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Joltin' Joe Has Left and Gone Away: The Vanishing Presumption Against Preemption

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"JOLTIN' JOE HAS LEFT AND GONE AWAY": THE VANISHING PRESUMPTION AGAINST PREEMPTION

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When Paul Simon asked, "Where have you gone, Joe DiMaggio?," Mrs. Robinson replied, "Joltin' Joe has left and gone away."[1] But if Simon was a law professor (what a loss to music!), the lyric might have been "[w]here have you gone, the presumption against preemption? Federalists turn their lonely eyes to you."

The Supreme Court regularly states that when Congress legislates "in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[2] But this declaration is devoid of force and no longer even hortatory. If the national motto "In God We Trust" is a "ceremonial deism," the presumption against preemption is a ceremonial federalism.[3]

Consider *Egelhoff v. Egelhoff*,[4] in which the Court held that the federal Employee Retirement Income Security Act of 1974 (ERISA)[5] expressly preempted a Washington law providing that the designation of a spouse as the beneficiary of a non-probate asset is automatically revoked upon divorce.[6] While the majority acknowledged the applicability of the "presumption against preemption in areas of traditional state regulation such as family law,"

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[1] SIMON & GARFUNKEL, *Mrs. Robinson*, *on* THE ORIGINAL SOUNDTRACK ALBUM TO "THE GRADUATE" (Columbia 1968), *available at* http://www.paulsimon.com/lyrics/mrs_robinson.htm l (last visited Jan. 14, 2003).

[2] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting *Rice*, 331 U.S. at 230).

[3] *See* Marsh v. Chambers, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting) (differentiating between the Legislature's invocations and mottos such as "God save the United States and this Honorable Court," because the latter has lost religious significance). The phrase "ceremonial deism" originated with the dean of the Yale Law School, Eugene Rostow. *See* Arthur E. Sutherland, *Book Reviews*, 40 IND. L.J. 83, 86 & n.7 (1964) (quoting, from memory, Rostow's unpublished 1962 Meiklejohn Lecture at Brown University).

[4] 532 U.S. 141 (2001).

[5] 29 U.S.C. § 1001 *et seq.* (2000).

[6] *Egelhoff*, 532 U.S. at 143.

it summarily dismissed the presumption because "Congress ha[d] made clear its desire for pre-emption."[7] Thus, the *Egelhoff* majority proved that clarity, like beauty, is in the eye of the beholder. Any express preemption case must begin with a divination of what exactly Congress sought to preempt, in a word, the *field* that Congress sought to preempt. Surely, the Court could not have meant that ERISA expressly preempts the entire field of state inheritance law. While it might have meant that ERISA expressly preempts only those state laws that conflict with ERISA's objectives, the *Egelhoff* case was a poor vehicle for such an assertion insofar as the Washington statute reinforced ERISA's ultimate objective of fair protection of employee benefits.[8]

The problem in *Egelhoff* was that Congress poorly expressed itself since it is clear that Congress intended ERISA to directly preempt state law, but what is not clear is the scope that Congress intended that preemption should have—enter the presumption that the preemption, like Joe DiMaggio, has "left and gone away." The presumption is against a broad reading of federal law that purports to preempt the state law and that expressly acts like other *clear statement* rules to ensure that the federal political process has focused upon the displacement of state authority. Without such a rule, there is no assurance that Congress has in fact attended the consequences of displacing state authority. This holds true whether

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[7] *Id.* at 151; *see also* 29 U.S.C. § 1144(a) (2000) (providing that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA).

