

Federal Preemption of State Preemption of City Powers

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Can the U.S. tell a state not to interfere with a city's authority? If so, when? If so, should it?[1]

State Preemption of Local Government Authority

Classic situation for a Home-Rule City. The city wants to [regulate firearms][offer municipal broadband service][protect consumers from predatory sales or lending practices] [etc.], but the state legislature adopts a law preempting the local power to act on that subject. Sometimes, it might be a state agency that adopts preemptive regulation under delegated legislative powers. Either way, the city is rendered powerless to act.

Federal Preemption of State Authority

Of course, the federal government can preempt state legislative powers in a matter that is properly subject to federal regulation. *See, e.g., Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203-04 (1983) (federal law can preempt state law if federal legislation shows congressional intent to occupy the field or state law actually conflicts with federal law); *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003) (federal executive power over foreign policy preempts California's Holocaust Victim Insurance Relief Act). Federal agency regulations can preempt state laws too, so long as the subject is within the scope of agency authority. *See Fidelity Federal Savings- & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes").[2]

Federal Preemption of Local Power

Of course, federal preemption of state law includes preemption of local ordinances enacted on the same subject by cities throughout the state – there is no question that when it preempts state laws Congress simultaneously preempts ordinances of cities. "[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough County. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

Federal Preemption of State Preemptive Authority?

So, in an area in which there is federal regulatory authority, can the federal government enact legislative or regulatory provisions that prevent a state from preempting local government power?

Yes, if Congress acts with unmistakable clarity. Can federal agencies accomplish the same result through regulations?

Back in the 1980's a fierce legal battle raged in courts across the nation over the preemptive effect of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA")[3]. One issue was whether Congress intended FIFRA to limit states' powers to restrict local regulation of pesticide labeling or use. The resulting judicial opinions touched on our subject. Among them:

> The [federal] legislative history does not demonstrate a clear congressional intention to preempt traditional local police powers to regulate the use of pesticides or to *preempt state power to distribute its regulatory authority between itself and its political subdivisions*. 7 United States Code section 136v is phrased to authorize states to adopt more stringent regulations.

People ex rel. Deukmejian v. County of Mendocino, 36 Cal.3d 476 at 492 (Cal. 1984) (emphasis added). This of course suggests that if Congress had clearly expressed its intent to "preempt state power to distribute its regulatory authority between itself and its political subdivisions" Congress could have done so.

The US Supreme Court decision that eventually settled the scope of FIFRA preemption approached our issue from the opposite direction, observing, "On the other hand, it is sufficiently clear that under the opinion announced by the court below, the State would have been precluded from permitting local authorities to regulate pesticides." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607 (1991). The Court did not decide whether Congress could have precluded the state from preventing local regulation.[4]

Later in the majority opinion, and particularly in Justice Scalia's concurrence, the Court edges closer to (but does not quite reach) our issue – still focusing on arguable restrictions on state powers to delegate rather than on possible federal restrictions on state power to limit local government powers. For example Justice Scalia remarks:

> This reasoning is unpersuasive. As an initial matter, it would still have to be shown under ordinary canons of construction that FIFRA's delegation of authority to "State[s]" would not therefore *allow the States in turn to redelegate some of this authority to their political subdivisions either specifically or by leaving undisturbed their existing statutes that would otherwise provide local government with ample authority to regulate*. We have already noted that § 136v(a) can be plausibly read to contemplate precisely such redelegation. The term "State" is not self-limiting since political subdivisions are merely subordinate components of the whole. The scattered mention of political subdivisions elsewhere in FIFRA does not require their exclusion here. The legislative history is complex and ambiguous.

501 U.S. at 612 (emphasis added).

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The Constitution should not be used as a tool to convert an employment dispute into a federal claim simply because the employee works for the government. Were the rule otherwise, it would open the door to significant headaches for government employers, including preventing them from dealing with insubordinate or disruptive employees in the same manner that their private employer counterparts can. Additionally, the Supreme Court's warning in *Garcetti* would likely come to pass if the Court rules in the petitioner's favor: courts would have to sit as super-personnel deciders for a large number of decisions made by government employers, again simply by virtue of the fact that the employer is the government.

IMLA has submitted an amicus brief in the *Franks* case in support of the Respondent's position to highlight these points.

