7

Federal Preemption of State and Local Environmental Laws

Norman A. Dupont

Practice Tip: This chapter explores preemption of state laws by overriding federal law. What does the constitutional preemption principle have to do with environmental laws? Plenty. Federal courts, particularly the Supreme Court, have invoked the preemption doctrine in striking down a number of state environmental and public health laws, and this chapter examines the most recent of these decisions. Because environmental lawyers are likely to encounter or assert an increasing number of preemption claims—which are invoked as the ultimate constitutional trump cards to override state or local laws—the chapter concludes with a set of guidelines on how practitioners should evaluate claims of constitutional preemption, either in bringing such claims or defending against them.

The Supremacy Clause clearly states that the Constitution and "the Laws of the United States" shall be the "supreme law of the land; and the judges in every state shall be bound thereby."[1] Preemption is a constitutional doctrine of ancient lineage that dates back to some of the first rulings of Chief Justice Marshall more than two hundred years ago. The doctrine is, however, ultimately founded on statutory interpretation: Did Congress intend to preempt the particular state law in question?[2] In undertaking this evaluation, courts must consider the peculiar nature of many federal environmental laws that invite, if not insist on, state and local cooperation. The Clean Air Act (CAA) expressly provides an exception to the state of California (and those states that adopt California air standards) if the EPA administrator grants California a waiver from preemption by federal standards.[3] Both the CAA in section 166 and the Clean Water Act in section 510 expressly anticipate that states or localities could set standards that are "no less stringent" than federally mandated minimums.[4] These provisions seem to permit further state and local regulation as long as the federal minimum standard (or floor) is not breached. Finally, the bromide that a court must "search for congressional intent" can be an elusive quest given either intended or unintended ambiguities left by the drafters. As Justice Souter noted about a section of the CAA, "[R]ightly understood legislation can be untidy: statutes can be unsystematic, redundant, and fuzzy about drawing lines."[5]

Given the flexible "let the states participate" structure of many federal environmental statutes, the application of seemingly standard preemption doctrines to the environmental field is problematic. For the environmental lawyer, the application of preemption by the federal courts often depends on an informal and unstated categorization of preemption in the environmental context.

Preemption: The "Tripartite" Test and Doctrinal Confusion

Environmental lawyers should understand that the doctrine of preemption is traditionally said to apply if a state or local law contradicts federal law in one of three manners: (1) the federal statute expressly preempts state or local laws; (2) the federal statute "occupies the field of this particular area" and therefore the doctrine called field or complete preemption precludes further state or local regulation; or (3) the state or local law "conflicts" with the federal law and therefore conflict preemption exists. The latter two types of preemption have been termed implied preemption to distinguish them from the express preemption context.[6] Of course, this three-part structure breaks down in actual practice. Initially, conflict preemption itself has two different varia-

tions: The conflict can be so severe that compliance with both the federal and state laws is a "physical impossibility"; alternatively, preemption can be found where a court need only conclude that the state law stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[7] This second form of implied conflict preemption is sometimes termed obstacle preemption or impairing federal objectives preemption, further leading to confusion in categorizing the various types of preemption.[8]

In a candid moment, Justice O'Connor for a plurality of the Court conceded that the three-part analytical test was somewhat less than rigorous: "The Court's previous observation that our pre-emption categories are not 'rigidly distinct' is proved true by this case."[9] Thus, the Supreme Court in *Gade v. National Solid Wastes Management Ass'n* conceded that field preemption may be understood as a "species" of conflict preemption, and justices in that very case disputed whether the appropriate type of preemption was express or conflict preemption.[10] As Professor Tribe wrote with considerable understatement, "[t]hese three categories of preemption [express, field, and implied conflict] are anything but analytically air-tight."[11]

The environmental lawyer should note the substantial criticism of the entire concept of conflict preemption. Justice Thomas in 2009 authored a telling concurrence in which he criticized the very basis for this type of preemption and argued that it is a vague and "potentially boundless" doctrine that allows courts to go far beyond the narrow text of the federal statutory text.[12] Justice Thomas's concerns were foreshadowed by Professor Tribe, who warned that "preemption analysis is, or at least should be, a matter of precise statutory construction *rather than an exercise in free-form judicial policymaking.*"[13] In April 2010, Judge Browning of the District of New Mexico cited those concerns as evidence that the Supreme Court is now backing away from the entire concept of implied conflict or obstacle preemption.[14]

The Presumption against Preemption: "A Sometimes Thing"

Even if the analytical category for the type of preemption (express, field, or conflict) is clear, the environmental lawyer must still grapple with a second form of confusion in applying the Supremacy Clause—the "presumption" against preemption. Like the basic three different (but overlapping) types of preemption, this presumption is more easily stated than applied. Indeed, a review of recent cases demonstrates that the presumption against preemption of state and local laws recalls George Gershwin's famous observation about the questionable fidelity of Porgy's beloved: "A sometimes thing."[15]

The "presumption" has been held to apply in fields that lack a long-standing federal presence (such as interstate navigation or airspace) and based on a structural "assumption" about federalism. In a typical formulation, the Supreme Court noted: "We . . . assum[e] 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.'"[16] But the application of this constitutional presumption is anything but simple. Does the presumption against preemption apply even in an express preemption case, where the advocate of federal supremacy argues that the express words of a congressional statute directly override the challenged state law? Not until 2008 did the Supreme Court clearly hold that the presumption against preemption applied in an express preemption case.[17] Advocates urging federal preemption of state laws similarly argued that the presumption did not apply to an implied conflict preemption case. This argument was rejected by a bare five-member majority of the Supreme Court only in 2009.[18]

Preemption in Environmental Law

Preemption cases in the environmental field can be organized into three categories: (1) cases in which advocates for industry, particularly but not exclusively trade associations, have become much more aggressive in arguing that the very federal environmental law they once opposed is now a complete barrier to a state or local regulation that they detest yet more vigorously; (2) local laws or ordinances that federal courts view as NIMBY ("not in my back yard") provisions that are almost always deemed inconsistent with federal laws; and (3) some state laws or local ordinances are deemed to conflict with express provisions of federal statutes creating federally approved labeling standards, such as the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). For the environmental lawyer, if the state law or local ordinance she is defending is deemed to either be a NIMBY-type statute or one that requires a warning that might otherwise be federally regulated, then the lawyer will need to carefully explain to the reviewing court why the particular state law is not preempted. Alternatively, if the environmental lawyer is facing an industry or trade association-led effort to challenge a state law based on a broader assertion that some part of the state law "conflicts" generally with a federal law, then recent court decisions from the Third and Ninth Circuits suggest that the lawyer defending the state statute has a much better chance of ultimately prevailing.

