

MODULE 7

Preemption of State and Local Laws

Hines · Rice · Florida Lime · PG&E · Gade · Crosby · Lorillard · Wyeth · Arizona · Monsanto

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Preemption: the map

When federal and state law both speak, the Supremacy Clause decides.

EXPRESS

- Congress says so.
- The fight is over scope.

IMPLIED • FIELD

- Congress occupies the field.
- Even complementary state law falls.

IMPLIED • CONFLICT

- Physical impossibility.
- Purposes and objectives.

Congressional intent is the cornerstone.

Where the analysis starts: Rice

An assumption in favor of the States, announced in a case the States lost.

THE ASSUMPTION

- The States' historic police powers survive...
- ...unless Congress's purpose is “clear and manifest.”

THE RESULT

- Nine of twelve Illinois rules superseded.
- Three survived: “Into these fields it has not moved.”

“Assumption,” not “presumption.” The second word is not in Rice.

Express preemption: how far does it reach?

My board: "Scope? How broad is the reach of the preemption? See Lorillard."

THE CLAUSE

- No state rule "based on smoking and health"...
- ..."with respect to the advertising" of cigarettes.

THE HOLDING

- Billboard limits near schools: preempted.
- They single out cigarettes.

WHAT SURVIVES

- General zoning rules.
- Rules on sale and use.

One question: does the rule single out cigarettes?

Field preemption: Hines v. Davidowitz

My board: an old case, about alien registration.

PENNSYLVANIA, 1939

- Aliens register every year.
- Carry a card. Show it on demand.

CONGRESS, 1940

- Its own Alien Registration Act.
- One uniform national system.

THE RULE

- No state law may “complement” it.
- Preempted even if it helps.

Preempted even if the state law complements federal law.

Physical impossibility: the sulfur example

Can the regulated party obey both laws at once?

A • NO CONFLICT

- Feds: no more than 10 ppb.
- California: no more than 5 ppb.
- Meet 5 ppb and you obey both.

B • CONFLICT

- Feds: between 5 and 10 ppb.
- California: below 5 ppb.
- No product satisfies both.

Stricter is not impossible. Contradictory is.

Florida Lime & Avocado Growers v. Paul

California's oil rule against federally certified Florida avocados.

THE CLASH

- Federal orders: mature by picking date.
- California: at least 8% oil.
- Some certified fruit turned away.

THE COURT

- Growers could leave fruit on the tree longer.
- Both laws can be obeyed.
- No preemption.

Justice White, dissenting: an “obstacle” to Congress's purposes.

Wyeth v. Levine

An FDA-approved drug label, and a state jury that found it inadequate.

WYETH ARGUED

- It could not change the label without the FDA.
- So obeying the jury was impossible.

THE COURT

- It could strengthen the warning itself.
- No “clear evidence” the FDA would refuse.
- No preemption.

The manufacturer is responsible for its label “at all times.”

Purposes and objectives: PG&E

California's moratorium on new nuclear power plants.

THE FEDERAL FIELD

- Nuclear safety.
- Wholly occupied.

CALIFORNIA

- No new plants until waste disposal is solved.
- Its stated purpose: economic.

THE COURT

- Will not probe the State's "true motive."
- No preemption.

"The courts should not assume the role which our system assigns to Congress."

Obstacle preemption: a matter of judgment?

Three opinions, seventeen years, one argument.

GADE • KENNEDY

- Warns against “a freewheeling judicial inquiry.”
- Congress, not courts, preempts.

CROSBY • THE COURT

- Massachusetts's Burma law: preempted.
- “A matter of judgment.”

WYETH • THOMAS

- Obstacle preemption strays from the text.
- He concurs only in the judgment.

The taxonomy everyone quotes from Gade had four votes.

Arizona v. United States: four provisions

S.B. 1070 (2010): preemption in the immigration context.

§ 3

- State crime: no federal registration papers.
- Field: preempted.

§ 5(C)

- State crime to work without authorization.
- Obstacle: preempted.

§ 6

- Warrantless arrest for removability.
- Obstacle: preempted.

§ 2(B)

- “Show me your papers” checks during stops.
- Not enjoined — for now.

Three struck down. One left for the state courts to construe first.

Arizona: why three provisions fell

Federal policy is flexible, and foreign nations are watching.

§ 3 • FIELD

- Hines: one national registration system.
- Even complementary laws fall.

§ 5(C) • OBSTACLE

- Congress punishes employers, not workers.
- A deliberate choice.

§ 6 • OBSTACLE

- Removal is a federal discretion.
- Risk of “unnecessary harassment.”

“One national sovereign, not the 50 separate States.”

Current case: Monsanto v. Durnell

Roundup, a cancer warning, and one preposition.

THE CLAIM

- Missouri jury: Roundup needed a cancer warning.
- EPA approved the label without one.

THE COURT

- EPA's approval is a requirement “under” FIFRA.
- A state warning duty adds to it.
- Expressly preempted.

Wyeth: the manufacturer controlled its label. Here, EPA does.

For discussion: the pricing-algorithm statute

A hypothetical. Every branch of the map is in play.

THE STATUTES

- Federal: disclose algorithmic pricing.
- § 7(a): preempts state disclosure laws.
- § 7(b): saves general unfair-trade law.
- New York: bans discriminatory personalized pricing.

QUESTIONS FOR DISCUSSION

1. Does § 7(a) reach New York's law?
2. No clause at all: is the field occupied?
3. Can FTC rules preempt?
4. Can a company obey both?

Module 7 on one slide

One line per branch of the map.

THE LINE, ONE BRANCH AT A TIME

- Express: read the clause for its scope (Lorillard, Monsanto).
- Field: no room left, even to complement (Hines; Arizona § 3).
- Impossibility: can you obey both? (Florida Lime, Wyeth).
- Obstacle: “a matter of judgment” (PG&E, Crosby; Arizona §§ 5(C), 6).
- Throughout: Congress's purpose, and Rice's assumption.

Next — Module 7A: when the Commerce Clause alone limits the States.

Next: Module 7A — The Dormant Commerce Clause. Readings on the course website.