Notes

1. No. 13-483.
2. 547 U.S. 410 (2006).
3. *See* Lane v. Cent. Ala. Cmty. Coll., 523 Fed. Appx. 703, 710 (11th Cir. 2013).
4. *Id.*
5. *Garcetti,* 547 U.S. at 421.
6. *Id.*
7. *Id.* at 418-19, 421-22 (internal citations omitted) (emphasis added).
8. *Id.* at 423.
9. *Id.* at 421.
10. *Compare Garcetti,* 547 U.S. at 412-15; w*/ Lane,* 523 Fed. Appx. at 710.
11. *See Garcetti,* 547 U.S. at 415; *Lane,* 523 Fed. Appx. at 710.
12. *See Garcetti,* 547 U.S. at 415; *Lane,* 523 Fed. Appx. at 710.
13. *Lane,* 523 Fed. Appx. at 710.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Lane,* 523 Fed. Appx. at 710.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 712.
23. *Lane,* 523 Fed. Appx. at 712.
24. *Id.*
25. *Id.* (internal citations omitted).
26. *See* Brief of Petitioner, Petition for a Writ of Certiorari, No. 138-483, available at: http://sblog.s3.amazonaws.com/wp-content/uploads/2014/01/Lane-Petition-and-Appendix.pdf (last accessed on February 27, 2014) (emphasis added).
27. *See* Clairmont v. Health, 632 F.3d 1091 (9th Cir. 2011) (concluding that employee's subpoenaed testimony was not a part of his official job duties and therefore was protected under the First Amendment); Reilly v. City of Atlantic City, 532 F.3d 216 (3d Cir. 2008) (explaining that a police officer's trial testimony was protected by the First Amendment because, although the testimony stemmed from the officer's official duties, the officer had an "independent obligation as a citizen to testify truthfully."); Morales v. Jones, 494 F.3d 590, 598 (7th Cir. 2007) (concluding that a public employee's subpoenaed deposition testimony about speech he made pursuant to his official duties was protected speech under the First Amendment). In *Morales,* the Seventh Circuit distinguished between the police officer's speech made in a deposition pursuant to a subpoena versus the exact same speech made to the assistant district attorney in a conversation. *Morales,* 494 F.3d at 597-98. Specifically, the court held that the deposition testimony was protected speech, even though he was testifying about his official duties because testifying in a civil suit pursuant to a subpoena was, according to the Seventh Circuit, "unquestionably not one of [the police officer's] job duties..." *Id.* at 598. The Seventh Circuit recognized the "oddity of a constitutional ruling in which speech said to one individual may be protected under the First Amendment, while precisely the same speech said to another individual is not protected..." but nonetheless held that *Garcetti* established just such a framework. *Id.* ML

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A few years later, the Court held that "[49 U.S.C.] § 14501(c) does not bar a State from delegating to municipalities and other local units the State's authority to establish safety regulations governing motor carriers of property, including tow trucks." *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 428 (2002). Again, the holding carried the negative implication that Congress could have barred state control over municipal regulatory powers if Congress intended to do so.

The Supreme Court revisited our issue in 2004, holding that Federal Telecommunications Act § 253(a) did not preempt a Missouri law that barred cities from offering telecommunications services because the term "any entity" in the federal law did not unmistakably include a city. The Court was overtly hostile to the idea that federal law could preempt state laws limiting city powers but grudgingly admitted that Congress could do so if it spoke with absolute clarity:

> The municipal respondents' position holds sufficient promise of futility and uncertainty to keep us from accepting it, but a complementary principle would bring us to the same conclusion even on the assumption that preemption could operate straightforwardly to provide local choice, as in some instances it might. Preemption would, for example, leave a municipality with a genuine choice to enter the telecommunications business when state law provided general authority and a newly unfettered municipality wished to fund the effort. But the liberating preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607–608, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) (internal quotation marks, citations, and alterations omitted); *Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 433, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002). Hence the need to invoke our working assumption that federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power, in the absence of the plain statement *Gregory*[5] requires. What we have said already is enough to show that § 253(a) is hardly forthright enough to pass *Gregory*: "ability of any entity" is not limited to one reading,

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> and neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms. The want of any "unmistakably clear" statement to that effect, 501 U.S., at 460, 111 S.Ct. 2395, would be fatal to respondents' reading.

Nixon v. Missouri Municipal League, 541 U.S. 125, 140-41 (2004).[6] I have not yet found a Supreme Court decision that allowed federal law to preempt state limits on local government powers. I would appreciate hearing from anyone who has.