We now turn to how federal courts have applied the three overlapping categories of preemption to various types of challenges to state and local environmental regulations.

Preemption Claims Asserted by Industry and Trade Associations

At least one commentator has noted that preemption "is almost certainly the most frequently used doctrine of constitutional law in practice."[19] This observation appears to apply even to the environmental law field, where preemption, next to constitutional issues of standing, looms as the single most prominent constitutional issue noted in reported cases. Why is this?

One answer is that industry, either directly or through trade associations, appears willing, if not eager, to initiate preemption cases either as a plaintiff in a preemptive manner (*Chemical Specialty Manufacturers v. Allenby*[20]) or as a defense to toxic tort or property damage suits (*Bates v. Dow Agrosciences*,[21] *Ferebee v. Chevron Chemical Co.*[22]). There is, of course, some logic behind this demonstrable eagerness: Industry in particular is a party that likes governmental stability, and fifty different rules in fifty different states is hardly a model of stability. Rather, it constitutes what industry claims was a "crazy-quilt" pattern of state laws.[23] Beyond merely a desire for stability, however, the environmental lawyer must recognize a more fundamental dynamic described in 1991 by Professor Candice Hoke:

> Business and industry groups have spurred this trend [of offensive preemption suits] when they have found state regulatory schemes more burdensome, or their enforcement more aggressive, than pertinent federal legislation. . . . When an industry has achieved a federal regulatory regime that is conducive to its self-determined interests, known in the literature as "agency capture," a parallel system of state regulatory law may threaten to dilute or to vitiate the advantages amassed on the federal level.[24]

Professor Thomas Merrill has suggested that federal agencies may be structurally biased in favor of federal preemption due in part to an agency's bureaucratic drive toward "empire building."[25]

But whatever the "true motives" of industry, or of federal agencies that sometimes support industry claims of preemption, it is demonstrably the case that Professors Hoke and Merrill's observation about the sheer volume of industry-sponsored preemption suits is correct in the environmental arena.[26] Examples of industry-initiated preemption suits are manifold.[27] If one adds to this list the number of claims that have been discussed under the NIMBY category (explained in more detail later in this chapter), then the proposition that industry asserts a large number of preemption claims in the environmental field is virtually indisputable.

Preemption Claims Brought by Single Firms

In many instances, "industry" means a single company seeking to vindicate its perceived federal right to design its automobile only under federal standards, locate a liquefied natural gas (LNG) facility, or ship nuclear waste into a particular community.[28] Single-company preemption suits involve a wide variety of state and local actions that are allegedly preempted by federal law. Some, such as *Weaver's Cove* or *Jersey Central Power*, seem to fall into the category of NIMBY actions brought against local communities (or states) that appear to be obstructing federally sanctioned power plants. Other preemption claims asserted by individual firms are defensive efforts by a particular firm seeking to avoid tort or nuisance liability.[29]

Preemption Claims Brought by Industry Groups and Trade Associations

A large number of recent environmental cases asserting federal preemption are brought by "industry" in the form of a trade association. In some instances, trade association lawsuits are efforts to preempt future potential lawsuits (or regulation) of individual members and raise potential constitutional questions about the standing of such associations to assert such claims. We examine more traditional trade association preemption cases first and then turn to the "we haven't been harmed yet, but could be" association suits.

A relatively early example of an industry-wide effort to preclude state taxation based on federal environmental preemption is *Exxon Corp. v. Hunt*.[30] In this case, a group of corporations, including Exxon, challenged New Jersey's imposition of a "Spill Fund and Compensation" tax on the grounds that the federal tax under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) preempted the local tax. The Supreme Court held that some of the New Jersey statute was expressly preempted to the extent that it sought to impose a tax for the same categories of costs that are recoverable under CERCLA. Other portions of the New Jersey statute, which imposed a tax for types of costs (third party damages resulting from the release of hazardous substances), were held by the Court not to be preempted.

From this early use of CERCLA preemption, however, industry trade associations have expanded their challenges to state and local regulations based on any number of federal statutes. In 1998, the American Automobile Manufacturers Association challenged Massachusetts' effort to require the production of "zero-emission vehicles" as conflicting with section 209 of the CAA. The First Circuit held that the answer depended on whether the so-called California waiver provision covered the Massachusetts regulation; the court referred this issue to EPA for advice and determination.[31] Two years later, the First Circuit again considered the trade association's challenge to Massachusetts' regulation and held that in fact it was preempted.[32] The same trade association

brought a similar challenge to New York State's efforts to adopt a "low vehicle emission" provision, modeled on certain California provisions.[33]

A similar industry effort was mounted by the Engine Manufacturers Association and the Western States Petroleum Association in challenging a Southern California air district's requirement that purchasers of "fleet vehicles" procure alternative-fuel vehicles. The air district argued that a state requirement that an entity purchase a certain type of alternative-fuel vehicle was not the same as an "emissions standard" regulated only by federal law under the CAA's section 209. The Supreme Court, however, accepted the arguments of the two trade associations and held that "standard" as used in section 209 of the CAA encompassed such a "fleet vehicle purchase" requirement.[34] Justice Souter filed a dissent, noting in particular sections of the legislative history of the CAA to argue that Congress had no intent to preempt state standards that affected only the types of cars to be purchased after federal manufacturing standards were satisfied.[35] In hindsight, the attempts of the U.S. automobile industry to resist state and local efforts to require more fuel efficient cars may seem a doomed legal strategy to fight both new fuel technologies and an environmental "green" movement. But, at the time, it certainly represented a classic example of industry trade associations using the preemption doctrine to stave off state regulations that they then abhorred.

