Pepperdine Law Review

Volume 33
Issue 1 *Symposium: Federal Preemption of State Tort Law: The Problem of Medical Drugs and Devices*

Article 1

12-15-2005

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Reflections on *Hines v. Davidowitz*: The Future of Obstacle Preemption

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For decades, the doctrine of preemption has been a fecund source of confusion and division. Preemption goes to the heart of our federal system, a fact which prompted Pepperdine School of Law to attempt to shed some light on this vitally important arena of constitutional law and public policy. In April 2005, the School of Law hosted a symposium on the issue of federal preemption of state tort law, specifically addressing the applicability of state law to medical drugs and devices.

At one level, the rules as to preemption are reassuringly simple. By virtue of the Supremacy Clause, embodied in Article VI of the U.S. Constitution, the power of Congress to preempt state law in an enormous range of regulatory activity cannot seriously be doubted.[1] This seems so manifestly obvious, and indeed so straightforward, that the subject has sparked limited scholarly, or even practical, treatment.

Accordingly, scholars have fretted that the academy has been content merely to scratch the surface of this deep and abidingly important subject. One scholar noted that "[a]lthough as a topic, preemption has largely been ignored by constitutional law scholars, it is almost certainly the most frequently used doctrine of constitutional law in practice."[2] Increasingly, scholars have questioned the easy assumptions that inform much of the seemingly settled, black-letter law of preemption.[3]

In this questioning, scholars have rightly lamented that "the Supreme Court's numerous preemption cases follow no predictable jurisprudential or

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1. U.S. CONST. art. VI, cl. 2.

2. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994).

3. *See generally* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000) (arguing that, in contrast to existing belief, "federalism does not admit to a general presumption against federal preemption of state law.").

analytical pattern."[4] This seems ironic since easy categories are employed, such as express preemption, in which Congress includes a provision directly addressing the relationship of federal law to that of the states,[5] or conflict preemption, in which obedience to state law brings about a conflict with federal law.[6]

These ostensibly clear categories (albeit filled with their own interpretive challenges) are complicated by a highly relevant, deliciously rich concept first articulated by the Supreme Court in 1941 in *Hines v. Davidowitz*.[7] It is this case – and its progeny – that provides a deep reservoir from which to draw the more specific issue that brings this conference together.

The statute at issue in *Hines* was Pennsylvania's Alien Registration Act, which required aliens to register once a year for a nominal fee and carry an identification card.[8] Pennsylvania residents brought a representative action contesting the statutes's constitutionality.[9] The district court agreed with the plaintiffs, enjoining enforcement of the measure on two grounds: the Act denied equal protection to aliens, and encroached upon federal powers.[10]

After the district court entered judgment, Congress enacted its own Alien Registration Act.[11] This federal measure tailored the Supreme Court's review of *Hines*, as the Court was required to "pass upon the state Act in light of the Congressional Act."[12] As a result, the Court did not address the lower court's findings; instead, the Court focused solely on whether congressional action had precluded state action.[13] A review of the *Hines* decision leaves no doubt that a decidedly nationalist vision triumphed.[14]

Because no categorical preemption in the traditional sense was to be found, either in the form of express preemption or conflict preemption, the *Hines* Court first reviewed the nature of the regulation in question.[15] The Court discussed the importance alien regulation plays in comity to other nations, and determined that:

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4. *Id.*

5. Of course, numerous complex interpretative questions emerge within this category of preemption, even when Congress has explicitly spoken. For example, what is the meaning of the frequently used statutory term "requirements"? When the term is included as an express preemption provision, does it include not only statutes and regulations, but common law tort actions as well?

6. *See generally* Gibbons v. Ogden, 22 U.S. 1 (1824) (introducing the concept of conflict or implied preemption).

7. 312 U.S. 52 (1941).

8. *Id.* at 59.

9. *See id.* at 60.

10. *Id.*

11. *Id.*

12. *Id.* The federal statute provides for a *single* registration of aliens, at which time aliens would produce detailed information and have their fingerprints taken. *Id.* Such information was to be held in confidential federal files. *Id.* The statute required neither that aliens carry an identification card nor that they exhibit the card to law enforcement. *Id.* at 60-61.

13. *Id.* at 62.

14. *See id.* at 62-63, 73-74.

