Colorado Preemption Law

The Evolving Meaning of "Conflict"

BY DANIEL E. KRAMER

This article discusses how the meaning of "conflict" has evolved in case law on preemption.

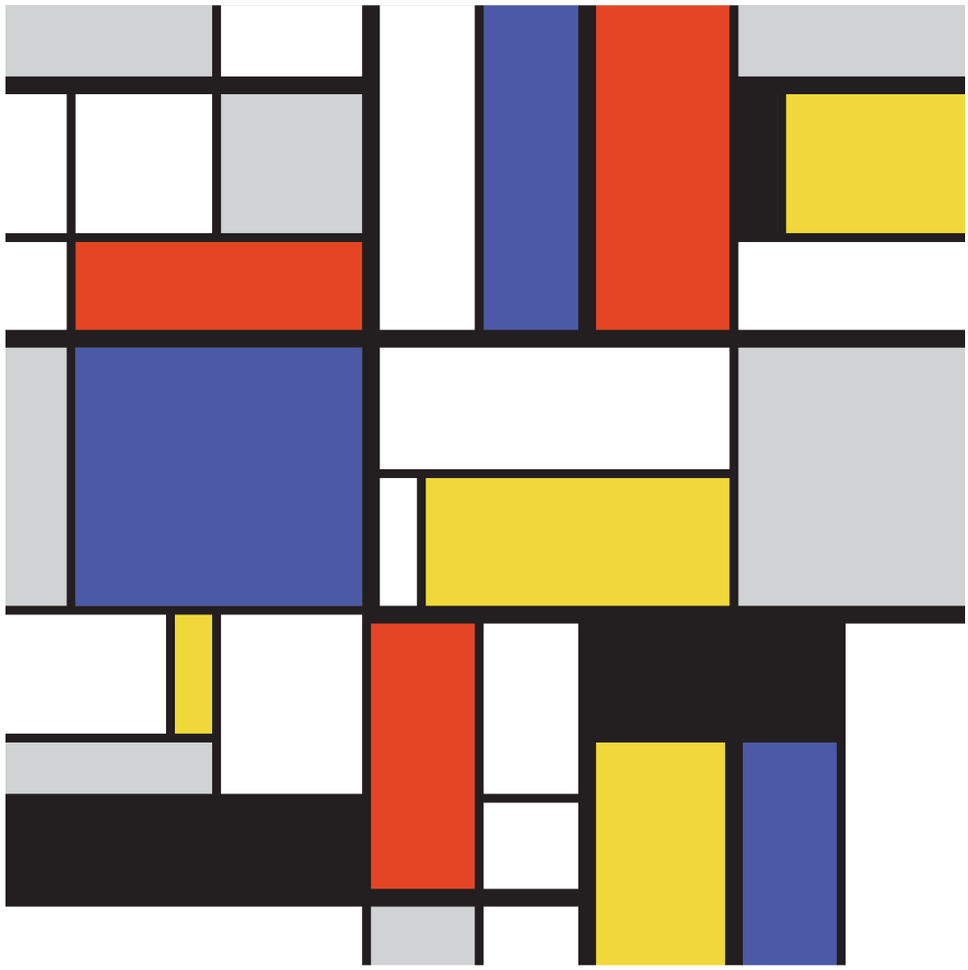
Some areas of law resemble a Mondrian painting, unceasingly transforming chaos into orthogonal order, however complex and energetic. Preemption law is not like that. Preemption law is Picasso-like: simple-looking at first blush, but deeply complex, often attempting to reconcile several incompatible perspectives into an interlocking but uncooperative whole. Colorado law follows this national trend, coopting federal concepts and adding its own at times.

This article seeks to put into perspective revisions the Colorado Supreme Court made, in a series of 2016 decisions, to the doctrine governing when state laws preempt—that is, supersede—local laws. The article focuses specifically on a species of preemption variously called operational conflict, obstacle preemption, or conflict preemption. The changes paint yet more colors and figures onto an already crowded and confounding canvas.

Preemption Principles

The impact of home rule on preemption analysis, while not the focus of this article, is an unavoidable threshold issue. In matters of "solely" or "purely" local concern, where the interest of the state as a whole is relatively minor or nonexistent, a home rule city's laws will trump state statutes, regardless of the General Assembly's intent.[1] But for all other issues on which a home rule city legislates—ones of predominantly state concern, or of mixed state and local concern—as well as all legislation by a county or statutory municipality, preemption questions come down to the courts' interpretation of the state statute as it relates to a local ordinance.