Perhaps inspired by the successful efforts to hold off state regulation of motor vehicle purchase requirements, trade associations found a potent new source of preemption in the 1975 Energy Policy and Conservation Act and its preemption of state vehicle emission standards in lieu of federal standards. The Air Conditioning and Refrigeration Institute, together with other gas and electrical appliance trade associates, challenged California's regulations requiring a placard be placed on new appliances with the manufacturer's name and energy performance standards, citing a purported conflict with the Energy Policy and Conservation Act of 1975. They lost.[36] In Vermont, a consortium of new car dealers, auto trade associations, and manufacturers sought to challenge state regulations adopting California's automobile greenhouse gas emission standards as preempted by the Energy Policy Act and the CAA. They too lost.[37] On the other hand, the Metropolitan Taxicab Board of Trade, described as representing New York City's taxicab owners, successfully invoked the provisions of the Energy Policy and Conservation Act to preempt the City's efforts to incentivize the purchases of hybrid-fueled cabs.[38]

A more recent variant of industry preemptive challenges to local efforts to push "green" environmental programs is found in the American Trucking Associations' challenge to regulations enacted by the ports of Los Angeles and Long Beach, designed to regulate the diesel trucks that make harbor pickups and deliveries. The trucking association sued based on claims that the ports' efforts violated the Federal Aviation Administration Authorization Act

of 1994. The Ninth Circuit issued two separate opinions, finding that a portion of the ports' regulations was likely preempted, but that another portion was saved from preemption because it fell within the statutory exception to preemption for local regulations based on "safety."[39]

Industry Preemption Claims Based on Favorable Agency Statements Asserting Preemption

Recently, industry preemption suits have focused on statements from a favored federal agency that are used to assert preemption of a particular lawsuit. In two cases involving separate common law tort and statutory challenges to perceived high levels of methylmercury in canned tuna, industry procured a letter by an FDA official, Dr. Lester Crawford, opining that the particular lawsuit was preempted by the Federal Food, Drug, and Cosmetic Act.[40] In two separate trial courts, one state court in California, the other a federal district court in New Jersey, the trial judges found the commissioner's view persuasive and entitled to weight, and granted judgment based in part (or wholly) on federal preemption grounds.[41]

The Third Circuit reversed the district court's finding of preemption and in particular rejected the notion that a litigation-specific letter was entitled to any weight in evaluating a preemption claim. The court emphasized that recognition of federal agency regulations can sometimes have preemptive force, but that does not mean that "federal law capable of preempting state law is created every time someone acting on behalf of an agency makes a statement or takes an action within the agency's jurisdiction."[42] The Third Circuit noted that while the record before it did not provide a "full context" for the issuance of the FDA commissioner's preemption letter, the record in the parallel California litigation showed that the FDA letter bore a "striking resemblance" to a letter prepared by a private attorney on behalf of the canned tuna industry, urging the FDA to "issue[] an appropriately worded letter."[43]

The California litigation ended with an appellate victory for the canned tuna industry based on a statutory defense other than federal preemption.[44] Notwithstanding the Third Circuit's earlier decision in *Fellner*, however, the California Court of Appeal refused to categorically reject such a litigation-specific "it's preempted" letter and simply affirmed the trial court's decision on other grounds.[45]

Another example of state court reliance on informal agency statements asserting preemption is contained in *American Meat Institute v. Leeman*, in which the California Court of Appeal expressly cited U.S. Department of Agriculture letters. These letters claimed preemptive effect of the labeling provisions of the Federal Meat Inspection Act without any apparent scrutiny of the basis or weight to be accorded to such informal statements.[46]

The most recent example of a food industry association challenge to state regulation of food sources was the Ninth Circuit's rejection of such an effort in *National Meat Ass'n v. Brown*, in which the court largely rejected claims of express and implied preemption based on the Federal Meat Inspection Act.[47] In that case, the trade association argued that a California statute regulating the use of sick or "downer" pigs inside meat processing plants would conflict with a federal meat inspection statute. But Chief Judge Koszinski, writing for a unanimous panel, rejected the association's claim that federal regulators were unlikely to give required permission to euthanize sick cattle or pigs, noting that "[t]here's no reason to suppose that federal [USDA] officials wouldn't willingly give permission to euthanize downer animals."[48]

Thus, an environmental lawyer can expect that either single firms or industry associations will continue to assert claims of preemption to stave off unwanted state or local environmental regulation. Industry efforts to obtain "case-ending" letters claiming that a particular lawsuit is preempted may be less frequent during the current Obama administration,[49] but this trend is certainly far from over.

Preemption Based on a Judicial Perception of a NIMBY State or Local Law

Once a federal court determines that the state law or local ordinance in question actually constitutes a form of NIMBY legislation, that court typically finds the ordinance preempted. Courts often hold that such NIMBY legislation either is expressly preempted or preempted because Congress chose to "occupy the field." Typical earmarks of NIMBY-style legislation are that (a) it completely bars or delays the activity (e.g., hazardous waste disposal, nuclear power plant wastes) within the local jurisdiction; (b) typically, it is found more in a local ordinance than state law; and (c) it often involves local lawmakers trying to make public health/environmental determinations in an area already occupied by federal law. In 1985, the Third Circuit struck down two ordinances of the Township of Lacey, New Jersey, that prohibited the transport into and subsequent storage of radioactive nuclear waste in the local jurisdiction in which a nuclear power plant resided. The Third Circuit in *Jersey Central Power & Light Co. v. Township of Lacey* held that the Township's ordinances were preempted under "field" preemption based on both the legislative history of the Atomic Energy Act and the formal regulations of the Nuclear Regulatory Commission.[50] Judge Higginbotham, writing for the court of appeals, noted the "locality's outright ban on . . . radioactive materials" and further emphasized that the ordinances in question were enacted specifically

to prohibit the transport of such materials by a nuclear power plant that was already licensed by the Nuclear Regulatory Commission.[51]

