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## Preemption?

1. Section IX in Volume 67 Number 20 of the Federal Reporter, Question 6 (page 4539) asks, in full

> What should be the interplay between the national 'do-not-call' registry and centralized state 'do-not-call' requirements? Should state requirements still be needed to reach intrastate telemarketing? Would the state requirements be pre-empted in whole or in part? If so, to what degree? Should state requirements be preempted only to the extent that the national 'do-not-call' registry would provide more protection to consumers? Will the national do-not-call registry have greater reach than state requirements with numerous exceptions?

2. In the Prepared Statement of the Federal Trade Commission on Proposed Amendment of the Telemarketing Sales Rule to Establish A National "Do-Not-Call" Registry before the Judiciary Committee of the Senate of the Commonwealth of Kentucky on February 6, 2002 (www.ftc.gov/os/2002/02/kentuckytestimony.htm), the Commission's official position is "neutral on the issue of preemption". As will be discussed below, such an officially neutral position may be the worst position to take in an area where the Supreme Court has not formulated a unified theory of when administrative preemption of state law occurs.

## Introduction

3. Since the prolific creation of the federal agencies during the New Deal era, there has been a veritable explosion of federal actions (laws, regulations, etc.) affecting almost every sphere of life. As the judicial expansion of federal power continues to increase, federal agencies are delegated broader and broader authority to create, implement, and enforce important policy decisions and regulatory programs. While some authors argue that such an increase in agency power results in an undermining of constitutional democracy and will receive a more sympathetic ear in this supposedly new era of renewed federalism[1], such conjecture is not the subject here.

4. However, as the federal government increases its presence in areas once the sole domain of states, and as such presence is more often than not manifested through the actions of federal

agencies, the conflict between federal agencies and the legal domain of state legislatures is most apparent when federal agencies attempt to not only regulate a particular area, but also to exclude any state regulation. In short, preemption is always a salient constitutional issue on the federal/state continuum.

## Federalism

5. Article VI, clause 2 of the Constitution provides that the laws of the United States "shall be the supreme law of the Land;…any Thing in the Constitution or Laws of any state to the Contrary notwithstanding". Thus, the Court has stated that,

> [S]ince our decision in *McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819), it has been settled that state law that conflicts with federal law is "without effect". Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superceded by…Federal Act unless that [is] the clear and manifest purpose of Congress'. *Rice v. Santa Fe Elevator Corp.*, 331 US 218, 230 (1947). Accordingly, '"[t]he purpose of Congress is the ultimate touchstone'" of pre-emption analysis. *Malone v. White Motor Corp.*, 435 US 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 US 96, 103 (1963)).[2]

6. If the Founders' decision to "preserve[ ] the states as separate sources of authority and organs of administration"[3] mandates state law to continue governing most matters unless and until the federal government takes "the affirmative steps required to adopt law capable of displacing contrary state law under the Supremacy Clause"[4], the question remains: Are agency actions to be considered "Laws" as required by the Constitution? If administrative rules adopted pursuant to broad delegations of legislative power are "Laws", then they have the same effect as "Laws" and fall within the Constitution's delineation of separation of powers and federalism. If such administrative rules are not "Laws", then what are they? Throughout many preemption decisions, the Court has remained clear that it is for the Judiciary to decide whether an agency's preemptive actions fall within the scope of delegated authority and whether they rise to the level of "Law". As the Court stated in *Louisiana Public Service Commission v. FCC*[5]:

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[1] See, for example, David A. Herrman. "To Delegate of Not to Delegate--That is The Preemption: The Lack of Political Accountability in Administrative Preemption Defies Federalism Constraints on Government Power". 28 Pac. L.J. 1157.
[2] *Cipollone v. Liggett Group*, 505 US 504 (1992) (plurality opinion).
[3] Wechsler, Herbert. "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government", 54 Colum. L. Rev. 543, 543 (1954).
[4] Clark, Bradford R. "Separation of Powers As A Safeguard Of Federalism". 79 Tex. L. Rev. 1321, 1326 (2001).
[5] 476 US 355 (1986).

> A federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency...An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.[6]

The Court sidesteps the main question as to the status of agency actions by turning instead to a delegation analysis: "[w]hen any Branch acts, it is presumptively exercising the power the Constitution has delegated it"[7]. Thus, "the underlying statute, rather than the regulation itself, establishes the rule of decision and preempts contrary state law"[8]. When an agency issues a substantive regulation (a regulation displacing contrary state law by regulating the very conduct otherwise governed by such law) that conflicts with state law, the inquiry is whether the regulation falls within the terms of the agency's organic statute.[9] If it does, the statute (and the regulation) displaces state law.[10] If it does not, the agency's action is *ultra vires* and is without force or effect.