One surefire way for a statute to exhibit a legislative intent to preempt a local law is to expressly state that no local government may pass any ordinance within a particular substantive scope. This is express preemption, and a court's



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task in applying this type of statutory clause is straightforward: to overturn a local enactment if it falls within the prohibited sphere.[2]

Beyond that, the courts have recognized two methods to invalidate ordinances as preempted: implied preemption and conflict preemption. Despite originating from distinct concepts, the two bleed into each other. Implied preemption arises when a state statute so thoroughly regulates a particular subject matter that it implicitly leaves no room for local regulation. It occupies the field and local regulations that attempt to enter the field are invalid.[3]

Conflict preemption, on the other hand, invalidates a specific local regulation where it conflicts directly with a state regulation, such that the two regulations are incompatible.[4] The meaning of conflict preemption is neatly encapsulated within the Latin etymology of “conflict”: con + fligere, to strike together. The type of regulatory incongruity that gives rise to this preemption is therefore a “head on collision,” not merely a close call or a tight squeeze.[5]

Tests for Conflict Preemption

If express and implied preemption do not apply, local ordinances that regulate subject matter similar to a state statute, but do not directly collide with it, are valid. And Colorado courts have held that a local law may be valid even if it regulates the “same subject” as state law.[6] The similarity of the subjects of the state and local laws does not give rise to preemption.

As to what *does* raise a conflict, courts have devised several tests. First and most obviously, a local ordinance conflicts with state law if it is impossible to comply with both. This is the impossibility test.[7]

The second test is the forbids/authorizes test, which Colorado borrowed from Ohio in 1942. Under this test, conflict exists where a local ordinance forbids what a state statute authorizes, or authorizes what statute forbids.[8] This test does not feature in federal jurisprudence, but has become commonplace among the states. Note that the test is not that a locality cannot forbid what the state merely “allows.” That formulation would be misleading, because “allow” has two relevant meanings: to tolerate, and to affirmatively approve.[9] Here the courts mean that a local ordinance cannot forbid what the state has “expressly,” “explicitly,” or “affirmative[ly]” *authorized*.[10] The distinction is critical, because state law can be said to tolerate anything that it does not forbid. Preemption law does not prevent local governments from restricting or prohibiting anything that state

law merely tolerates. The primary motivation for any local regulation is that the state does not regulate conduct in the locality's desired manner; in other words, the state tolerates the conduct. So replacing "authorize" with "allow" or "permit" (which carries the same ambiguity as "allow") in the formulation of the test would subtly expand preemption drastically and thus minimize the potential for any local regulation to survive.

Third, an ordinance conflicts "in operation" with a statute if it materially impedes or destroys the state's interest. This test boasts the oldest pedigree; as early as 1824,[11] the U.S. Supreme Court proclaimed that state laws are preempted if they frustrate the purposes of Congress.[12] The operational conflict test can be read as an as-applied counterpart to the more facial-sounding forbids/authorizes test. At first, the Colorado Supreme Court applied it that way, requiring a fully developed evidentiary record to prove that the local law in fact impeded the operation of the state law.[13] This is how the Court understood the test as recently as January 2016.

It is at this granularity, however, that the preemption principles begin to pixelate into something more cubist, as discernable from a triad of 2016 Colorado Supreme Court cases.

Ryals v. City of Englewood

Ryals was a convicted and registered sex offender who purchased a home in Englewood.[14] When he attempted to register his residence with the local police, he was instead cited for violating a local ordinance.[15] The ordinance prohibited certain registered sex offenders and sexually violent predators from residing within 2,000 feet of a school, park, or playground or within 1,000 feet of a licensed day care center, recreation center, or public swimming pool.[16] Ryals sued in federal court, arguing the local ordinance was preempted by the Colorado Sex Offender Registration Act (CSORA), among other claims.[17]

The federal district court held a four-day trial and found that the ordinance rendered 99% of Englewood off limits to sex offender residency.[18] The court found this to be a de facto ban on residency of these sex offenders within Englewood.[19] Comparing this effect to the provisions of CSORA, and applying Colorado state preemption law, the court held that the operational effect of the ordinance interfered with the state's interest in uniform reintegration of sex offenders.[20] Englewood appealed, and the Tenth Circuit certified the question to the Colorado Supreme Court.[21]

The Supreme Court considered three features of state law in determining its preemptive effect. First, the state statute assigns the Sex Offender Management Board (SOMB) the responsibility to "determine the best practices for living arrangements for and the location of adult sex offenders within the community."[22] The SOMB requires a sex offender who seeks to change residence to "receive prior approval by the supervising officer."[23] The SOMB has also advised that restrictions like Englewood's are "counterproductive to public safety."[24]

