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Between State Police Power and Federal Preemption, Is There Room for a Gas Hookup?

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KEY TAKEAWAYS

Lawmakers in major cities argue that the Energy Policy and Conservation Act does not prevent the banning of gas appliances in residential and commercial buildings.

Federal preemption, applied promiscuously, tends to confound the federal–state division of powers that is indispensable to the maintenance of a federal republic.

Though EPCA preemption is not limitless, due regard for Congress's intent and state authority over local issues still precludes local laws banning gas appliances.

Regulatory efforts aimed at curbing the use of fossil fuels are not an exclusively federal project. As the Biden Administration pursues its characteristic "whole-of-government" approach to decarbonizing our economy, certain state and local governments have shown a similar enthusiasm for initiatives that attack emissions sources right down to the level of home appliances.

Two notable examples of these regulations come from the cities of Berkeley, California, and New York, New York. In 2019, Berkeley adopted Ordinance No. 7,672-N.S. to prohibit the installation of fuel gas pipes in new buildings for the stated purpose of "reducing the environmental and health hazards produced by the consumption and transportation of natural gas."[1] In 2021, New York adopted Local Law 154 to prohibit "the combustion of any substance that emits 25 kilograms or more of carbon dioxide per million British

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thermal units" in new buildings. The approaches differ slightly, but in both cases, the effect is the same: a ban on the use of gas appliances in newly constructed buildings whether commercial, residential, or mixed in use.

Regulations affecting necessary features of homes and certain businesses were bound to—and did—provoke criticism from an array of skeptics including business owners, tradesmen, and appliance manufacturers. Critics of these appliance bans were vindicated and maybe a little surprised when a panel of the Ninth Circuit federal court of appeals declared that Berkeley's law was preempted by the federal Energy Policy and Conservation Act (EPCA).[2] The same critics are no doubt hoping that New York City's ordinance will meet the same fate in litigation pending (as of this writing) in the U.S. District Court for the Southern District of New York.[3]

Free marketeers quickly hailed the Ninth Circuit's ruling as a win against progressives' "anti-fossil fuel agenda."[4] But perhaps a little circumspection is in order. Conservatives should know from past (often bitter) experience that federal preemption is strong medicine. When applied promiscuously, preemption tends not only to defeat good substantive policies at the state level, but also to confound the division of powers between the state and federal governments that many conservatives consider indispensable to the maintenance of a federal republic.[5]

The Ninth Circuit's ruling offered left-leaning critics the chance to cast themselves in the unusual role of federalism's principled defenders, resisting the temptations to displace nuanced local initiatives with a one-size-fits-all national policy. Fairly or not, these critics seem to enjoy the novelty of that newfound role. "Our system of federalism requires much more respect for state and local autonomy," said Judge Michelle Friedland in her dissent from the Ninth Circuit's decision not to rehear the Berkeley case *en banc*.[6] Even Judge Diarmuid O'Scannlain, the long-serving jurist who sided with the restaurants against Berkeley, wrote a separate concurring opinion to note how the decision was in tension with case law counseling narrow readings of preemption provisions where the matter preempted was a "traditional state concern."[7] Few things are more traditionally local in nature than building codes.

So, apart from feeling satisfied that the steak (or tofu) cooked at a Berkeley restaurant will have benefited from the heat of a gas range, how should right-leaning observers assess the Ninth Circuit's approach? Is the result compatible with the solicitude due to state sovereignty within its traditional sphere? Is the approach a sound one that we would happily see repeated in the New York litigation and wherever else similar attempts are made by state and/or local governments to regulate gas appliances into oblivion?

The short answer is, "Yes. In the specific context of EPCA, the approach is sound." Although preemption inevitably deprives states of some power they otherwise had, EPCA's preemption, which leaves homeowners and restauranteurs free to use gas ranges, also leaves the states in possession of much of the power they traditionally have exercised over local building codes and pollution.