[8] David Egelhoff had made Donna Egelhoff, his wife, the beneficiary of a life insurance policy, which was governed by ERISA, provided to him by Boeing, his employer. David and Donna divorced, and two months later, David died intestate. Although Donna was still the named beneficiary of the life insurance policy, David's statutory heirs argued that they were the beneficiaries by reason of the Washington statute revoking the designation of Donna as the insurance beneficiary upon David and Donna's divorce. *Egelhoff*, 532 U.S. at 144. By finding preemption the Court ignored the fact that Donna, the ex-spouse, had already received half the community property of the marriage and would receive property already awarded to the decedent spouse in the marital dissolution by virtue of preemption's displacement of the Washington revocation statute. *See id.* at 159 (Breyer, J., dissenting). So much for ERISA's objective of fair protection of employee benefits.
Furthermore, the Washington statute was "a rule of interpretation . . . designed to carry out, not to conflict with, the employee's likely intention as revealed in the [ERISA] plan documents." *Id.* at 154 (Breyer, J., dissenting). The Washington statute treated the divorced beneficiary spouse as if he or she had predeceased the decedent unless "[t]he instrument governing disposition of the nonprobate asset expressly provides otherwise" (Wash. Rev. Code § 11.07.010(2)(b)(i) (West Supp. 2003)) and Egelhoff's Boeing insurance plan was "silent about what occurs when a beneficiary designation is invalid." *Egelhoff*, 532 U.S. at 154–55 (Breyer, J., dissenting). Because the Washington statute merely filled that gap, it did not conflict with either Boeing's ERISA plan or the objectives of ERISA itself.

one conceives of federalism as primarily enforceable by politics or by judges.

Advocates of politically enforceable federalism should be willing to admit that upholding ambiguous congressional assertions of preemption undermines the very premise of politically enforceable federalism—that political process will carefully weigh the balance of federal and state interests before displacing state authority. Supporters of judicially enforceable federalism may wish that judges would examine the substance of federal law to determine if it is an improper invasion of state authority, but at the least, they will agree that a clear, unambiguous statement by Congress concerning the scope of its express preemption is a minimal safeguard.

Consider *Geier v. American Honda Motor Co.*,[9] in which the Court found implied "obstacle" conflict preemption[10] of ordinary state principles of tort when Congress authorized the Secretary of Transportation to promulgate minimum auto safety standards in order to reduce injuries and deaths resulting from traffic accidents, and further, the Secretary used that authority to issue regulations that required some autos, but not all, be equipped with air bags.[11] The federal objective identified by the Court in *Geier* of gradually phasing in airbags would ultimately be frustrated by a state's imposition of tort liability on an auto manufacturer who complied with the agency standard by manufacturing a vehicle without an airbag. This federal objective was an agency objective, not a congressional objective. Supposedly, the presumption against preemption carries special force when the federal norm that allegedly preempts state law is an agency rule.[12]

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[9] 529 U.S. 861, 886 (2000).

[10] *See id.* The so–called "obstacle" conflict preemption occurs when state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Obstacle conflict preemption is not normally to be found where the conflict is between state law and a general, broad, or abstract federal objective. *See, e.g.,* Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (finding no conflict between Montana's substantial severance tax on coal—which admittedly made coal more expensive to the electrical generation utilities that used it—and a variety of federal laws that specifically have as their objective the production and consumption of coal).

[11] *Geier* , 529 U.S. at 864–65.

[12] *See* California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 583 (1987) (stating that administrative regulations should "declare any intention to pre-empt state law with some specificity"); *see also* Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 717–18 (1985) (opining that preemption of state law by federal agency rules poses special federalism concerns, such that they should "make their intentions clear if they intend for their regulations to be exclusive"); Fidelity Fed. Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153–54 (1982) (reasoning that preemption of state law by federal agency rules occurs when the agency "promulgates regulations intended to pre-empt state law").

There is good reason for strong application of the presumption against preemption to agency action. Preemption cases are cases about federalism, and the presumption against preemption ought to be regarded as a substantive canon of constitutional interpretation.[13] Regardless of whether one views federalism as politically enforceable or judicially enforceable, the presumption against preemption ought to apply to agency action. Advocates of a politically enforceable federalism must recognize that "[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emption ramifications for state law."[14] Partisans of judicially enforceable federalism must be equally quick to acknowledge that the values of federalism are more endangered by politically unaccountable administrators than by politically accountable members of Congress.