Waste of any type, not just nuclear waste, has been the subject of local regulations arguably designed with one purpose—to keep waste out. In *Southeastern Oakland County Resource Recovery Authority v. City of Madison Heights*, the Sixth Circuit struck down a local ordinance designed to preclude the construction of a new "solid waste to energy" incinerator next to the residential community that had grown up around the old incinerator.[52] Technically, the Sixth Circuit found that the Michigan state laws governing air pollution expressly preempted the local ordinance. But, in so doing, the Sixth Circuit reviewed both an express provision of a Michigan state law regulating solid wastes and a claim by the local town that the state law was itself preempted by the federal CAA. The circuit court held that notwithstanding the CAA's express statutory language stating that air pollution control is the primary responsibility of "States *and local governments*," that this federal standard was not an "empowerment" to localities to "bypass" state law. Thus, the Sixth Circuit ultimately held that federal law did not preempt Michigan state law that clearly precluded the City's efforts to ban this type of incineration operation.[53]

In 1996, the Tenth Circuit struck down a local ordinance by the City and County of Denver seeking to prohibit "hazardous wastes" in areas zoned for industry purposes. In this case, the City of Denver's zoning ordinance that prevented the implementation of an EPA Superfund remedy for on-site containment of hazardous wastes conflicted with CERCLA's essential purposes, and therefore was impliedly preempted by CERCLA.[54] The Tenth Circuit's decision in *United States v. City & County of Denver* is understandable in striking a NIMBY statute that precluded the implementation of a remedy selected by a national entity, EPA. But the Tenth Circuit's analysis nowhere mentions any constitutional "presumption" against the preemption of local ordinances, particularly those dealing with zoning law, an area traditionally left to state law. The Tenth Circuit appears to have simply ignored the presumption against preemption of local laws in its preemption analysis.[55]

In 2008, the Court of Appeals for the Seventh Circuit came to the opposite conclusion in holding that the Village of DePue's nuisance action against Exxon could proceed notwithstanding Exxon's claim that the nuisance action would interfere with CERCLA and was impliedly preempted.[56] Exxon was conducting a remedial cleanup of a local village site pursuant to a state-supervised cleanup and argued that the local nuisance action, which sought daily penalties and an order forcing an immediate cleanup of the site, was preempted. Although the Seventh Circuit did ultimately bar the village's nuisance action based on preemption due to Illinois state law, its holding on the limited preemption afforded under CERCLA is a striking departure from the Tenth Circuit's analysis in *City & County of Denver.* The Seventh Circuit started by not-

ing that "CERCLA's preemptive scope is not total[]" and then noted with studied understatement that "[t]he precise contours of CERCLA preemption over state environmental cleanups or municipal ordinances . . . are not easy to discern."[57] For the Seventh Circuit, however, the issue of federal preemption was easily resolved because Exxon, the entity challenging the village's nuisance action, had failed to meet *its* burden to demonstrate any conflict between the village's nuisance ordinance and federal involvement in a state-supervised remedy.[58]

The Ninth Circuit decided one of the rare NIMBY cases that found partial, but not complete, preemption of a local ordinance. In *Fireman's Fund Insurance Co. v. City of Lodi*, the court of appeals evaluated Lodi, California's ordinance designed to implement its own "mini-CERCLA" statute and press directly for cleanup of groundwater contamination caused by local industry.[59] The court concluded that there was no "field preemption" created by CERCLA, and that both states and political subdivisions thereof were free to enact hazardous waste regulations as long as there was no conflict preemption created by such local ordinances.[60] The Ninth Circuit held that, to the extent the City's ordinance purported to grant the municipality itself (a potentially responsible party for the contamination) a complete "get out of jail free" card, the ordinance was preempted.[61]

Federal courts have held that local actions are preempted where the state action created an indefinite delay (rather than an absolute statutory bar) to a federally authorized power plant. The First Circuit in *Weaver's Cove Energy v. Rhode Island Coastal Resources Management Council* struck down as preempted Rhode Island's attempt to use its delegated powers over the state's coastal zone to delay any action on a dredging permit required to allow large ocean tankers bearing LNG to travel to the designated site (located in Massachusetts) for offloading the natural gas to the power plant.[62] Under the Federal Natural Gas Act, the Federal Energy Regulatory Commission was responsible for issuing a consolidated permit that was to take into account many environmental issues. The federal statute, however, preserved state rights under other federal statutes, including the Coastal Zone Management Act. The State of Rhode Island, purporting to act pursuant to its delegated authority under the Coastal Zone Management Act, simply refused to process the power plant operator's application for approval of the dredging. As the First Circuit noted, "as of this date, the appellant state agency has not acted on the merits of an application which has been pending before it since July 2004."[63] This deliberate delay was too much for the First Circuit, which held that the state's *inaction* itself conflicted with the broad federal power to regulate the licensing of such power plants. The First Circuit based its conclusion in part on the Federal Energy Regulatory Commission's own adjudicatory orders issued during its initial consideration of the operator's application for the LNG facility.[64]

The First Circuit's ultimate holding is unquestionably the correct conclusion, but its reliance on a federal agency's own adjudicatory orders to determine the "express intent of Congress" is problematic in the broader context of environmental law.

In another variation of the NIMBY suit, the Second Circuit struck down a town's efforts to regulate cell phone towers on aesthetic grounds. The court of appeals held that the Town of Clarkstown's local ordinance effectively regulated not just the look of the towers, but also attempted to control radio frequency and technologies that were preempted by the Telecommunications Act of 1996.[65]

Preemption of State Law Based on a Federal Standard for Labeling or Warning about Environmental Safety

In contrast to cases in which federal courts extend preemption analysis to strike down local regulations based on a perception that they are local efforts to exceed the scope and intent of federal law, another category of cases deals with the federal statute that imposes a federal labeling requirement. Such cases are often the sources of heated debate in the Supreme Court in the context of FDA-approved labeling for medical devices[66] or cigarettes,[67] but also occur in the environmental law context. Cases involving federal environmental laws imposing a labeling requirement show a divergence of result and confusion of analysis: Preemption is sometimes found by one court of appeals based on the same statute that another court of appeals holds has no preemptive effect.