Preemption Generally

The United States is by design, if not always in practice, a federal republic of "dual sovereigns" with the state and federal governments remaining independently competent to legislate in their respective spheres.[8] Within this dual-sovereignty system, preemption is the natural consequence of the Constitution's Supremacy Clause: "[W]hen federal and state law conflict, federal law prevails, and state law is preempted."[9]

Federal preemption of state law takes a variety of forms.

- *Express preemption* occurs when Congress has stated in a legislative enactment that the law displaces certain types of state laws or regulations;

- *Conflict preemption* occurs when the demands of state and federal law are inconsistent or where state law poses an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress;"[10] and

- *Field preemption* occurs when Congress has so thoroughly occupied a policy "field" with regulatory architecture that it supplants all state efforts within that remit.

Each limits state sovereignty, but that does not mean that each presents the same risk of extinguishing state sovereignty. The risk is arguably lowest when preemption is explicit. Although express preemption provisions can be broad, Congress's decision to include such a provision makes it more likely that legislators considered the extent to which the law's efficacy required the displacement of state law. Relative to other federal actors—e.g., courts or bureaucrats—legislators have some incentive to conserve the sovereignty of the states that they represent.

Preemption provisions, like most legislation, may be susceptible of multiple interpretations, but they are less liable to give rise to overly broad

preemption than the alternatives are. That is because where the other two alternatives are invoked, the account given for preemption comes not from legislators, but from the courts. Where there is no express preemption provision, it is less clear that legislators intended to preempt state law. Lacking a true textual hook, preemption will rest on a judicial inference about its likely existence, and the preemptive scope will depend *solely* on judicial recreation of congressional purpose or judicial conjecture concerning the bounds of the policy "field" over which Congress supposedly sought sole dominion.

EPCA's Purpose and Preemption

EPCA contains an express preemption provision according to which, apart from certain demanding exceptions, "no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective."[11] In certain cases, the provision's application is straightforward: Where a state purports to adopt a rival standard for a covered appliance's use of energy or water, federal law will displace it without regard to whether that standard is more or less demanding. The potential for ambiguity and overbreadth comes from Congress's choice to extend preemption beyond state standards to include state laws "concerning" an appliance's "energy efficiency, energy use, or water use." The reach of the word "concerning" could be the subject of doctoral dissertations in linguistics, but suffice it to say that while the word may be definable in a dictionary, its application is neither self-evident nor self-limiting. Thus, while the preemption inquiry is grounded in text, an interpreter trying to make sense of this command must make some reference to Congress's purpose: "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case."[12]

Key to the Ninth Circuit's ruling against Berkeley was that court's understanding that "EPCA is concerned with the end-user's ability to use installed covered products at their intended final destinations, like restaurants," and that "by enacting EPCA, Congress ensured that States and localities could not prevent consumers from using covered products in their homes, kitchens, and businesses."[13]

The cities, of course, do not share that view, and their counterargument to preemption rests on narrower constructions of EPCA's purpose. In its filings in the New York federal case, the state maintains that while EPCA has multiple purposes, the only relevant one is "to conserve energy supplies through energy conservation programs."[14] In her dissent from the denial of rehearing, Judge Friedland added that "the text of EPCA's preemption

provision guarantees uniform appliance efficiency standards. It does not create a consumer right to use any covered appliance."[15] The cities and their fellow travelers place much significance on the lack of an explicit statutory right to use an appliance.

The answer to the ultimate question of preemption lies downstream of the question of which side offers a more faithful conception of Congress's purpose(s). Congress can state its purpose or purposes expressly or impliedly, but in all cases, the purpose must be discernible from "the text and structure of the statute at issue."[16]

EPCA represented Congress's endeavor to create a "comprehensive national energy policy."[17] Brought on by the 1970s fuel shortage that became a national security emergency, Congress, through EPCA, sought to "minimize the impact of disruptions in energy supplies" including by promoting domestic production of fossil fuels.[18] One of its methods for promoting energy independence was to "reduce domestic energy consumption through...energy conservation programs."