Second, CSORA requires sex offenders to register their residency with local law enforcement, which approves and verifies the addresses. CSORA provides:

> A local law enforcement agency shall accept the registration of a person who lacks a fixed residence; except that the law enforcement agency is not required to accept the person's registration if it includes a residence or location that would violate state law or local ordinance.[25]

Third, the Colorado Sex Offender Lifetime Supervision Act delegates to the parole division the task of "parole supervision in . . . housing," effectively requiring the parole officer's approval for the sex offender's chosen residence.[26]

Because Englewood is a home rule city, the Court began with the home rule analysis, finding that sex offender residency is a matter of mixed state and local concern. The state had a "strong" need for uniformity of regulation in this area, and the legislature had tasked SOMB with "*comprehensively*" managing sex offenders.[27] The Court repeatedly returned, however, to CSORA's exception allowing local law enforcement agencies to deny registration when it would violate a local ordinance as substantiating the city's interest in sex offender residency alongside the state's interest.[28] Because "both sides have a stake in the matter," the Court found this a matter of mixed concern.[29] Accordingly, the ordinance could coexist with state law so long as the two did not conflict.[30]

The Court thus reached the question of conflict preemption. It applied the forbids/authorizes test: Did the local ordinance forbid something state law authorized?[31] First, the Court noted that nothing in state law prevented cities from banning sex offenders; in other words, the local ordinance was not expressly preempted.[32] Next, the Court explained that nothing in state law "suggests that sex offenders are permitted to live anywhere they wish":[33]

> Significantly, there is only one state provision that explicitly concerns sex offender residency, and that provision only requires state officers to approve sex offenders' new residences. . . . Nothing in this provision suggests that a city cannot ban sex offenders from residing within its borders. *State approval of a sex offender's application does not imply that a city must also approve it.* On the contrary, state approval is but one prerequisite to relocating.[34]

The state law and its implementation therefore did not amount to "authorization" of a sex offender's residence.[35] Where the district court saw a state scheme requiring individualized assessments of sex offenders' proposed residences, the Supreme Court saw only that the state scheme "generally favors" such assessments.[36]

Thus, the Court drew a careful line between state "approval" and state "authorization." While the former leaves room for local regulation and even prohibition, the latter would conflict with such measures. However, the Court did not directly explain how to distinguish approval from authorization, other than to say authorization requires more than "legislative silence."[37]

The Court also gave weight to the CSORA provision requiring local law enforcement to accept the registration of sex offenders without a fixed residence, "except that the law enforcement agency is not required to accept the person's registration if it includes a residence . . . that would violate state law *or local ordinance*."[38] The Court took this to mean that "local ordinances play an important role in determining residency,"[39] and broadly held that the exception "contains no qualification on the types of local ordinances to be given effect."[40]

Ending on an expansive note, the Court held that even local ordinances potentially in conflict with state law and state "goals" are not necessarily preempted, but instead will be found to conflict with state law only where the two "cannot coexist" and are "irreconcilable."[41] That would seem to tighten the application of the operational conflict test.

This straightforward brand of conflict analysis is fiercely protective of local authority, collapsing it into a question of whether it is literally impossible to comply with both state and local law. But an influential dissent by Justice Hood, joined by Justice Gabriel—the Court's two most junior members at the time—presaged another direction.

The dissent attacked the majority's interpretation of the CSORA provision on local ordinances with textual construction and legislative history. It was merely an exception, Justice Hood wrote, to a narrow requirement that local law enforcement accept a sex offender's registration *despite lacking a fixed residence*.[42] But most of the dissenting opinion dealt with the larger question of what constitutes conflict.

Early in the opinion, Justice Hood accused the Court over time of "inconsistently describ[ing] the standard for identifying operational conflict."[43] Quoting a 1992 case on the local regulation of oil and gas, Justice Hood described the operational conflict test as whether the effect of the local ordinance would materially impede or destroy the state interest—a test the majority ignored.[44] Proposing a new taxonomy of conflict, he then described this "materially impede" test as *encompassing* the others, including the forbids/authorizes test.[45] The latter test, then, is but one way to prove a material impediment; another is to show directly that the operational effect of the local law would "undermine" the state scheme.[46]

According to Justice Hood, in *Ryals*, the operational effect of the ordinance was a total ban on sex offender residency. The State, meanwhile, had established an "elaborate framework of laws" to address the "inevitable" return of sex offenders into residential society.[47] This framework is "extremely comprehensive," "[d]ecades in the making," and "oversee[s] virtually every aspect of a sex offender's life."[48]

The ordinance "hinders" this framework, as stated by Justice Hood: [49] "To me, approval by the state, plus disapproval by a locality, equals conflict."[50] Notice the faint echo, in this turn of phrase, of the forbids/authorizes test. Under the logic of Justice Hood's dissent, no longer must the challenger of an ordinance prove that the State has *authorized* what the local government has forbidden. The State need only have exhibited *approval* of the locally forbidden activity by way of regulating the subject matter extensively. The logic also skirts the safeguards of the implied preemption test; no longer must the State have so thoroughly regulated the subject matter as to crowd out all room for local regulation. Instead, to preempt a local law, the state law need only be "comprehensive" and "elaborate."