The most prominent federal environmental statute involving labeling requirements is FIFRA, which requires that labels for pesticides be reviewed and approved by EPA. Once approved by EPA, FIFRA has an express preemption provision that precludes "States" from imposing any "requirements for labeling or packaging *in addition to or different from* . . ." those required by federal law.[68]

Federal circuit courts, and even the Supreme Court, have vigorously debated the application of this seemingly stark statutory command in a series of cases questioning whether state tort lawsuits are either "requirements" within the meaning of the statutory term or the action of a "State" to impose a warning requirement that is "in addition to" the EPA-approved pesticide warning. The debate began in 1984, when the District of Columbia Circuit concluded that a Maryland state tort suit for damages caused by exposure to the pesticide parquet was not preempted by FIFRA. The D.C. Circuit concluded that the state tort suit merely imposed monetary damages, not a formal "requirement" that Chevron change its EPA-approved label.[69] Judge Mikva, writ-

ing for the court, was a former member of Congress and took care to note legislative history in FIFRA that gave states room to regulate pesticides as long as the state regulation was at least as stringent as federal law.[70] Implicitly, Judge Mikva suggested that FIFRA's legislative scheme established a "floor" of federal regulation, not a "ceiling" that completely ousted state common law.[71]

In 1992, the Ninth Circuit weighed in on the preemptive effect of FIFRA labeling requirements as applied to California's Proposition 65, which subjects manufacturers to liability for selling products known by the state to be carcinogenic or cause reproductive harm, unless the manufacturer provides a "clear and reasonable" warning.[72] The Chemical Specialties Manufacturers Association sought a judicial declaration that Proposition 65's requirement for a warning imposed on insecticide and disinfectant products its members marketed was preempted by FIFRA.[73] The Ninth Circuit found no preemption, reasoning that the type of "warning" required by Proposition 65 could be satisfied by a mere "point of sale," warning the consumer that the establishment in question traded in carcinogenic compounds. Such a "point of sale" warning was not within FIFRA's regulation of "labeling," a defined term that referred to labels placed on the pesticide container itself. While the plaintiff trade association argued that FIFRA's definition of labeling included items that "accompanied" the product, the Ninth Circuit rejected this reading, noting that it would lead to an absurd result—that any advertising of the price of the pesticide or price stickers attached to shelves containing such products—would be "impermissible labeling."[74] In addition, the Ninth Circuit followed the "floor-not-ceiling" analysis of *Ferebee* in concluding that Proposition 65's requirement of a supplemental warning to consumers would not expose the manufacturer to federal prosecution of the company, merely because it attempted to comply with California's statutory mandate.[75]

However, the Fifth Circuit reached a directly contrary conclusion about FIFRA's preemption of state labeling requirements just two years later in *MacDonald v. Monsanto Co.*[76] MacDonald, an individual whose job required the spraying of a toxic herbicide—2, 4-D—sued various manufacturers of that herbicide in Texas state court, claiming that they failed to warn him of the dangers associated with the herbicide. The manufacturers filed for summary judgment on the grounds that their EPA-approved label preempted any state common law claims based on a "failure to warn" theory.[77] The district judge denied the motion based on his reading of the D.C. Circuit's analysis in *Ferebee*. However, a divided panel of the Fifth Circuit held that FIFRA did indeed preempt state common law actions, particularly in light of the Supreme Court's 1992 decision in *Cipollone v. Liggett Group, Inc.*[78] For the majority, the Supreme Court's reasoning that the Public Health Cigarette Smoking Act preempted a state law claim for failure to warn was largely dispositive of MacDonald's claim before the Fifth Circuit.[79] A dissenting judge noted that

even *Cipollone* did not claim that the separate public health act preempted all state law claims, and that FIFRA's express preemption clause had to be limited to safe labeling requirements compared to the federal FIFRA labeling, which expressly required a label that was necessary to "protect health." Under this reading, FIFRA did not preempt a state common law suit that alleged a failure to warn in a manner that would be "protective" of human health.[80]

A subsequent Ninth Circuit decision called into question the prior panel opinion in *Allenby* in 1995, again citing *Cipollone* as the basis for its reasoning. In *Taylor AG Industries v. Pure-Gro*, the Ninth Circuit issued a broad interpretation of FIFRA's preemptive effects on state common law suits and distinguished its own prior precedent in *Allenby* as a "pre-*Cipollone* case" that did not deal with imposition of common law liability for failure to include a warning not required by a federal agency.[81]

Ultimately in 2005, the Supreme Court stepped into this Serbonian bog of conflicting circuit court holdings about FIFRA's preemptive power. While the text of the Supreme Court's opinion in *Bates v. Dow Agrosciences*[82] clearly favors the narrow reading of FIFRA preemption in *Ferebee* and *Allenby*, the Court's ultimate holding, which remanded certain of the plaintiff peanut farmer's "failure to warn" claims for further consideration,[83] left a miasmic cloud of confusion lingering in this area of environmental law preemption. *Bates* involved a tort suit brought in Texas, not for personal injuries, but for economic damages, specifically damages to the farmer's peanut crops allegedly incurred as a result of a label on a relatively new Dow pesticide that proclaimed its efficacy in all soil types. Western Texas soil, with a high pH, produced an adverse reaction with Dow's Strongarm pesticide that damaged peanut crops. Dow's defense was that EPA approved the label under FIFRA, and therefore federal preemption applied. The Supreme Court acknowledged that FIFRA preemption was the subject of conflicting appellate court decisions and determined that FIFRA preemption was largely limited to preempt only those state "requirements" (which could be state common law decisions) that imposed a labeling requirement "in addition to" the federal standard. Thus, since FIFRA's labeling requirement applied only to labels, the peanut farmer plaintiffs were free to continue with their contract-based claims that Dow violated "express warranties" about the efficacy of its pesticide, even if that warranty was located on the "label" itself. Similarly, since FIFRA regulated only written "labels," the peanut farmers were free to proceed with their claims that Dow offered oral representations outside the "labels."[84] The Supreme Court firmly rejected the notion that a jury verdict that might "induce" a manufacturer to change its label constituted a "requirement" that might violate FIFRA's express preemption provision. Finally, the Supreme Court stressed that the presumption against preemption applied in this context, where there was a long history of state tort actions against manufacturers of high-risk

products.[85] But, the peanut farmer plaintiffs were not completely home free: To the extent that their state law "failure to warn" claims under Texas law would require a label "in addition to" the EPA-approved warning, such a label would be preempted under FIFRA. The Court remanded this issue of Texas common law to the lower courts.[86]

How to Handle a Federal Preemption Claim in Environmental Law

The basic categories of federal preemption are in fact loose analytical tools that are hardly analytically rigorous, and application of a presumption against preemption of traditional areas of state regulation such as health and safety is itself a "sometimes thing." What is the environmental lawyer to do when she confronts (or asserts) a claim of federal preemption of state or local law? While the overall constitutional doctrine is at best uncertain, some fundamental guidelines do exist.