Relevant here is Congress's evolving conception of the role that the states would play in furthering these goals. That evolution tended in one direction, away from state–federal cooperation and toward state displacement. Originally, states were permitted to adopt their own appliance standards at variance with federal ones.[19] When that produced inconsistent regulatory standards without corresponding gains in efficiency, Congress moved away from the model of state-by-state experimentation, allowing states to adopt only standards identical to federal ones.[20] Departures from the federal standards were permitted where there was a demonstrated local interest and only if the state's "regulation would not unduly burden interstate commerce."[21]

In 1987, Congress enlarged the constraint on state autonomy and the consequent displacement of state authority. When the D.C. Circuit required the Department of Energy (DOE) to drop its "no-standards" approach, it was appliance manufacturers who, in conjunction with the Natural Resources Defense Council, devised national appliance standards that Congress enacted into law.[22] In connection with these new statutory standards, Congress adopted EPCA's current preemption provision. It was understood that the statutory standards and statutory preemption would displace the status quo ante in which "appliance manufacturers [were] confronted with a growing patchwork of differing State regulations which would increasingly complicate their design, production and marketing plans."[23]

Congress knew that inconsistent state regulation could interfere with the interstate commerce in regulated appliances. When those concerns

manifested, Congress broadened preemption to ameliorate the difficulties that manufacturers faced. EPCA is not unique in this sense; "free private trade in the national marketplace" is, after all, the animating principle behind the Commerce Clause that gave Congress the power to enact EPCA.[24] So potent is that principle that some zealous judges have imagined that it displaces state laws even when Congress has not legislated in the relevant commercial field.[25] A majority of the current Supreme Court remains amenable to such arguments.[26] Thus, even *without* EPCA preemption, appliance manufacturers would not be without arguments against the Berkeley and New York laws.[27]

Mercifully, resort to the so-called dormant commerce clause is unnecessary because the "wakeful" one is at work in EPCA.[28] It is evident that a desire to eliminate burdens on manufacturers motivated Congress's enactment of the 1987 amendment including the current preemption provision, but that purpose did not remain submerged in the murky depths of legislative history. While the current preemption provision still permits the Secretary of Energy to grant waivers when there is a compelling local interest, Congress limited that discretionary waiver authority with the caveat that no such waiver could be granted where the "State regulation will significantly burden manufacturing, marketing, distribution, sale, or servicing of the covered product on a national basis."[29] Congress elaborated on the nature of that impermissible burden by directing the Secretary to determine:

> the extent to which the regulation would result in a reduction—
>
> **(i)** in the current models, or in the projected availability of models, that could be shipped on the effective date of the regulation to the State and within the United States; or
>
> **(ii)** in the current or projected sales volume of the covered product type (or class) in the State and the United States; and
>
> **(D)** *the extent to which the State regulation is likely to contribute significantly to a proliferation of State appliance efficiency requirements and the cumulative impact such requirements would have.*[30]

With congressional purpose thus understood, it becomes evident how and why regulations like Berkeley's and New York's fall within the ambit of EPCA preemption. Although neither Berkeley's nor New York's law is written as an energy standard or a direct regulation of the appliances themselves, the direct and obvious effect of both laws is to prevent the installation of these appliances in new construction because of the type of fuel on which these appliances depend. If the cities' authority to enact these regulations is accepted in principle, then there is nothing to limit states and locales across the nation from

following this example of evasion and enacting laws that single out federally regulated appliances for obsolescence based on their fuel source.

An appreciation of Congress's purpose also helps to answer the cities' chief objections. First, when the cities assert that EPCA is monolithically concerned with improving energy efficiency, one can confidently answer that this gives only a partial account of EPCA's purposes in general and of the 1987 amendment's purposes in particular.

Second, the objection that EPCA did not codify a right to use gas appliances carries little force against preemption. It is true that EPCA nowhere endows consumers with an explicit right to use gas appliances or manufacturers with an explicit right to sell them, but it would have been strange for EPCA to do so—strange because it is unnecessary.

