THE JOURNAL OF
APPELLATE PRACTICE
AND PROCESS

DEVELOPMENTS
AND PRACTICE NOTES

JUDGING FEDERAL REGULATIONS THAT PREEMPT STATE LAW: THE ROLE OF THE PRESUMPTION AGAINST PREEMPTION*

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In dealing with questions of federal preemption, appellate lawyers often find themselves addressing the presumption against preemption—the principle that a federal statute will not be held to have preempted state law unless that is the clear and manifest intent of Congress. But suppose the preemption question arises in the administrative context, when a federal agency adopts a rule that expands its jurisdiction far enough to preempt state power over a field traditionally regulated by the states. Should the appellate specialist look to that presumption in deciding whether the agency's rule fell within its statutory power? Or would the courts use other tools of statutory

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interpretation, including the *Chevron* doctrine,[1] in deciding whether the rule was permissible?

The Supreme Court shed significant light on this question during the last term. In *New York v. FERC*,[2] it held that the presumption against preemption would *not* determine whether an agency had authority to adopt a regulation asserting greater jurisdiction, even if the rule's effect would be to displace the historic power of states to regulate in a particular area. This decision represented the latest of several refusals to extend the presumption to the administrative context, and effectively frees federal agencies from its constraints in interpreting their organic statutes.

The presumption against preemption has a revered pedigree. For at least a century, courts analyzing whether state law has been displaced pursuant to the Supremacy Clause have "start[ed] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[3] Though many more courts quote this principle than actually apply it,[4] the cases citing it are legion. It has often been applied in cases of implied preemption, particularly in determining whether a field has been preempted by federal law.[5] It has also been applied—over some vigorous dissents—in cases of express preemption, as

1. *See Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984) (indicating that administrative regulations promulgated to fill legislative gaps will be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute").

2. 535 U.S. 1 (2002).

3. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Reid v. Colo.*, 187 U.S. 137, 148 (1902).

4. *E.g. Cal. v. FERC*, 495 U.S. 490, 497 (1990) (quoting presumption but finding preemption); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting presumption but finding preemption); *Napier v. A. Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926) (noting presumption but finding preemption); *Sinnot v. Davenport*, 63 U.S. 227 (1859) (noting presumption but finding preemption). *See generally* Viet Dinh, *Reassessing the Law of Preemption*, 88 Geo. L. J. 2085, 2104-05 (2000) (questioning impact of presumption in obstacle preemption cases).

5. *E.g. English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990); *Cal. v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *Hillsborough County v. Automated Med. Laboratories, Inc.*, 471 U.S. 707 (1985).

a principle limiting the construction of congressional directions about preemption.[6]

Thus, the presumption appeared to be a weapon of some power when, in *New York v. FERC*,[7] New York and the other petitioning states invoked it to challenge a FERC rule asserting jurisdiction over a substantial segment of retail electrical transmission service. The petitioners pointed out that, after the passage of the Federal Power Act in 1935,[8] local utilities had provided transmission service to retail customers as part of their sales of electricity, and that states had therefore historically regulated all aspects of such retail sales. When, in the last decade, a growing number of states began to permit or require utilities to unbundle their transmission services, FERC had stepped in to claim jurisdiction over the unbundled transmission services associated with retail sales, inserting federal regulators into a field that had until then traditionally been the province of the states. The petitioning states claimed that FERC's 1996 rule[9] about unbundled retail transmission had gone too far—that FERC had exceeded its statutory authority under the Federal Power Act by invading this area.[10] To the surprise of many in the industry, the Supreme Court granted their petition, as well as a competing petition from Enron asking for even greater FERC jurisdiction.

The petitioning States made the presumption against preemption one of the centerpieces of their brief. They presented what seemed to be a simple syllogism: They began with the general proposition that the presumption permits preemption only where it can be shown that it was the "clear and manifest purpose"[11] of Congress to displace state law. Then, they pointed out that retail transmission, as a service distinct from a sale, did not exist when the Federal Power Act was enacted. Thus, they concluded, no showing of a clear and manifest congressional

6. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992).

7. *See* 535 U.S. 1.

8. 16 U.S.C. §§ 791a-828c.

9. *See Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Services by Public Utilities*, 61 Fed. Reg. 21540, 21624-21627, 21725-21732 (May 10, 1996).

10. *See* 16 U.S.C. § 824(b).