Consider *United States v. Locke*[15] in which the Court held that Washington's regulations of oil tankers plying Puget Sound were impliedly preempted by a series of federal laws regulating similar but not identical aspects of tanker traffic in American waters.[16] The Court concluded that Congress intended to occupy the entire field of tanker design, construction, and operation, and the Court asserted that the presumption against preemption should not apply at all "when the State regulates in an area where there has been a history of significant federal presence."[17] Upon superficial examination this might make sense. When Congress has undertaken significant regulation of ocean–going tankers surely the field cannot be one "which the States have traditionally occupied."[18] This overlooks, however, the fact that in a field preemption case the entire inquiry is whether what Congress has done is sufficiently pervasive to constitute an implicit declaration that no other regulation of the area is to be allowed, and the critical inquiry is to decide what constitutes the field. Of course, Congress may occupy an entire field and thoroughly oust the states from any regulatory role in that

[13] *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 726 (1991) (describing federalism as "the respect that federal courts owe the States and the States' procedural rules when reviewing [them]").

[14] *Geier*, 529 U.S. at 908 (Stevens, J., dissenting).

[15] 529 U.S. 89 (2000).

[16] *Id.* at 94.

[17] *Id.* at 100–03, 108.

[18] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

field, but the presumption against preemption is futile to careful consideration of the scope of the field. The presumption against preemption operates to confine the field; if the presumption evaporates immediately upon congressional entry to a field there is a heightened risk that the preempted field will be defined too broadly. The danger of a broad field definition is that field preemption always carries with it the risk of a regulatory vacuum—the *pervasive* federal scheme may fail to address an issue of particular concern to an individual state, and the federal failure may not be indicative of a congressional intention to leave the matter unregulated. Let us not forget that field preemption is an *implied* preemption doctrine; Congress could have stated which field it wished to occupy, but Congress did not. In the absence of a clear directive from Congress, the burden of proof of preemptive intent ought to be on those asserting such congressional intent.

To answer the riddle of why the presumption has *left and gone away* is to engage in speculation. It may not be as hard of a nut to crack as the Zen koan of the sound of one hand clapping, but it is still hard-shelled. Perhaps the Justices think that identification of fields *traditionally occupied* by states is a fool's errand, much like the errant quest for traditionally sovereign functions that were abandoned in *Garcia v. San Antonio Metropolitan Transit Authority*.[19] If that is so, one must explain why the Court has left much of the same inquiry alive in the context of the market-participation exception to the dormant Commerce Clause. Perhaps the Justices think that the presumption against preemption is akin to a *clear-statement* rule, but, if that is so, one must explain the enthusiasm with which the Court has embraced a clear statement rule for abrogation of state sovereign immunity. Perhaps the Justices think that the judiciary ought not second-guess congressional judgments about the scope of federal regulatory power, but, if that is so, one must explain the spate of such second-guessing that is inherent in the Court's new commerce doctrine or in to the scope of the Fourteenth Amendment's enforcement power. Perhaps the Justices agree with Professor Caleb Nelson because preemption is a Supremacy Clause doctrine, and the Supremacy Clause includes a *non obstante* clause that directs courts to refrain from efforts to harmonize federal law with pre-existing state law and that courts should make no effort to read federal law narrowly

[19] 469 U.S. 528, 530–31 (1985).

in order to preserve state regulatory authority.[20] If that is so, one must explain why the Court has never mentioned the point and, indeed, why it continues to simultaneously repeat and ignore the presumption against preemption. Perhaps the Justices are simply shamelessly expedient in this area, but, if that is so, one must explain why preemption is riddled with expediency and other areas of constitutional adjudication are not or, worse yet, explain why the entire enterprise is expedient claptrap. At bottom, we are left groping. Federalism is more than a slogan, a mantra to be repeated at the constitutional shrine—it is an end in itself, a structural device to diffuse power to better secure individual and collective autonomy. It is freedom to choose our political arrangements to suit varied tastes and freedom from a political version of the homogenous sludge that increasingly characterizes global *culture.* The presumption against preemption is a modest star in the firmament of federalism; our political heavens are dimmer for its loss.

[20] *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232, 255, 290–303 (2000).