The manufacture, sale, and purchase of gas appliances is perfectly lawful; no state authorization is necessary to make them so.[31] Every part of this chain of commerce can be made subject to reasonable regulation, but the relevant question is, Who has that authority? Absent congressional regulation, states and locales would have at least some authority to do so, but as already explained, Congress displaced states as regulators within the limited sphere of appliances covered by EPCA. The consequence is that manufacturers and purchasers retain the ability to engage in this manufacture and commerce except to the extent that it is limited by Congress. Where explicit preemption is at work, as it is here, the question is not whether states retain authority, but whether states may reinsert themselves into an equation from which Congress has subtracted them. States and their subsidiary locales cannot resume the status of regulators by claiming a purely local authority to make the appliances unusable. "More often than not...the power to block the local event is the power to block the entire transaction."[32]

Talk of an affirmative "right" to use gas appliances, as the cities and Judge Friedland frame the matter, is a red herring. It creates the misleading impression that by ruling against the cities, courts thereby vest the challengers with an unburdenable freedom of appliance use, immune from regulation and potentially requiring state involvement for its full realization. Not so: Holding that states are no longer competent to regulate a particular matter does not obligate any state or local authority to provide natural gas infrastructure where it does not exist. A far-flung consumer cannot demand that his local government expend resources on infrastructure projects to enable him to exercise his supposed right of gas stove usage.[33] The cities are only prohibited from interposing obstacles, the direct effect of which is to prevent the use of otherwise available natural gas "to run a covered appliance."[34]

Third, a fulsome understanding of congressional purpose deprives narrower readings of the preemption provision of plausibility. In her dissent from the denial of rehearing, Judge Friedland offers a subtle dissection of EPCA's use of the term "energy use" across statutory provisions. She concludes that "energy use" has a narrow, technical meaning: i.e., the "typical amount of energy consumed per use cycle or in a given amount of time."[35] Because this is a "performance standard" not concerned with the variable energy usage of a machine when installed, she concludes that Berkeley's law does not affect an appliance's energy use in the narrow sense that is relevant to EPCA. She criticizes the three-judge panel in the Berkeley case for employing "improper colloquial meanings" and a kind of "uncritical literalism" that confers a non-statutory right of use already discussed.[36]

Literalism is often a myopic fixation on a particular term or phrase to the exclusion of relevant context, but if that charge can be fairly levelled against either approach, it is Judge Friedland's. Hers is the literalism that misses the forest for the trees. Conceding that EPCA codifies no right to use gas appliances, it is not a faithful reading of Congress's handiwork to conclude that Congress's decision to include a broadened preemption provision had nothing whatever to do with preserving manufacturers' practical ability to sell their appliances. By making "energy use" synonymous with an abstract performance standard, she artificially narrows EPCA preemption to laws that create such standards. To the extent that she permits the word "concerning" to do any of its broadening work, it is only to cover laws that "aim to require consumers to use products with higher efficiency standards than those prescribed by DOE."[37] That is to say EPCA preempts only laws that prescribe appliance standards either literally or in effect. That sort of redundancy—one that allows no broadening effect to the word "concerning"—might have been a clue that she had construed the meaning of energy use too narrowly or technically. But that was not the inference she chose to draw.

It is one thing to give the law's text a narrow meaning; it is another to substitute restrictive words for ones that are meant to broaden. Congress plainly intended to preempt more than state performance standards, and it expressly included local building codes as an example of preempted non-performance standards. Why? Because Congress understood those sorts of laws as being related to appliances closely enough to have the potential to defeat EPCA's purposes. Judge Friedland's approach is insensible to that fact. She would allow for the preemption of some state regulation that is restrictive but leave unaddressed state regulation that is prohibitory, as in the cases of Berkeley and New York.