11. *Hillsborough County*, 471 U.S. at 715 (quoting *Jones*, 430 U.S. at 525).

purpose to preempt could be made in this case, and any assertion of federal jurisdiction over this type of service would be inconsistent with the presumption against preemption.[12]

The Supreme Court unanimously rejected this theory. Drawing on briefs filed by the Solicitor General and the Edison Electric Institute, Justice Stevens's opinion for the Court contained a separate section entitled "The Presumption against Pre-emption."[13] He explained there that federal preemption of state law can raise two quite different types of legal questions. The first is "whether a given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority."[14] In that situation, he observed, the Court starts with the well-established presumption against preemption.[15]

The second type of question, however, arises "when a controversy concerned . . . the scope of the Federal Government's authority to displace state action."[16] Such a situation, the Court reasoned, does not involve the presumption against preemption, "but rather requires us to be certain that Congress has conferred authority on the agency."[17] Looking to its earlier decision in *Louisiana Public Service Commission v. FCC*,[18] the Court concluded that

> a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority [,] . . . [for] 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.[19]

Moreover, "the best way to answer such a question—*i.e.*, whether federal power may be exercised in an area of pre-existing state regulation—'is to examine the nature and scope of the authority granted by Congress to the agency.'"[20] Thus, "we

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12. *See* Br. of Petr. at 11-17, *N.Y. v. FERC*, 535 U.S. 1 (2002) (summary of argument and standard of review) (available on LEXIS at 2000 U.S. Briefs 568).

13. 535 U. S. at 17-20.

14. *Id.* at 17-18.

15. *Id.* at 18.

16. *Id.* at 17.

17. *Id.* at 18.

18. 476 U.S. 355 (1986).

19. *N.Y. v. FERC*, 535 U.S. at 18 (quoting *La. Pub. Serv. Commn.*, 476 U.S. at 374).

20. *Id.* (quoting *La. Pub. Serv. Commn.*, 476 U.S. at 374).

must interpret the statute to determine whether Congress has given FERC the power to act as it has, *and we do so without any presumption one way or the other.*"[21]

While the Court cited only *Louisiana Public Service* as authority for this conclusion, it was in fact foreshadowed by other decisions. In the relatively early *United States v. Shimer*,[22] the Court upheld a federal regulation that displaced state law, observing that, as long as the agency's choice

> represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.[23]

Again in *Fidelity Federal Savings & Loan Association v. De La Cuesta*,[24] the Court upheld a federal regulation that preempted state commercial law without giving any weight to the presumption, pointing out instead that "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law."[25] The court's inquiry is thus limited to "whether [the agency's pre-emptive] action is within the scope of [its] delegated authority."[26]

Neither of these earlier cases, however, explicitly referred to the presumption. In *Smiley v. Citibank South Dakota, N.A.*,[27] Justice Scalia, writing for a unanimous Court, explicitly refused to apply it in determining the validity of an OCC regulation that authorized national banks to charge late-payment fees and hence preempted state laws prohibiting banks from imposing and collecting those fees. The question was whether the statutory authority over "interest" encompassed these late-payment fees. The petitioner had argued that the presumption "in effect trumps *Chevron*, and requires a court to make its own interpretation . . . that will avoid (to the extent possible) pre-emption of state

21. *Id.* (emphasis added).

22. 367 U.S. 374 (1961).

23. *Id.* at 383.

24. 458 U.S. 141 (1982).

25. *Id.* at 154.

26. *Id. Accord City of N.Y. v. FCC*, 486 U.S. 57 (1988) ("[T]he correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action.").

27. 517 U.S. 735 (1996).

law."[28] The Court reasoned, however, that this "confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive."[29] The Court assumed that the latter question could be decided de novo by the courts, but sustained the agency's substantive interpretation on a *Chevron* rationale.[30]

New York v. FERC represents a step beyond *Smiley*. In *Smiley*, the agency's regulation essentially reflected a change in a specific substantive rule, not in the scope of the agency's jurisdiction or field preemption.[31] In *New York v. FERC*, on the other hand, the agency was interpreting its basic jurisdictional grant. The scope of that provision broadly determined both the scope of the agency's power and the remaining area left for state regulation. Thus, the effect of *New York v. FERC* is to hold the presumption inappropriate even where the agency was interpreting the scope of its own powers, with the inevitable displacement of a field of state law.

This rejection of the presumption against preemption is significant for several reasons. It appeared in an opinion penned by a Justice who had been a principal proponent of the presumption.[32] It was endorsed by the entire Court. And it reflected a general rule: In the "sort of case we confront here—defining the proper scope of the federal power,"[33] the reach of the agency's jurisdiction under its organic statute would be determined by traditional tools of statutory construction, but not by the presumption against preemption.

