

Hello. This is Leslie Gielow Jacobs. I'm a professor at University of the Pacific, McGeorge School of Law. The topic of this "In Brief" is Preemption.

Preemption is a legal effect whereby one law wins, and one law loses. I'm going to be talking about preemption by federal law of state and local laws, where it comes from, and how it works. Where does this idea of preemption come from? It comes from the Constitution of the United States.

The constitution, after setting up the three branches of government and some other rules about how states and the federal government are supposed to behave, has Article Six, which says that the "Constitution and the Laws of the United States, which are made Pursuant thereof, shall be the supreme Law of the Land."

We call that the Supremacy Clause, and it's from the Supremacy Clause that the whole law of preemption stems. Notice, very few words -- "shall be the supreme Law of the Land" -- but we've got a fairly detailed look that courts need to take before they decide whether federal law preempts either a state law or a local law.

The point of the preemption situation is that when federal law says something, and it conflicts with state law, federal law wins, so long as the federal government has the power to do it, but it's not so easy to figure out exactly what the federal law says.

The way that the preemption in court proceeds is that when somebody claims, "This state statute is preempted by a federal statute," then what the court has to do is interpret the federal statute. It has to see, "What did Congress mean when they wrote it, and did Congress mean to displace state and local laws on this particular issue?"

In fact, the court has come up with a number of different types of preemption that could happen. The easiest one, kind of [laughs] is express preemption. That is, if Congress writes a statute, puts in a provision, labels it preemption, and says exactly what's preempted -- "We mean to preempt this type of state law" -- then it happens. It's preempted. Done.

It's often not that clear, though. Congress often doesn't use words that are all that descriptive of exactly what they want to preempt. There are questions about how far it extends. But if Congress has said something about preemption, then the court will figure out what it meant, and there may be express preemption. Other types of preemption, however, are implied.

That is, the court says even if Congress doesn't say it specifically, or what the president's executive order and agency action could also be preempting state law, even if they don't say it specifically, sometimes the court will read into the action of the federal government and find that what the federal government meant to preempt, either the state or the local law.

Within the implied preemption, we have several types of that, too. One of them is field preemption. That's where the federal government has such a complex and comprehensive body of law that the way the court looks at it, or a court looks at it, is to

say, "You know what? The federal government," -- Congress here, we use that as an example, "meant to," what we say, occupy the field and not leave any room for states to legislate.

One example of that would be immigration law, where, in fact, Congress has the explicit power to regulate immigration and has done so in a comprehensive way. The way to figure that out is to look at exactly what the federal government's done and said, "Did they intend to leave room for the states to have some other types of laws, or didn't they?"

It's rare to find field preemption. Most times, the federal government intends to let the states regulate as well.

The other type of implied preemption is conflict preemption, and there are two types of that, too. One of them is "physical impossibility conflict preemption," and that would be an example where the federal government sets a standard. "Oranges must have eight percent juice content."

Then, if the state sets a standard, "Oranges can't have more than eight percent juice content," we'd be in a situation where it's not possible for people regulated by these two statutes to comply with both of them. If they conflict in that obvious sort of way, that's a type of preemption.

Finally, the broadest type of preemption -- but the most unclear -- is called "frustrate-the-purpose preemption."

This is one where Congress, for example, hasn't explicitly said that they want to preempt state law, but the court looks at what Congress has done in its statute, it looks at what the state's doing, and it decides that, in fact, what the state is doing, or the city, is frustrating the purpose of the federal law.

Perhaps one of the most interesting, or certainly one of the earliest examples of preemption is in the old case of *McCulloch versus Maryland*. This is a case where the question was whether the state deciding to tax the federal bank -- a precursor to the federal reserve. The state was imposing a high tax on it essentially because it didn't want it to operate -- whether the imposition of the tax was preempted by Congress's decision to create the bank.

Notice in that situation, Congress didn't say, "We want to preempt tax laws," but the way that the court reasoned was imposing high taxes, the power to do that on federal entities, frustrates the purpose of Congress when it creates those entities, because it wants them to be able to operate unimpeded. That's an early example of frustrate-the-purpose preemption.

I'll give one more example, and this is how state laws and federal laws can operate in harmony. For example, Congress, in all sorts of area, regulates and allows agencies to regulate, but we can take wage and hour standards, or safety standards in the workplace.

The federal OSHA sets standards for safety, for example saying, "You have to be tested every year," and you have to comply by other sorts of regulations. Those are the standards that the federal government sets, but states can set more standards.

The federal government says you have to be tested once a year. If the state wants to say, "No, you have to be tested every six months." The court has said in that type of context, "That's OK. Congress wanted to set what we call a floor, not a ceiling," and in all sorts of areas -- this is just one example -- it's leaving room for the states to do additional things.

In summary, we've got preemption as stemming from the Supremacy Clause of the constitution, express being the most obvious, but then, there being these implied types of preemption, field and then conflict. Both frustrate the purpose and physical impossibility.

It's a fairly complex inquiry, but it comes up very frequently, because in so many things, the federal government and the state want to have something to say.

That concludes this In Brief on the topic of Preemption. This is Leslie Gielow Jacobs of McGeorge School of Law in Sacramento. Thanks for listening.