But Friedland further detracts from her own position by asserting that "EPCA would not preempt a direct prohibition on natural gas appliances enacted for the reasons Berkeley had here" (combating climate change and improving air quality).[38] Thus, states and their subdivisions are perfectly free to render EPCA's preemptive effect nugatory so long as they have the presence of mind to frame their law as addressing a purpose other than EPCA's. That dissolves the careful regime of exceptions that Congress permitted in EPCA's preemption provision. Congress anticipated that rare instances of "unusual and compelling State or local energy[] interests" would arise, militating in favor of granting an exception to federal standards.[39] Yet Friedland's approach would make the exception the rule in addition to disposing of the statutory requirement for the Secretary to consider how laws framed to meet a supposed exception would affect the commerce in covered appliances.

Without gainsaying concerns over mankind's influence on the environment, the view driving the cities' legislation and Friedland's dissent partakes of the same error that the dissenting justices identified in *Massachusetts v. EPA*. Friedland, for instance, maintains that "[c]limate change is one of the most pressing problems facing society today, and we should not stifle local government attempts at solutions."[40] But what the cities pretend to address locally "is focused no more on them than on the public generally—it is literally to change the atmosphere around the world."[41] And the "problems associated with atmospheric concentrations of CO_2 bear little resemblance to what would naturally be termed 'air pollution.'"[42] It is either ironic or telling that progressive-minded judges want state and local sovereignty to express itself in precisely that sphere in which it is most obviously impotent.

From Meat to Nicotine to Gasoline

Beneath the closely reasoned arguments about consistent usage of statutory terms, there is a broader commonsense principle: "[A] government official cannot do indirectly what she is barred from doing directly."[43] Numerous Supreme Court decisions give judicial sanction to that principle in circumstances like those at hand.

For instance, the Court has "often rejected efforts by States to avoid preemption by shifting their regulatory focus from one company to another in the same supply chain."[44] Berkeley understood that it could not directly regulate the design, manufacture, or trade in appliances covered by EPCA, so it prevented those appliances from being hooked up. New York made a similar move; knowing that it could not directly regulate energy usage, it regulated the inevitable byproduct of the covered appliance's energy usage:

carbon emissions. These maneuvers were similar in nature (though not necessarily in extent) to sales bans because the laws eliminated the demand for traditional gas appliances in new buildings.

The Supreme Court has addressed such tactics before. In *National Meat Association v. Harris*, the Court assessed California's attempts to escape the preemptive effect of the Federal Meat Inspection Act by, among other things, banning the sale of meat from animals slaughtered in violation of California's restrictions. A unanimous Court would not have it: "[I]f the sales ban were to avoid the FMIA's preemption clause," it reasoned, "then any State could impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved. That would make a mockery of the FMIA's preemption provision."[45]

For the same reason, a mere difference in stated purpose between state and federal law "does not transform" a state law regulating the subject of federal law "into an innocuous and peripheral set of additional rules" that escape preemption.[46] In a 2008 case, the Supreme Court addressed Maine's attempt to avoid express preemption under the Federal Aviation Administration Authorization Act of a state law restricting the transportation of tobacco products. Maine tried to create daylight between its law and the FAAAA by characterizing its legislation as a public health measure, a classic form of regulation under the state's police power. The Court was unimpressed and ruled unanimously against Maine. The FAAAA, the Court noted, says "nothing about a public health exception."[47] To hold otherwise would have "severely undermine[d] the effectiveness of Congress'[s] pre-emptive provision."[48] Had Maine been allowed to go forward on the basis of its public health concern, it would have produced "the very effect that the federal law sought to avoid."[49]

Something similar can be said about EPCA: It contains no climate-change exception. That too would have severely undermined the preemption provision. It is also fair to say that if locales were allowed to restrict gas appliances by appealing to climate or health concerns, they would bring about the same state of affairs that Congress enacted the preemption provision in 1987 to avoid.

Presumed Sovereign

Where Congress has not legislated, states are perfectly free to legislate based on moral or ethical concerns even when those legislative choices negatively affect the flow of interstate commerce.[50] Courts should not displace those judgments by invoking the orthodoxy of free markets, because respect for dual sovereignty requires a fairly high tolerance for friction between the two.