- Examine the federal statute closely. Does it expressly preclude the state law? If not, is the federal statute so broad as to occupy the entire regulatory field and constitute field preemption? Or does it merely suggest that the state (or local) law might "impliedly" conflict with federal law?
- Examine the legislative history of the federal statute. If the "touchstone" of preemption is congressional "intent," then what evidence (or lack thereof) is contained in the legislative history of the federal statute?
- Examine the agency charged with implementing the federal law that is alleged to preempt the state law or regulation. Has the agency issued regulations pursuant to notice-and-comment procedures that assert preemption of the particular issue? Has the agency asserted preemptive intent in a context other than notice-and-comment rulemaking procedures? What evidence, if any, is there that such statements were issued at the request of a single stakeholder without due consideration of other possible views?
- Consider whether the state or local statute falls within the scope of an area traditionally regulated by states and not the federal government. Is the presumption against preemption available in the particular instance?
- Review carefully the most recent Supreme Court cases in the area of preemption, even if they deal with nonenvironmental contexts, such as the FDA and regulation of medical devices, required warnings on FDA-regulated drugs, or the like. The Supreme Court has issued a series of

rulings in the area of preemption that have moved decidedly against finding preemption, absent a clear case of express preemption. Justices Stevens and Thomas (an unlikely combination if there ever was one!) have separately written to express great concern about the doctrine of implied conflict or obstacle preemption. The environmental lawyer must know and consider the Supreme Court's holdings and the opinions of these two justices to frame an appropriate argument for (or against) federal preemption in a particular case.

Conclusion

The world of federal preemption of state and local environmental laws is truly a bog of conflicting jurisdictional principles. These principles are not consistently applied and carry a high possibility of judicial error, particularly at the trial court level where busy judges are confronted with truly confusing Supreme Court pronouncements. Nonetheless, the environmental lawyer can prepare to enter this confusing world by focusing on this chapter's guidelines.

CASE STUDY

Addressing Greenhouse Gas Emissions and Federal Preemption

Effective climate change regulation will likely require both federal and state or local initiatives. Although no federal laws limiting greenhouse gas emissions have yet been passed, many state and regional initiatives are already under way. But a recent decision of the Court of Appeals for the Second Circuit demonstrates that industry associations opposed to climate change regulations can use federal statutes to preempt state or local efforts.

New York City is famous (or infamous, perhaps) for its fleet of cabs. Few cities have more cabs per square block than New York, yet getting a taxicab in that city during a rainstorm is a labor that even Hercules might have avoided. For decades, the regulation of taxicabs, including the fleet size and type, the nature of operations (leased drivers or driver owners), and even the type of cars used, has been the subject of local ordinances.[87]

New York's cab fleet was largely populated by gas-guzzling, emission-producing Ford Crown Victorias. Few were surprised when the City revised its taxicab regulations to require all new cabs to meet specific miles-per-gallon (mpg) requirements and to require that taxicab owners

purchase hybrid or "clean-diesel" fueled cabs. The taxicab industry association filed a suit seeking an injunction against the new regulations based on federal preemption under the Energy Policy and Conservation Act (EPCA). The district court issued the requested injunction after finding that EPCA section 504 expressly precluded local regulation "related to fuel economy standards. . . ."[88]

New York City and its mayor, Michael Bloomberg, were not so easily defeated. Instead, they pursued a new regulatory framework for cabs: The City would not directly regulate the mpg limits for new cabs, but rather provide financial incentives to fleet owners. A cab fleet owner would be allowed to lease a new hybrid or clean-diesel-engine taxi for more money. But fleet owners sticking with the old Crown Victorias would be limited to a lower maximum fee from drivers leasing their cabs, a maximum lease fee that declined over time. In November 2008, Mayor Bloomberg announced the new regulatory system as "another avenue" to achieve the "greening of [yellow] cabs, reducing air emissions, and reducing carbon emissions."[89]

The Metropolitan Board for taxicab drivers appealed to the same district court judge, Judge Crotty, who was not amused by Mayor Bloomberg's efforts to end-run the court's prior ruling. Judge Crotty held that the new regulations were tantamount to requiring the purchase of hybrid cars, and thus they were preempted under both the EPCA and the CAA.[90] The City appealed to the Second Circuit in August 2009.

The court of appeals asked for an amicus brief from the United States to assist the court in sorting out the preemption issue. The United States filed a brief urging the court *not* to hold the New York City cab regulations preempted on the grounds that taxicab regulation was long established as a local prerogative and there was no evidence that Congress intended to override that prerogative.[91]

Despite the combined briefing of both the United States and New York City, the Second Circuit found that the EPCA preempted the new regulatory regime. The court of appeals declined to rule on whether the CAA would also have preemptive effect on the grounds that such a ruling was unnecessary.[92] It also termed the district court's emphasis on whether the new "incentive" system effectively mandated the purchase of new hybrid cabs to be "misguided" and unnecessary. For the court of appeals, once the City's regulation was deemed "related to" a fuel economy standard, then section 504 preempted the regulation. No further examination of the practical effects of the City's regulation was therefore necessary.[93]

The Second Circuit's opinion mysteriously ignored the presumption against preemption concept. Neither did it consider the legislative history or any other evidence of congressional intent as to EPCA. Instead it

cited a series of cases that deemed the phrase "related to" as one that should be broadly construed in *other* statutory contexts, such as the Employee Retirement Income Security Act.[94]

Much could be said about the Second Circuit's evident failure to consider various factors about possible federal preemption. But this case illustrates that the future of local (or state) climate change efforts may be clouded by a wave of industry-inspired preemption suits.

Notes

1. U.S. CONST. art. VI, cl. 2.

2. *See* Altria Group, Inc. v. Good, 129 S. Ct. 538, 543 (2008) ("'[T]he purpose of Congress is the ultimate touchstone' in every pre-emption case.'") (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

3. *See* EPA Endangerment Finding, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (announcing finding of EPA Administrator Jackson that greenhouse gas emissions constituted an "endangerment" as preliminary step to formal regulation of such emissions).

4. Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 266 (2004) (Souter, J., dissenting); *cf.* Exxon Corp. v. Hunt, 475 U.S. 355, 363 (1986) (describing section 114(c) of the Comprehensive Environmental Response, Compensation, and Liability Act as "not a model of legislative draftsmanship" whose wording is "at best inartful and at worst redundant.").

5. *Engine Mfrs. Ass'n*, 541 U.S. at 266 (Souter, J., dissenting).

6. Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992); English v. Gen. Elec. Co., 496 U.S. 72, 78–79 (1990). *See generally* Paul Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 252 (2000).

7. *Gade*, 505 U.S. at 98.

8. *See* S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 750–51 (1991) (describing "impairment of federal objectives" category of preemption and criticizing the "proliferation" of different categories of federal preemption).

9. *Gade*, 505 U.S. at 104 (citation omitted).

10. *Id.* at 104 n.2.

11. 1 LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1177 (3d ed. 2000).

12. Wyeth v. Levine, 129 S. Ct. 1187, 1207 (2009) (Thomas, J., concurring).

13. TRIBE, *supra* note 11 (emphasis added).

14. Begay v. Pub. Serv. Co. of N.M., 2010 WL 1781900, at *22–*23 (D.N.M. Apr. 15, 2010).

15. GEORGE GERSHWIN, PORGY & BESS (1935) ("A woman is a sometimes thing. . . ."). *See* Hoke, *supra* note 8, at 733 ("The Supreme Court's devotion to its presumptions, however, can only be described as fickle.").

16. United States v. Locke, 529 U.S. 89, 108 (2000) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

17. Altria Group, Inc. v. Good, 129 S. Ct. 538, 543 (2008).

18. Wyeth v. Levine, 129 S. Ct. 1187, 1195 n.3 (2009). Although Justice Thomas concurred in the judgment to make the decision technically a six-to-three vote, he expressly disavowed the majority's application of a presumption against preemption in that case. *Id.* at 1208 n.2 (Thomas, J., concurring).

19. Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 768 (1994).

20. Chem. Specialty Mfrs. v. Allenby, 958 F.2d 941 (9th Cir. 1992).

21. Bates v. Dow Agrosciences, 544 U.S. 431 (2005).

22. Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 496 U.S. 1062 (1984).

23. *See Bates*, 544 U.S. at 448–49 (describing and rejecting industry fears of "crazy-quilt" patchwork of state laws).

24. Hoke, *supra* note 8, at 691.

25. Thomas W. Merrill, *Ordering State-Federal Relations through Federal Preemption Doctrine: Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 756 (2008).

26. *Id.* at 732 (describing why business corporations tend to be "pro-preemption").

27. Examples include Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004) (industry claim that local California's air district's mandate to public agency's to "buy green" fleet vehicles violated CAA); Exxon Corp. v. Hunt, 475 U.S. 355 (1986) (industry claim that CERCLA precludes portions of New Jersey's Spill Fund and Compensation Act); Nat'l Meat Ass'n v. Brown, 599 F.3d 1093 (9th Cir. 2010) (industry assertion that California health regulation barring the use of weak or "downer" pigs for human consumption was preempted by Federal Meat Inspection Act), *cert. granted sub nom.* Nat'l Meat Ass'n v. Harris, No. 10-244 (U.S. June 27, 2011); Fellner v. Tri-Union Seafoods, 539 F.3d 237 (3d Cir. 2008) (industry claims that New Jersey tort suit against mercury contamination in fish were preempted by FDA policy statement); Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm., 410 F.3d 492 (9th Cir. 2005) (industry challenge to state law requiring labeling of appliances as "energy efficient" preempted by Federal Energy Policy and Conservation Act); Exxon Mobil Corp. v. EPA, 217 F.3d 1246 (9th Cir. 2000) (industry assertion that EPA's approval of Nevada's state implementation plan for oxygenated fuels violated CAA); Am. Auto. Mfrs. Ass'n v. Mass. Dep't of Envtl. Protection, 163 F.3d 74 (1st Cir. 1998) (industry asserts that Massachusetts standards for zero-emissions vehicle preempted by CAA).

28. *See, e.g.,* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008); Weaver's Cove Energy v. R.I. Coastal Res. Mgmt. Council, 589 F.3d 458 (1st Cir. 2009); Village of DePue, Ill. v. Exxon Mobil Corp., 537 F.3d 775 (7th Cir. 2008); Exxon Mobil Corp. v. EPA, 217 F.3d 1246 (9th Cir. 2000); Jersey Cent. Power & Light Co. v. Township of Lacey, 772 F.2d 1103 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986).

29. *See, e.g., Baker*, 128 S. Ct. 2605; Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000); MacDonald v. Monsanto Co., 27 F.3d 1021 (5th Cir. 1994); Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1992). *Geier* has been extensively cited as a broad preemption decision, a reading severely questioned in *Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131 (2011).

30. Exxon Corp. v. Hunt, 475 U.S. 355 (1986).

31. Am. Auto. Mfrs. Ass'n v. Mass. Dep't of Envtl. Protection, 163 F.3d 74 (1st Cir. 1998).

32. Am. Auto. Mfrs. Ass'n v. Comm'r, 208 F.3d 1 (1st Cir. 2000).

33. Am. Auto. Mfrs. Ass'n v. Cahill, 152 F.3d 196 (2d Cir. 1998).

34. Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 257 (2004).

35. *Id.* at 261–62 (Souter, J., dissenting).

36. Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm., 410 F.3d 492, 505 (9th Cir. 2005).

37. Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295 (D. Vt. 2007).

38. Metro. Taxicab Bd. of Trade v. City of N.Y., 633 F. Supp. 2d 83 (S.D.N.Y. 2009), *aff'd*, 615 F.3d 152 (2d Cir. 2010).

39. Am. Trucking Ass'ns v. City of L.A., 596 F.3d 602 (9th Cir. 2010); Am. Trucking Ass'ns v. City of L.A., 559 F.3d 1046 (9th Cir. 2009).

40. The California attorney general's brief filed in People v. Tri-Union Seafoods, 90 Cal. Rptr. 3d 644 (Cal. Ct. App. 2009), contains a detailed description of how a trade association representing the tuna canning industry specially requested (and obtained) this letter from Dr. Crawford. The brief is available at 2007 WL 1786439 at *14–*16.