The holding in *New York v. FERC*, though novel, has a sound constitutional underpinning. The presumption against preemption is a means of implementing the Supremacy Clause.[34]

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28. *Id.* at 743-44.

29. *Id.* at 744 (emphasis in original).

30. *Id.* at 744-45.

31. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1434, 1437 (2001).

32. *See Medtronic*, 518 U.S. at 484-486; *Cipollone*, 505 U.S. at 516, 518, 523. *See also Jones v. U.S.*, 529 U.S. 848, 912-13 (2000) (Stevens & Thomas, JJ, concurring) (characterizing presumption against preemption as "well-established"); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000) (Stevens, Souter, Thomas & Ginsburg, JJ, dissenting) ("I respectfully dissent from . . . the Court's unprecedented extension of the doctrine of pre-emption").

33. *N.Y. v. FERC*, 535 U.S. at 18.

34. U.S. Const. art. vi, cl. 2.

That clause is essentially a choice-of-law provision: It tells the courts which rule of law—state or federal—to apply when the two appear to be in conflict or repugnant to one another.[35] As a choice-of-law provision, the Supremacy Clause does not provide any direction as to "the nature and scope of the authority granted by Congress to the agency."[36] By the same token, the presumption against preemption, designed as a tool for implementing the Supremacy Clause, addresses whether federal and state laws are in conflict, not whether a federal agency is within its powers.

The Court's rejection of the presumption against preemption in *New York v. FERC* has already had an impact in a very different setting. *American Civil Liberties Union of New Jersey, Inc. v. County of Hudson*[37] addressed whether the public had a right to compel disclosure of the identities and other information concerning the many post-September 11 detainees held in New Jersey jails by the Immigration and Naturalization Service. The state trial court ordered disclosure pursuant to state law. Five days later, the INS promulgated, without either notice or an opportunity for prior public comment, a rule that barred disclosure of information concerning INS detainees held in county jails.[38] Although this regulation arguably intruded into aspects of the state's police power, New Jersey's Appellate Division reversed, finding on the authority of *New York v. FERC* that the presumption against preemption was inapplicable: "When determining whether an agency acted within the scope of its authority in promulgating a regulation, courts do not invoke a presumption against pre-emption."[39]

As *County of Hudson* demonstrates, the presumption against preemption will not define the authority of a federal

35. *See e.g.* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225 (2000); Paul D. Clement & Viet D. Dinh, *When Uncle Sam Steps In—There's No Real Disharmony between High Court Decisions Backing Pre-emption and the Federalism Push of Recent Years*, 23 Leg. Times 66 (June 19, 2000).

36. *New York v. FERC*, 535 U.S. at 18 (quoting *La. Pub. Serv. Commn.*, 476 U.S. at 374).

37. 799 A.2d 629 (N.J. App. Div. 2002), *cert. denied*, 803 A.2d 1162 (N.J. 2002).

38. *Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities*, 67 Fed. Reg. 19508 (Apr. 22, 2002) (interim rule) (effective Apr. 17, 2002).

39. 799 A.2d at 647 (citing *New York v. FERC*).

agency. However, another doctrine may achieve some of the same goals where a federal agency appears to be overreaching. In *Solid Waste Agency v. United States Army Corps of Engineers*,[40] the Court rejected an agency rule that asserted Clean Water Act jurisdiction over all ponds used by migratory birds. The rule raised "significant constitutional questions"[41] as to the scope of Congress's power under the Commerce Clause. The Court therefore reasoned that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."[42] This alternate presumption is rooted in the Court's "prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority."[43] Thus, where an agency's interpretation of its powers displaces state law to the extent that it actually pushes the constitutional envelope, the presumption against an expansive statutory interpretation might be an effective means of curbing its reach.

In sum, those who address on appeal the validity of federal regulations must recognize that the protean power of a federal agency to shape its own jurisdiction is no longer, if it has ever been, bounded by the presumption against preemption. It is limited instead by the express terms of the agency's organic statute, the reasonableness of the agency's construction of the statute, and the need to avoid constitutionally questionable federal incursions into areas reserved to the states. Appellate review of the validity of federal agency regulations displacing local law must proceed on the basis of traditional tools of statutory construction (including the *Chevron* doctrine), not on the basis of a presumption designed for evaluating the validity of the state laws themselves.

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40. 531 U.S. 159 (2001).

41. *Id.* at 174.

42. *Id.* at 172.

43. *Id.* at 172-73.