However, when Congress has legislated with an explicit intent to preempt, the default setting changes. That is all the more so where, as in EPCA, Congress evinced a persistent concern with state interference in the interstate market for covered appliances. At first, the logic of decisions like *National Meat Association* and *Rowe* can seem circular—like purposivism layered atop purposivism: The preemptive scope of the preemption provision should be determined by reference to its preemptive purpose. Yet there is a commonsense underpinning to the thinking that reflects the backdrop against which Congress legislates. First, despite its dubious fidelity to original meaning,[51] the dormant commerce clause has been part of Supreme Court jurisprudence since at least 1873.[52] That doctrine has the power to displace state laws even in the absence of federal legislation. Second, where Congress legislates without including a preemption provision, its work nonetheless takes on preemptive effect through the operation of the Supremacy Clause and the doctrine of obstacle preemption.

Congress knows all this, so when it chooses to include an express preemption provision, it signals a keen awareness that its designs can be frustrated by inconsistent state law and a desire to avoid that problem. For an interpreter, taking that desire seriously involves something like the use of the principles behind obstacle preemption to buttress the conclusions from the express preemption inquiry. Of course, it is still sensible to recognize the differing effects of broad and narrow preemption provisions. Express preemption can never mean limitless displacement of state law even when Congress preempts with broad words like "concerning" or "relating to." Where Congress has been explicit but overzealous in the scope of its preemption, courts should not hesitate to question the constitutional basis for that sweeping disregard of traditional state sovereignty.[53]

That brings us to the thus-far-unmentioned problem that bothered Judge O'Scannlain in his concurring opinion: whether courts should apply a presumption against preemption that narrows the scope of any such provision to preserve state sovereignty. Under the old dispensation, O'Scannlain explains:

> [T]he 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. Second, "any understanding of the scope of a preemption statute must rest primarily on a fair understanding of congressional purpose," which is "primarily" discerned from statutory text but also informed by "the structure and purpose of the statute as a whole."[54]

O'Scannlain ultimately sided with the restaurants against Berkeley, but he did so only because he believed that circuit precedent foreclosed him from applying the presumption, though a narrower reading of EPCA's preemption provision was available.[55] O'Scannlain never lays out his own narrow interpretation of EPCA's preemption provision. When he wrote his original concurrence for the panel, he did not have the benefit of Friedland's dissent, so one can only speculate as to whether he had in mind something like her interpretation of EPCA's preemption clause or something else.

The Supreme Court, while not repudiating the presumption against preemption, has shied away from employing it in cases that involve an express preemption provision. In 2008, Justice Clarence Thomas observed that "the Court's reliance on the presumption against pre-emption has waned in the express pre-emption context."[56] Although the Court acknowledged the presumption in *Gobeille v. Liberty Mutual* (ERISA preemption), it ruled against the state in spite of the presumption. Furthermore, the Court made no reference to the presumption in cases like *Rowe* (FAAAA preemption) and *National Meat Association* (FMIA preemption). Other circuit judges have charted the presumption's gradual course toward desuetude.[57]

The presumption's vitality is in doubt, but assuming it still carries some force, it is not self-evident that it would be outcome-determinative on the issue of EPCA preemption in cases like Berkeley's. The outer edges of what the word "concerning" covers are surely ambiguous, but that does not mean the provision's application to the cities' laws is necessarily ambiguous too. Hopefully, based on the discussion thus far, it is evident how near to the heartland of EPCA preemption laws like Berkeley's and New York's lie. "Any presumption against pre-emption, whatever its force in other instances, cannot validate a state law that enters a fundamental area of [EPCA] regulation and thereby counters the federal purpose in the way this state law does."[58]

Nevertheless, I would not be eager to discard the presumption even in cases involving an express preemption provision. Ambiguity does not pose much of a difficulty here, but preemption provisions, like any text drafted by Congress, may produce interpretive difficulties, some of which may not be readily resolvable with the traditional tools of statutory interpretation. Although the presumption itself is not some hoary bequest from the Founding era, it nonetheless encodes a time-honored constitutional value into the process of judicial review.[59] It partakes of the same spirit that animates the requirement that Congress must speak clearly when it intends to remove state sovereign immunity.