7. An agency may preempt state law when, amongst other reasons, it "stands as an obstacle to the accomplishment and execution of the full objectives of Congress"[11]. Furthermore, "preemption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation"[12]. To the extent that an agency's regulation affects both interstate and intrastate services, preemption may be upheld "where it [is] not possible to separate the interstate and the intrastate components" of the regulation[13].

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6 476 US 355, 374.
7 *INS v. Chadha*, 462 US 361, 415 (1989) (Scalia, J. dissenting).
8 Clark, Bradford R. "Separation of Powers As A Safeguard Of Federalism". 79 Tex. L. Rev. 1321, 1431 (2001).
8 476 US 355 (1986).
9 *United States v. Shimer*, 367 US 374, 385 (1961) (regulations contrary to state law upheld as "a valid exercise of the authority granted by the Administrator" by statute).
10 *Fidelity Federal. Savings & Loan Association v. De la Cuesta*, 458 US 141, 153 (1982) ("Federal regulations [within statutory authority] have no less pre-emptive effect than federal statutes".).
11 476 US 355, 368-69 (1986) (citing *Hines v. Davidovitz*, 312 US 52 (1941)).
12 476 US 355, 368-69 (1986) (citing *Fidelity Federal Savings & Loan Association. v. De la Cuesta*, 458 US 141 (1982) and *Capital Cities Cable, Inc. v. Crisp*, 467 US 691 (1984)).
13 476 USC 355, 376 n.4. c.f. *FCC Report and Order: Promotion of Competitive Networks in Local Telecommunications Markets WT Docket No. 99-217. Implementation of Local Competition Provisions in the Telecommunications Act of 1996 CC Docket No. 96-98. Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network CC Docket No. 88-57.* 465 PLI/Real 527, 577-578.

**Administrative Preemption of State Law by a Federal Agency**

8. "Administrative preemption" refers to situations in which an agency's policies and regulations affect the preemptive scope of a federal law or regulation and occurs in one of two ways. First, the regulation determines the interpretation of a federal statute which, in turn, preempts state law. Second, the regulation itself preempts state law. In contrast, "regulatory preemption" refers to situations in which the courts--without input from an agency--interpret a federal statute to find preemption. Here, the issue is one of "administrative preemption" and not "regulatory preemption".

9. Agency preemption of state law is found in two well-developed yet conflicting jurisprudential doctrines. First, the Supreme Court historically has attempted to buffer federal/state conflicts by ensuring that state laws are never displaced unless Congress intended to so do. The "presumption against preemption" was established in *Rice v. Santa Fe Elevator Corp*[14] and demands that an ambiguous preemption statute be construed narrowly to avoid any unintended effects on state power[15]. Second, the Supreme Court has commanded that in instances where Congress' intent was not clearly manifested, so long as the agency offers a reasonable interpretation of the ambiguous statutory provision, the courts must accept it. This principle of judicial deference to agency decision-making was announced in *Chevron, USA, Inc. v. Natural Resources Defense Council*[16]. The tension created by these two principles is clear: *Rice* demands that a court faced with statutory ambiguity find no preemption; *Chevron* deference demands a court to allow an agency to find preemption even when the statute is ambiguous. Is there resolution to such tension? Professor Walthall argues that "The Court's decisions thus reveal a pattern of asymmetrical deference to agency interpretations, depending upon the agency's choice of a broad or narrow interpretation of a statute's preemptive effect."[17].

10. When an agency seeks to effect preemption by offering its own interpretation of the preemptive effect of a federal statute, *Chevron* applies as the agency attempts to substitute its own understanding of congressional intent for that of the court's. When the agency promulgates regulations having a preemptive effect, these regulations fall under one of the classic categories of preemption: express, conflict, obstacle, and field. Even when the agency acts, the question of

[14] 331 US 218 (1947).
[15] C.f. *Cipollone v. Ligget Group, Inc.*, 505 US 504, 516-18 (1992); *Massachusetts v. DOT*, 93 F3d 890 (DC Cir. 1996).
[16] 467 US 837, 842-845 (1984).
[17] Walthall, Howard P. Jr. "Chevron v. Federalism: A Reassessment of Deference to Administrative Preemption". 28 Cub. L. Rev. 715, at 717.

congressional intent remains central to the analysis, for the agency must either claim Congress intended to delegate preemptive power to the agency, or the agency itself has the inherent power to preempt.

11. Here, the FTC remains "neutral" on the issue of preemption; thus it claims neither preemption nor non-preemption. It appears *Chevron* is inapposite. Thus, we must look to the regulations themselves to determine whether they have a preemptive effect.

