

Legislative Preemption: What Is It and Why Does It Matter?

Fundamental to our theory of government is the idea that it exists to protect our rights, health, safety, and welfare. If a legislature enacts a law that violates someone's rights, the validity of that law itself can be challenged and nullified. Laws that don't protect our rights, health, safety, and welfare can be unconstitutional and illegal.

But we also have a system of law that allows state governments to prevent local governments from enacting laws to protect people's rights, health, safety, and welfare, and allows the federal government to prevent both state and local governments from doing the same. This system of law is called preemption. Preemption is a set of rules devised by the courts about which law supersedes when there is a conflict between laws enacted by different levels of government: local, state, and federal.

As courts have devised it, there is no regard for whether the superseded law is more or less protective of people's rights, health, safety, and welfare, but only whether there is a conflict between the two laws. It is taken as self-evident that the state law would overrule, or preempt, the conflicting local law and that federal law would preempt the conflicting state or local law.

Preemption is presented by lawmakers and the industries that benefit from it as uniformity that is in the public interest. The courts present preemption as a neutral principle of federalism that provides the answer to potential conflicts. But it has always been political, dating back to a landmark 1819 decision by the U.S. Supreme Court in *McCulloch v. Maryland*, regarding a national bank.

The establishment of a national bank for the United States was a source of great public controversy from the moment of the U.S. Constitution's ratification. In 1789 Treasury Secretary Alexander Hamilton proposed creating a national bank to regulate American currency and deal with national economic problems. Secretary of State Thomas Jefferson strongly opposed it, fearing that it would usurp the power of the various states and concentrate it to a dangerous degree in the central federal government. Congress created the First Bank of the United States in 1791 with a 20-year charter, but controversy continued. Those who supported Hamilton's vision of a stronger central government eventually formed the Federalist Party, while those who supported Jefferson's vision of a decentralized government that focused on states' rights formed the Democratic Republican Party.

The 10th Amendment to the U.S. Constitution states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." In the 1819 decision, Chief Justice John Marshall rejected the 10th Amendment's provision of states' rights, arguing that it did not include the word "expressly," unlike the Articles of Confederation, which the Constitution replaced. The decision established that the "Necessary and Proper" Clause of the U.S. Constitution gives the Federal government certain implied powers that are not explicitly enumerated in the Constitution and that the Federal government is supreme over the states. The 10th Amendment has been

contentious from its addition to the Bill of Rights and controversy over its authority being violated by Justice Marshall's court decision has existed ever since.

There is a distinction to be made with preemption, between preemptive laws that enforce and protect established civil rights, floor preemption, and ceiling preemption. Floor preemption provides federal or state governments to set minimum levels of rights, safety, health, or welfare protection below which states or local governments cannot go. For example, federal minimum wage laws set a minimum wage floor, but don't preempt state and local governments from setting higher minimum wages. Floor preemptions are beneficial restrictions toward the common good and for furtherance of protections of rights, safety, health, and welfare.

Ceiling preemption, on the other hand, provides federal or state government to set a cap, or ceiling, on how much state or local governments can protect people's rights, health, safety, and welfare. It has become a weapon used to prevent local governments from passing laws that federal and state legislatures oppose, along with their industrial donors and sponsors, and it may be unconstitutional. Even the Center for Disease Control has identified ceiling preemption as a barrier to public health laws. (https://www.cdc.gov/pcd/issues/2016/16_0121.htm)

The first grievances against King George III of England in the American Declaration of Independence read, "He has refused his Assent to Laws, the most wholesome and necessary for the public good. He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them. He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only." In other words, the colonial legislatures tried to make laws that the King didn't allow, laws they believed they needed to protect their rights, health, safety, and welfare.

By abolishing ceiling preemption, the courts can assure that state and local governments are able to fulfill their foundational purpose of protecting the people's rights, health, safety, and welfare. If the courts won't abolish ceiling preemption, then it will be up to the people to amend their state constitutions and eventually the federal constitution to do it.

Preemption enables legal decisions that favor parties who have invested in legislation that protects their political and economic interests. This is brought home in Colorado by numerous laws and decisions on the side of corporate industries served by state preemption that allow compromise of the rights, health, safety, and welfare of local communities. Two such laws regarding telecom issues are SB 05-152, "Concerning Local Government Competition in the Provision of Specified Communication Services" and HB17-1193, "Small Cell Facilities Permitting And Installation". They have not had legal challenges, but are the focus of statewide legislative repeal efforts organized by Coloradans For Safe Technology (CO4ST).

Language for both bills were outlined by model legislation written by ALEC (American Legislative Exchange Council), a private organization created and funded by the Koch brothers to push industry-favorable laws through state legislatures. SB 05-152 was passed in 2005 and restricts towns and cities from building their own broadband networks. HB17-1193 was passed

in 2017 and permits siting of small cell facilities in public rights-of-way, on public structures, with limited public hearing or administration by city and county governments, as well as limits on taxes, fees, charges, or leasing and the imposition of “shot-clock” time strictures for approval of applications.

Regardless of anyone's opinions on questions of cellular proliferation, health issues, the advent of 5G technology, and reliable wired alternatives to wireless technology, these ceiling preemptive laws prevent debate and enacting enforceable decisions about what we want, how much of it, and where to have it in our communities. The oppressive yoke of preemption by these two laws needs to be lifted and the democratic rights of communities to self-determination allowed to be grown and expressed freely.

When we hear public elected officials constantly say, "Our hands are tied," that means there is a ceiling preemptive law they are up against and they are afraid of getting sued by industry, backed by the state. What we need are courageous, democratic-thinking elected representatives who are willing to say, "In spite of the consequences, this is unjust law and we must do our job of representing the safety of our constituents and citizens," and mount legal challenges based on community rights, as guaranteed by the Declaration of Independence. A challenge to ceiling preemptive laws based on inherent rights of individuals and communities has never been presented in court and it needs to be a national legal debate, initiated by enacting local laws of self-protection.

Excerpts used from a blog entry, “Ceiling Preemption is UnAmerican” by Lindsey Schromen-Wawrin, for the Community Environmental Legal Defense Fund (CELDF). <https://celdf.org/>