These arguments in the *Ryals* dissent became holdings of the Court at its next opportunity to address preemption.

City of Longmont v. Colorado Oil and Gas Association

In 2012, the citizens of the City of Longmont initiated and voted to enact an amendment to the city's home rule charter that banned hydraulic fracturing and the storage or disposal of hydraulic fracturing wastes within the city.[51] Hydraulic fracturing, or fracking, is the process of injecting water, sand, and chemicals into an oil or gas well to open cracks in the rock below to liberate oil and gas from the rock so that it may be collected at the surface. Along with the oil and gas comes some of the injected fracking fluid, as well as other substances that had rested deep underground.

Oil and gas production in Colorado, as around much of the country, had increased dramatically over the prior decade, due to a confluence of factors including technological advances in such areas as fracking, horizontal drilling, slickwater, consolidation of well sites into smaller surface areas, and rising oil and gas prices. On the other hand, evidence was growing, if incomplete, that oil and gas drilling generally, and fracking in particular, carried risks to local health, safety, and welfare. These included air and water quality impacts; health impacts to nearby residents such as birth defects, heart disease, asthma, and cancer; risks of spills, fires, explosions, and even earthquakes; property value declines; and socioeconomic impacts.

The Colorado Oil & Gas Association, an industry group, and the Colorado Oil and Gas Conservation Commission (the Commission), the state agency responsible for implementing the state Oil and Gas Conservation Act (the OGCA), challenged Longmont's measure, arguing that the OGCA and the Commission's regulations promulgated thereunder preempt a local ban.[52] The city defended based on home rule authority and an argument that the state and local laws did not conflict. Ruling that the state regulations of oil and gas operations were comprehensive and that the local ban's conflict with the regulations was "obvious and patent on its face," the district court overturned the ban. At the time the Supreme Court heard the case, *Ryals* had been heard but not yet decided.[53]

As in *Ryals*, the Court weighed state and local interests to determine that the matter was of mixed state and local concern.[54] So, as in *Ryals*, the local law would coexist alongside the state law as long as the two would not conflict, and the Court reached the question of conflict preemption. The Court also recited past decisions holding that the OGCA does not expressly or impliedly preempt local regulation.[55]

Unlike in *Ryals*, the result was unanimous, and Justice Gabriel, who had joined the *Ryals* dissent, delivered the Court's opinion. He began by holding that the materially impede test and the forbids/authorizes test were both "directed to the same end, namely, to allow a court to determine whether a local ordinance conflicts with state law" (just what Justice Hood wrote in the *Ryals* dissent).[56] And the Court similarly elected to evaluate the *Longmont* case on the direct basis of whether the local law would materially impede or destroy a state interest.[57]

Along the way, the Court reformulated the law on how such a material impediment must be proven by the party seeking to demonstrate a preemptive effect. In the 1992 case *Board of County Commissioners, La Plata County v. Bowen/Edwards Associates, Inc.*, the Court preserved a local ordinance by requiring the oil and gas operator to prove a conflict with the state's interests as a *factual* matter:

> Any determination that there exists an operational conflict between the county regulations and the state statute or regulatory scheme . . . must be resolved on an ad-hoc basis under a fully developed evidentiary record. . . . [On remand,] the district court should permit both Bowen/Edwards and the county to develop an adequate evidentiary record on the preemption issue, and at the conclusion of the evidence the court should enter appropriate findings of fact and conclusions of law.[58]

Relying on this language, in *Longmont*, the city argued that summary judgment should not have been entered against it without an evidentiary hearing to determine whether the fracking ban would actually impede, as a factual matter, the state's interest in efficient oil and gas production. The Court, however, marginalized that *Bowen/Edwards* language:

> In virtually all cases this [operational conflict] analysis will involve a facial evaluation of the respective statutory and regulatory schemes, not a factual inquiry as to the effect of those schemes "on the ground."[59]

Therefore, rather than facts, courts are now directed to "assess the interplay between the state and local regulatory schemes" as a legal matter to see if the local scheme interferes with the interest behind the state scheme.[60] The Court's opinion did not develop its reasoning behind this shift.