Conclusion

Perhaps sovereign immunity is qualitatively different in a way that requires greater solicitude from Congress than any single aspect of the state's regulatory power does, but in the long term, successive piecemeal deprivations could render states quite impotent. As Justice Amy Coney Barrett once observed in her academic life, constitutional canons, like the presumption against preemption, "empower a judge not only to invalidate congressional actions that violate constitutional norms, but also to resist congressional actions that threaten those norms."[60]

Earlier, I suggested that federal elected representatives have some incentive to take their home state's sovereignty into consideration before opting for broad statutory preemption. But that political check, already diluted considerably by the Seventeenth Amendment, has been diluted further still by citizens' impoverished understanding of federalism and state sovereignty. Against that backdrop and the centripetal tendencies of modern power, state sovereignty could always use another honest defense.

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Endnotes

1. Ordinance No. 7,672-N.S.—"Prohibition of Natural Gas Infrastructure in New Buildings."
2. California Rest. Ass'n v. City of Berkeley, 89 F.4th 1094 (9th Cir. 2024).
3. SDNY Case 1:23-cv-11292.
4. The Editorial Board, *Gas Stoves Triumph over Berkeley*, Wall St. J. (April 17, 2023) https://www.wsj.com/articles/berkeley-gas-stoves-ninth-circuit-court-of-appeals-patrick-bumatay-645478c8?mod=article_inline.
5. Although both cases involve the authority of cities, that authority is derived from the state's sovereign authority. "Ordinarily, a political subdivision may exercise whatever portion of state power the State, under its own constitution and laws, chooses to delegate to the subdivision." City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 428–29 (2002).
6. *California Rest. Ass'n*, 89 F.4th at 1120.
7. *Id.* at 1108.
8. Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).
9. Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 471 (2018).
10. Virginia Uranium, Inc. v. Warren, 587 U.S. 761, 777, 139 S. Ct. 1894, 1907, 204 L. Ed. 2d 377 (2019).
11. 42 U.S.C. § 6297.
12. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (internal quotation marks omitted).
13. *California Rest. Ass'n*, 89 F.4th at 1102–03.
14. Ass'n of Contract Plumbers of the City of New York v. City of New York, Case 1:23-cv-11292, Defendant's Memorandum of Law in Support of Its Motion to Dismiss at 3, 5.
15. *California Rest. Ass'n*, 89 F.4th at 1121 (Friedland, J., dissenting from denial of rehearing).
16. Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1907, 204 L. Ed. 2d 377 (2019).
17. Nat. Res. Def. Council, Inc. v. Herrington, 768 F.2d 1355, 1362 (D.C. Cir. 1985) (quoting S. Rep. No. 516, 95th Cong., 1st Sess. 116 (1975)).
18. *Id.* at 1364 (quoting S. Rep. No. 516, 94th Cong., 1st Sess. 116–17 (1975)).
19. Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n, 410 F.3d 492, 499 (9th Cir. 2005).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 500 (internal quotation marks omitted).
24. *See*, *e.g.*, General Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997).
25. *See* Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 368 (2023) ("Reading between the Constitution's lines, petitioners observe, this Court has held that the Commerce Clause not only vests Congress with the power to regulate interstate trade; the Clause also 'contain[s] a further, negative command,' one effectively forbidding the enforcement of 'certain state [economic regulations] even when Congress has failed to legislate on the subject.'").
26. *See*, *e.g.*, *id.* at 391–93 (Kavanaugh, J., dissenting in part).
27. The strength of a claim under the so-called dormant commerce clause is beyond the scope of this paper. In raising it as a possibility, the paper is merely making an observation. The author in no way endorses the constitutional pedigree of dormant-commerce-clause claims. *See* Jack Fitzhenry, *Why Three Conservative Justices Enabled California to Regulate a Nationwide Industry*, The Federalist Society Blog (May 30, 2023).
28. Nat'l Pork Producers Council, 598 U.S. at 382–83 ("Under the (wakeful) Commerce Clause, that body enjoys the power to adopt federal legislation that may preempt conflicting state laws. That body is better equipped than this Court to identify and assess all the pertinent economic and political interests at play across the country.").
29. 42 U.S.C. § 6297(d)(3).
30. 42 U.S.C. § 6297(d)(1)(C)(3) (emphasis added).
31. *See Murphy*, 584 U.S. at 468 ("A State is not regarded as authorizing everything that it does not prohibit or regulate. No one would use the term in that way. For example, no one would say that a State 'authorizes' its residents to brush their teeth or eat apples or sing in the shower. We commonly speak of state authorization only if the activity in question would otherwise be restricted.").
32. Michael Greve, The Upside-Down Constitution 99 (Harvard University Press, 1st ed. 2012).

