is an excellent opportunity for interested parties to object to the proposed rule's preemption of state law on the issue. If sufficient opposition is voiced, the rule will not be issued. This is a significant check on the power of the federal government to preempt state law.

Executive Order 12162 also provides a valuable check on federal regulatory action. The Order ensures that executive departments taking federal action that would limit the policymaking discretion of the states only act when it is necessary. Such action also may occur only when constitutional authority for the action is clear and certain, and the national activity is necessitated by the presence of a problem of national scope. This Executive Order guarantees that federal agencies will only take action when the aforementioned advantages afforded by federal regulation outweigh the problems presented by state regulation. Further, for any regulations that would preempt state law or directly regulate the states in ways that interfere with traditional state functions, executive agencies would be required to submit the regulation to Congress for approval. Because there are certain areas in which federal government action is more desirable than decentralized state regulation, one might be concerned about federal government inaction. However, notice and comment periods (as well as direct petitioning of Congress) can be used by states to voice concerns regarding lack of effective federal enforcement.

I 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 Federal Government 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 a pre-imposed requirement by Congress of a clear statement of preemption in order to counterbalance the awesome effect of the Supremacy Clause. It seems to me 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 tinkering with 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, the federal government 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.