41. Fellner v. Tri-Union Seafoods, 539 F.3d 237, 241–42 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1987 (2009).

42. *Id.* at 245.

43. *Id.* at 250 n.8.

44. *Tri-Union Seafoods*, 90 Cal. Rptr. 3d 644.

45. *Id.* at 652–53.

46. Am. Meat Inst. v. Leeman, 102 Cal. Rptr. 3d 759 (Cal. Ct. App. 2009).

47. Nat'l Meat Ass'n v. Brown, 599 F.3d 1093 (9th Cir. 2010), *cert. granted sub nom.* Nat'l Meat Ass'n v. Harris, No. 10-244 (U.S. June 27, 2011). For a similar conclusion reached by a California Court of Appeal in a case in which industry defendants claimed preemption of state law warnings based on the federal Poultry Products Inspection Act, see Physicians Comm. for Responsible Medicine v. McDonald's Corp., 114 Cal. Rptr. 3d 414 (Ct. App. 2010), *review denied*.

48. *Nat'l Meat Ass'n*, 599 F.3d at 1100 n.5.

49. *See* Presidential Memorandum for the Heads of [Fed.] Executive Dep'ts and Agencies on "Preemption," 74 Fed. Reg. 24,693 (May 22, 2009) (setting procedural requirements for federal agencies prior to issuance of statements about preemptive effect of federal law).

50. Jersey Cent. Power & Light Co. v. Township of Lacey, 772 F.2d 1103 (3d Cir. 1985), *cert. denied,* 475 U.S. 1013 (1986).

51. *Id.* at 1104–5.

52. S.E. Oakland County Res. Recovery Auth. v. City of Madison Heights, 5 F.3d 166 (6th Cir. 1993).

53. *Id.* at 169–70.

54. United States v. City & County of Denver, 100 F.3d 1509 (10th Cir. 1996).

55. *Id.* at 1513.

56. Village of DePue, Ill. v. Exxon Mobil Corp., 537 F.3d 775 (7th Cir. 2008).

57. *Id* at 786.

58. *Id.* at 786–87.

59. Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928 (9th Cir. 2002).

60. *Id.* at 941–43.

61. *Id.* at 946–47.

62. Weaver's Cove Energy v. R.I. Coastal Res. Mgmt. Council, 589 F.3d 458 (1st Cir. 2009).

63. *Id.* at 464–65.

64. *Id.* at 472–73.

65. N.Y. SMSA Ltd. P'ship v. Town of Clarktown, 612 F.3d 97 (2d Cir. 2010).

66. *Compare* Wyeth v. Levine, 129 S. Ct. 1187 (2009) (no preemption of state tort suit claiming inadequate warning on pharmaceutical product subject to FDA review), *with* Riegle v. Medtronic, Inc., 552 U.S. 312 (2008) (finding preemption of state tort law given explicit FDA regulation of warnings for medical devices).

67. Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) (preemption of state common law seeking to impose additional warning on cigarettes in addition to the mandatory warnings in Public Health Cigarette Smoking Act of 1969).

68. 7 U.S.C. § 136(v)(b) (2010) (emphasis added).

69. Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984).

70. *Id.* at 1541–42.

71. *See generally* Weiland, *supra* note 6, at 282–83 (discussing "floor-not-ceiling" model for analyzing preemptive effect of federal environmental laws).

72. Although formally entitled the California Safe Drinking Water and Toxic Enforcement Act of 1986, the statute has become known both within and outside California by its number in the 1986 California state election, Proposition 65. CAL. HEALTH & SAFETY CODE § 25249.6 (West 2010) requires that someone selling a product containing a state-listed carcinogen to be subject to liability under the act (both injunctive relief and statutory penalties) unless they first give consumers a "clear and reasonable warning."

73. Chem. Specialties Mfrs. Ass'n v. Allenby, 958 F.2d 941, 942 (9th Cir. 1992).

74. *Id.* at 945–46.

75. *Id.* at 947.

76. MacDonald v. Monsanto Co., 27 F.3d 1021 (5th Cir. 1994).

77. *Id.* at 1022–23.

78. *Id.* at 1023–24.

79. *Id.* at 1024 ("Applying the reasoning articulated in *Cipollone* to FIFRA and the case at hand, the conclusion is manifest. . . .").

80. *Id.* at 1026–27 (Johnson, J., dissenting).

81. Taylor AG Indus. v. Pure-Gro, 54 F.3d 555, 561 n.2 (9th Cir. 1995).

82. Bates v. Dow Agrosciences, 544 U.S. 431 (2005).

83. *Id.* at 453–54.

84. *Id.* at 444–45.

85. *Id.* at 449–50.

86. *Id.* at 453–54.

87. *See, e.g.,* MARK W. FRANKENA & PAUL A. PAUTLER, AN ECONOMIC ANALYSIS OF TAXICAB REGULATION 15 (FTC Bureau of Economics Staff Report May 1984), *available at* http://www.ftc.gov/be/econrpt/233832.pdf ("[s]ince about 1930 the taxicab industry has been characterized by pervasive [local] government regulation"); *cf.* Golden State Transit v. City of L.A., 475 U.S. 608 (1986) (noting Los Angeles regulation of taxicab owners in that city; holding that city council efforts to condition franchise renewal on settlement of labor strike against franchise holder violated federal labor law requirement of neutral bargaining table for union and management).

88. Metro. Taxicab Bd. of Trade v. City of N.Y., 2008 WL 4866021 (S.D.N.Y. 2008).

89. Metro. Taxicab Bd. of Trade v. City of N.Y., 633 F. Supp. 2d 83, 85–86 (S.D.N.Y. 2009).

90. *Id.* at 87.

91. Brief for the United States as Amicus Curiae at 9–12, Metro. Taxicab Bd. of Trade v. City of N.Y., No. 09-2901 CV (2d Cir. July 27, 2010).

92. Metro. Taxicab Bd. of Trade v. City of N.Y., 615 F.3d 152 (2d Cir. 2010).

93. *Id.* at *4–5.

94. *Id.* at *3 (citing Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., 519 U.S. 316, 324–25 (1997)).