33. *See California Rest. Ass'n*, 89 F.4th at 1106.
34. *Id.*
35. *Id.* at 1121.
36. *Id.* at 1126.
37. *Id.* at 1125.
38. *Id.* at 1126.
39. 42 U.S.C. § 6297(d)(1)(B)–(C).
40. *California Rest. Ass'n*, 89 F.4th at 1120.
41. *Massachusetts v. E.P.A.*, 549 U.S. 497, 541 (2007) (Roberts, C.J., dissenting).
42. *Id.* at 558–59 (Scalia, J., dissenting) (cleaned up).
43. Nat'l Rifle Ass'n v. Vullo, slip op at 11.
44. Am. Trucking Ass'ns, Inc. v. City of Los Angeles, Cal., 569 U.S. 641, 652 (2013).
45. Nat'l Meat Ass'n v. Harris, 565 U.S. 452, 464 (2012).
46. Gobeille v. Liberty Mut. Ins. Co., 577 U.S. 312, 324–26 (2016).
47. Rowe v. New Hampshire Motor Transp. Ass'n, 552 U.S. 364, 374 (2008).
48. *Id.* at 376.
49. *Id.* at 371–72; see also *Gobeille*, 577 U.S. at 324–26 (2016) ("The perceived difference here in the objectives of the Vermont law and ERISA does not shield Vermont's reporting regime from pre-emption.… The Vermont regime cannot be saved by invoking the State's traditional power to regulate in the area of public health.").
50. *See* Nat'l Pork Producers Council, 598 U.S. at 382.
51. "The doctrine does not call upon us to perform a conventional judicial function, like interpreting a legal text, discerning a legal tradition, or even applying a stable body of precedents. It instead requires us to balance the needs of commerce against the needs of state governments." Comptroller of the Treasury of Maryland v. Wynne, 575 U.S. 542, 576–77 (2015) (Scalia, J., dissenting).
52. *See* Case of the State Freight Tax*,* 15 Wall. 232, 21 L. Ed. 146 (1873).
53. *See Gobeille*, 577 U.S. at 327 (Thomas, J., concurring) ("I write separately because I have come to doubt whether § 1144 [ERISA preemption] is a valid exercise of congressional power").
54. *California Rest. Ass'n*, 89 F.4th at 1109 (internal citations and quotations omitted).
55. *Id.* at 1107.
56. Altria Grp., Inc. v. Good, 555 U.S. 70, 99 (2008) (Thomas, J., dissenting).
57. *See* Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan, 938 F.3d 246, 258 (5th Cir. 2019) (collecting cases).
58. *Gobeille*, 577 U.S. at 324–26.
59. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 Boston U. L. Rev. 109, 168 (2010) ("Constitutionally inspired canons, by contrast, have the virtue of promoting an identifiable (and, short of constitutional amendment, closed) set of norms that have been sanctioned by a super-majority as higher law.").
60. *Id.*