Much more recently, when the D.C. Circuit invalidated the FCC's net neutrality regulations, *see Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), Senior Judge Silberman's separate opinion, concurring in part and dissenting in part, 740 F.3d at 659-68, suggested that the FCC's authority to promote competition in the local telecommunications market or other regulating methods that remove barriers to infrastructure investment would justify regulations invalidating state laws restricting cities' ability to deploy public broadband services. 740 F.3d at 660, n.2 and accompanying text.[7]

In his subsequent statement about where the FCC would be going on net neutrality after the *Verizon* decision, FCC Chairman Tom Wheeler referred to this portion of Judge Silberman's opinion, saying:

> The Commission will look for opportunities to enhance Internet access competition. One obvious candidate for close examination was raised in Judge Silberman's separate opinion, namely legal restrictions on the ability of cities and towns to offer broadband services to consumers in their communities.

Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules | FCC.gov, http://www.fcc.gov/document/statement-fcc-chairman-tom-wheeler-fccs-open-internet-rules (last accessed Feb. 21, 2014).

Unless the Supreme Court distinguishes or overrules the *Nixon v. Missouri Municipal League* standard quoted above, the FCC would need explicit congressional authority to intervene in state control of city power to offer broadband. Of course, the courts instead could simply defer completely to the FCC's view of its own jurisdiction, regardless of statutory text, as they did in *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013) (upholding based on deference to administrative agency interpretation of its jurisdictional statutes the imposition of FCC cell tower location procedural rules on cities in apparent disregard of the Telecommunications Act's limits of FCC power to interfere with local right-of-way management).

Federalism Concerns

If federal preemption of state preemption is permissible, is it wise as a matter of federalism? In the short term cities may welcome federal intervention to shield them from state restrictions. However, that attitude may not be wise in the long term for at least two reasons: First, worms turn. In some future instances cities might welcome a state prohibition against local government involvement in sensitive controversies, perhaps such as immigration control or minimum wage regulation, and want to resist some federal effort to foist responsibility for regulating such hot potatoes on cities. Second, federal preemption of state preemption of local government powers really does seem inconsistent with the federal system. Local governments are for most purposes political subdivisions of their states and, for better or worse, subject to the whims of their state lawmakers. Moreover, as hostile as state legislators may sometimes seem to local government sensibilities, state legislators are usually in closer touch with local concerns than are their federal counterparts.

Notes

1. Can we invent a term for this? "Inverse Preemption"? "Second Level Preemption"? Suggestions welcome at peter.haskel@dallascityhall.com.
2. It has even been held that a federal agency's informal attorney opinion letter could preempt a state constitutional provision. *See* First Gibraltar Bank, FSB v. Morales, 19 F.3d 1032, 1048 (5th Cir.), *cert. denied,* 513 U.S. 876 (1994), *opinion vacated and superseded on other grounds after remand*, 42 F.3d 895 (5th Cir. 1995). I just love citing this case because it is the only case that I have ever won after losing in the Court of Appeals and then having the Supreme Court deny certiorari. It has never been scientifically proven that support from a sympathetic and powerful member of Congress is detrimental to one's federal court litigation position.
3. FIFRA provisions are codified in many provisions of U.S. Code title 7.
4. Instead, the Court focused on whether federal preemption of state law would preclude the state from permitting local regulations. This issue might be relevant to cities without home-rule powers or to counties, special districts, and authorities that act under delegated state legislative power, but this issue does not directly concern home-rule cities.
5. Gregory v. Ashcroft, 501 U.S. 452 (1991), stating that "Congress needs to be clear before it constrains traditional state authority to order its government." *See Nixon,* 541 U.S. at 145.
6. Most lower courts had reached the same result as *Nixon*. *See, e.g.,* City of Abilene. v. FCC., 164 F.3d 49, 51 (D.C. Cir. 1999) ("In deciding this case we shall assume arguendo that Congress, acting within its constitutional authority, may—through the Supremacy Clause—supersede a State law limiting the powers of the State's political subdivisions"), but finding that Congress did not do so in § 253(a) with sufficient clarity. There may have been others, but I've so far found only *City of Bristol v. Earley,* 145 F. Supp. 2d 741, 749 (W.D. Va. 2001) holding that § 253(a) preempted state law and therefore allowed cities to provide telecommunications services.
7. Judge Silberman's approach seems to expand *Nixon*. In *Nixon* the Supreme Court demanded that Congress speak with "unmistakable" clarity before it would find preemption of state law that restricted cities, while Judge Silberman suggests that a general delegation of congressional power would suffice to allow the FCC to supplant a state's powers over its cities' authority. ML