15. *Id.* at 62.

> [T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, 'the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.'[16]

After concluding that state law was subordinate in the arena of alien regulation, the Court then addressed whether congressional action had precluded enforcement of the Pennsylvania statute.[17] The Court noted that "[f]or many years Congress has provided a broad and comprehensive plan" with respect to alien regulation.[18] In addition, some regulatory provisions specific to aliens had been routinely rejected by Congress on the basis that such "requirements were at war with the fundamental principles of our free government . . . ."[19] Such regulations were noticeably absent from the 1940 Federal Alien Registration Act.[20] From this, the *Hines* Court concluded that Pennsylvania's law, which included some of these more restrictive provisions, stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[21] "Obstacle preemption" thus was born.

This triumphantly nationalist conclusion by no means went unchallenged. Three members of the Court dissented, including no lesser lights than Justice (and future Chief Justice) Harlan Fiske Stone and Chief Justice Charles Evans Hughes.[22] The dissent reasoned that because Congress "may, if such is its will . . . . subtract from the powers which might otherwise be exercised by the states," the Court must guard "against such diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to [the Court's] own conceptions of [Congressional] policy . . . ."[23] Because nothing in the federal enactment made it clear that Congress intended to withdraw power over aliens from the States, the dissent concluded that it would be wholly inappropriate for the Court to draw the inference that Congress intended to create an exclusive registration system.[24] The dissent also emphasized that

16. *Id.* at 66 (quoting Gibbons v. Ogden, 22 U.S. 1, 211 (1824)).

17. *Id.* at 68-69. It is interesting to note that, in determining whether Pennsylvania's law stands as an obstacle to the goals of Congress, the Court found it significant that this legislation is in a field affecting international relations, stating that preemption is "the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority." *Id.* at 68.

18. *Id.* at 69.

19. *Id.* at 71.

20. *Id.* at 72.

21. *Id.* at 67.

22. *See id.* at 74-81 (Stone, J., dissenting).

23. *Id.* at 74-75.

24. *Id.* at 75.

the federal and state statutes were not inconsistent—an alien could comply with both.[25] In the dissent's view, it was not within the judicial power to strike down a state law in the absence of either express or conflict preemption.[26]

For its part, the *Hines* majority was keenly aware that there was neither an express preemption provision nor a conflict between the statute and federal measures.[27] Traditional preemption-triggering signs were noticeably lacking. However, the majority determined that the issue of alien registration was peculiarly suited by its nature to national, not state, legislation.[28] The *Hines* Court was purposefully driving this branch of constitutional law into the Hamiltonian tradition of national supremacy over state-centered governance.[29]

This Hamiltonian-Jeffersonian battleground remains active today. The nationalist vision embodied in the *Hines* majority opinion has surely stood the test of time, but not without its vigorous detractors. The Court has remained wedded to the *Hines* methodology, even in an era of textualism and structuralism in constitutional interpretation. Although the Rehnquist Court deeply valued anti-federalist principles, the prevailing view on preemption issues has been (in the main) surprisingly Hamiltonian.

A dramatic and deeply controversial illustration is *Geier v. American Honda Motor Co.*[30] There, the Court found preemption on *Hines v. Davidowitz* grounds.[31] Briefly stated, the case stemmed from a car accident – Alexis Geier hit a tree while driving her Honda Accord.[32] She brought a negligence and product liability action against Honda because the car was equipped only with a manual shoulder and lap belt, and not with an airbag or other passive restraint.[33] In response to Ms. Geier's state tort law action, Honda maintained that the complaint was preempted by the National Traffic and Motor Vehicle Safety Act of 1966.[34] This argument posed no small challenge, since the statute contained both an express preemption provision and a savings clause.[35] What room, if any, remained for "obstacle" preemption?

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25. *Id.* at 79, 81.

26. *Id.* at 78-81. *See also id.* at 75 (arguing that the Court should not strike down a state law concerning police power unless it "plainly and palpably violates some right granted or secured to the national government by the Constitution or similarly encroaches upon the exercise of some authority delegated to the United States for the attainment of objects of national concern").

27. *Id.* at 60-61 (majority opinion).

28. *Id.* at 73.