12. The FTC is proposing to amend the Telemarketing Sales Rule ("TSR" or "Rule")[18] adopted in August 1995 under the Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act")[19] which is itself enforced under the Federal Trade Commission Act[20]. Even though the Telemarketing Act directs the Commission to act in specific ways to prohibit "deceptive telemarketing acts or practices and other abusive telemarketing acts or practices"[21], and includes specific language concerning unsolicited telephone calls to consumers[22], nevertheless the Telemarketing Act itself does not include any specific language as to preemption or Congress' intent. As for the TSR, after the first round of public comments, the Commission stated that it "does not intend any such preemptive effect and is persuaded...that the quoted preemption provision in the revised proposed Rule should be dropped."[23]. Furthermore, § 310.7(b) articulates the Commission's intent that "Nothing contained in this section shall prohibit any attorney general or other authorized State official from proceeding in State court on the basis of an alleged violation of any civil or criminal statute of such State". Clearly, contrary to its official position that it is "neutral on the issue of preemption", the Commission does not intend the proposed changes to the TSR to preempt state law.

13. When an agency interprets its statute to limit its power to preempt, how has the Judiciary reacted? In *Lawrence County v. Lead-Deadwood School District*, the Department of the Interior did not interpret its statute as preempting state law. The Supreme Court suggested that it would defer to the agency's interpretation. However, avoiding *Chevron*, the Court cited *Blum v. Bacon*[24] and drew from it a deference formulation requiring an independent judicial analysis of the statute's legislative history. The result? The Court found preemption based on its own analysis of congressional intent and, in

[18] 16 CFR Part 310.
[19] 15 USCS 6101.
[20] 15 USC 41 et seq.
[21] 15 USCS 6102(a)(1).
[22] 15 USCS 6102(a)(3).
[23] 60 FR 43842, at section III Preemption.
[24] 457 US 132 (1982).

effect, overrode the agency's interpretation. Applying *Blum's* reasoning, even if the Commission intends not to invoke preemption, nevertheless a court may decide to conduct its own independent analysis of congressional intent and conclude differently. However, in *Medtronic v. Lohr*[25] the Court allayed fears of a *Blum* overriding and indicated that it is willing to defer to an agency's interpretations that narrow the scope of preemption. Thus, since the Commission is here narrowing (to be precise, eliminating) the scope of preemption, following *Medtronic*, a court should defer to the Commission's interpretation: state law is not preempted.

14. Looking at a similar telemarketing fraud statute passed by Congress for enforcement by the Federal Communications Commission--the Telephone Consumer Protection Act of 1991 ("TCPA")[26]--and cited by the Commission in its proposed changes to the TSR, the TCPA explicitly states that "nothing...shall preempt any State law that imposes more restrictive intrastate requirements or regulations..." except a state law which does not include a database if the FCC requires "the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations"[27]. Not a few problems will arise if two separate agencies establish similar databases but one does not preempt state law in any way (the FTC's) and one does preempt state law in at least one way (the FCC's).

## Conclusion and Recommendations

15. Preemption has its benefits. "By removing state and local impediments to a nationwide economy, pre-emption enhances our economic liberty"[28], ensuring businesses can effectively and efficiently compete in a global market. Creating a uniformity of legislation and regulations, preemption ensures a sense of security to businesses whose activities could otherwise be subject to the varying regulations of several states. Furthermore, preemption assists the federal government in uniformly establishing and ensuring standards in fields such as social legislation. As many conceptualize the federal government as one of the "primary protectors of individual and social rights, federal action to ameliorate social dilemmas is perceived to have, and does have, much greater force than acts by individual states"[29].

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[25] 581 US 470 (1996).
[26] 47 USCS 227.
[27] 47 USCS 227(e).
[28] Conrad, Robin and Jim Wootton. "Pre-Emption Under Attack: 'Federalism' Proposal Would Undermine Principle of Federal Law's Supremacy". Fulton County Daily Rep., Sept. 14, 1999, at 9.
[29] Donze, Patricia L. "Legislating Comity: Can Congress Enforce Federalism Constraints Through Restrictions on Preemption Doctrine?". 4 NYU J. Legis.& Pub. Pol'y 239, 243 (2000-2001).

16. As written, the proposed amended language does not explicitly announce the Commission's position on the issue of preemption. Such silence (or, at the most, an implicit position) may result in unnecessary judicial interpretation of the regulation and its underlying statutes. Furthermore, considering the wealth of federal regulation on telephone sales and a context which the Court has already characterized as "a background of federal pre-emption" on similar issues[30], unless Congress has explicitly announced that state law is not to be preempted, there remains the possibility of a court conducting its own independent analysis of the regulation and its regulatory background and, in effect, overriding the Commission's interpretation.

17. Thus, the Commission should explicitly state its position on the preemption question, especially the extent to which state law (present and future) is preempted (or not).

[30] *City of New York v. FCC*, 486 US 57, 66 (1988).