29. *See* THE FEDERALIST NO. 32, at 187 (Alexander Hamilton) (Henry Cabot Lodge ed., 1894) (stating that Congress has the power to establish a "uniform rule," which precludes a State from imposing a "distinct rule").

30. Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).

31. *Id.* at 881.

32. *Id.* at 865.

33. *Id.*

34. *Id.*

35. *Id.* The Court noted that a provision in 15 U.S.C. § 1392(d) (1988) expressly "pre-empts any safety standard that is not identical to a federal safety standard applicable to the same aspect of performance." *Id.* (internal quotations omitted).

The *Geier* Court vigorously embraced the *Hines* methodology, concluding that the state tort law created an obstacle to the achievement of national objectives, resulting in an actual conflict between state and federal measures.[36] That is, Ms. Geier's tort action depended on her claim that Honda had a duty to install an airbag.[37] The federal regulation, in contrast, deliberately imposed particular measures designed to increase highway safety, but allowed for a gradual phase-in period for the requirement of passive restraints.[38] Thus, the vehicle in question (the 1987 Accord) was compliant under federal standards but was insufficiently equipped to satisfy more particularistic state standards. Relying on *Hines*, the *Geier* Court concluded that an immediately active statewide airbag requirement would present an obstacle to the goals sought by the federal regulation, and therefore state action was preempted.[39]

This muscular employment of *Hines v. Davidowitz* triggered the ire of Justice Stevens, even though he had paid his respects to the *Hines* methodology in his majority opinion in *Medtronic, Inc. v. Lohr*.[40] In his *Geier* dissent, Justice Stevens maintained that it was inappropriate for the Court to "[rely] on history and regulatory commentary rather than either statutory or regulatory text" in determining whether a state law is preempted.[41] To the contrary, the dissent went on, a presumption of preemption should obtain.[42] Such a presumption, the dissent suggested:

> serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purposes—i.e., that state law is pre-empted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[43]

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36. *Id.* at 874.

37. *Id.* at 881.

38. *Id.* at 879; *see id.* at 874-81 (providing a detailed description of the federal regulations and the goals meant to be achieved through these regulations).

39. *Id.* at 881-82; *see also* Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. DAVIS L. REV. 1, 18 (2001) (reasoning that "the viability of a state tort suit as the one at issue in [the *Geier*] case could well frustrate this purpose by allowing the states, through the threat of tort liability, to effectively mandate the immediate blanket installation of airbags.").

40. 518 U.S. 470, 496 (1996) (stating that the FDA could determine if a state law should be pre-empted on the grounds that the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

41. *Geier*, 529 U.S. at 888 (Stevens, J., dissenting).

42. *Id.*

43. *Id.* at 907-08 (quoting *Hines*, 312 U.S. at 67).

Specifically, the dissent suggested that in a case involving administrative regulations, preemption should occur only when the agency clearly indicates preemptive intent.[44]

Responding to demand for an express statement of preemptive intent, Justice Breyer, countered for the *Geier* majority that "one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict."[45] Even without an express preemption statement, the reasoning went, the Court should discern preemption when there is a considerable conflict between federal and state visions.[46] The Court majority noted that "[w]hile we certainly accept the dissent's basic position that a court should not find pre-emption too readily in the absence of clear evidence of a conflict, for the reasons set out above we find such evidence here."[47]

Geier powerfully illustrates the Court's eager acceptance of the *Hines* methodology. *Hines*, in essence, added a rich (and broad) dimension to preemption: obstacle preemption continues to act in the ranks alongside express and conflict preemption.

Application of this extensive and complex grouping brings us to the topic of the symposium. The articles that follow address one area of application of preemption, and provide a comprehensive discussion on the applicability of state law to medical drugs and devices. The articles more fully apply the concepts adumbrated above, and, more importantly, meaningfully contribute to the ongoing preemption debate in a vitally important arena of our national life.

We at Pepperdine University School of Law are grateful to these distinguished scholars and practitioners for their important contributions to this enduring conversation in our federal republic.

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44. *Id.* at 908-10. *But see id.* at 884 (majority opinion) (criticizing the dissent for relying on cases which involved express preemption but not conflict preemption, which was the type at issue).

45. *Id.* at 885.

46. *Id.* at 884-85.

47. *Id.* at 885 (internal citations omitted).