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The Court used the purpose statement in the OGCA as a definition of the state's interest in the case:

> It is the intent and purpose of this article to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste, consistent with the protection of public health, safety, and welfare, including protection of the environment and wildlife resources. . . .[61]

Longmont presented evidence at summary judgment that the fracking ban harmonized with this state interest in two ways: because other production methods were at least as efficient as fracking, and because fracking is inconsistent "with the protection of public health, safety, and welfare." Under *Bowen/Edwards*, the city argued, an evidentiary hearing was therefore necessary. Even in *Ryals*, the district court's factual determination that Englewood's restriction constituted a de facto ban on sex offender residency, upon which the dissent relied, came only after a four-day trial. But here, the Court set aside the city's evidence regarding alternative drilling methods and called the city's evidence on health, safety, welfare, and the environment merely "competing views" and "differences of opinion" divorced from the legal questions at issue.[62]

The city also argued that the state does not affirmatively authorize fracking, either in general or with regard to individual drill sites. The city therefore claimed that the ban passed the forbids/authorizes test. While the Court noted that prior cases relied on the forbids/authorizes test to invalidate a local ordinance, in other cases "we have recognized that a conflict between state and local law may arise from the application of a local regulation in situations in which state law does not expressly authorize (or forbid) the activity that the local government forbids (or authorizes)."[63] In other words, the forbids/authorizes test is just one test for conflict among many that a local law must pass to survive scrutiny. This was a sharp departure from the *Ryals* majority opinion, yet the Court did not address the forbids/authorizes test further.

Thus, *Longmont* cleared the obstacles to implementing the principles of the *Ryals* dissent through a simple syllogism. First, the state's regulations on and gas operations are "extensive," "exhaustive," and "pervasive."[64] Second, the very comprehensiveness of these regulations implies that the state has an interest in the regulation of fracking being *uniform*.[65] Third, by upsetting that uniformity, a local fracking ban materially impedes the effectuation of the state interest.[66] It can be inferred that this is what the Court means by "assessing the interplay" between the local fracking ban and state law.[67]

In *Longmont*, the logic of *Ryals*, which focused on the narrowness of the forbids/authorizes test and included expansive language about conflict arising only where state and local law "cannot coexist" and are "irreconcilable," was nowhere to be seen. As a result, two core city arguments were rendered irrelevant: that the state merely approved of, but did not "authorize" fracking; and that the fracking ban did not collide head-on with any state law or regulation. The Court therefore affirmed the district court's decision overturning Longmont's fracking ban.

The Court did reiterate that the OGCA does not expressly or impliedly preempt local regulations; land use regulations relating to oil and gas are still lawful and proper.[68] But while implied preemption formally does not apply to oil and gas matters, *Longmont* bled elements of the implied preemption inquiry into conflict preemption law. The Supreme Court is no longer searching only for the traditional type of conflict: a head-on collision, an impossibility, forbidding what is authorized, or frustration of the state's legislative purposes proven by evidence. The Court instead found a mini-field within oil and gas—fracking regulation—and held that a local ban upset an *implied* legislative and regulatory intent of statewide uniformity.[69] That type of analysis had previously been confined to implied preemption doctrine. The implied preemption route was closed in *Longmont*, however, as the Court had previously held that the OGCA did not occupy the field of oil and gas regulation.[70]

Notably for future oil and gas preemption issues, the Court also clarified that how "technical" the local regulation appears is irrelevant.[71] All that matters is whether the local regulation passes the several tests for conflict with state law, including the OGCA and the Commission's regulations, considered as a whole and with attention to the need for statewide uniformity that they evince for a particular area of oil and gas regulation.[72]

A *Longmont* Corollary: *City of Fort Collins v. Colorado Oil and Gas Association*

In 2013, the year after Longmont's charter amendment passed, the citizens of Fort Collins initiated and adopted an ordinance imposing a moratorium on fracking and the disposal of fracking wastes.[73] The same industry group that sued Longmont also sued Fort Collins.

The Supreme Court treated this case as a companion to the *Longmont* case, hearing and deciding it on the same days as it did *Longmont*. The only remaining legal issue, under *Longmont*, was whether the local enactment's status as a temporary moratorium saved it from the preemptive effect applicable to a permanent ban.

> "Rather than answering how conflict preemption works, *Ryals* and *Longmont* may serve for some time as conflicting archetypes of how the courts might address a specific question—or as conflicting geometries suspended uneasily in a cubist landscape."

The Court held that it did not. While a shorter moratorium might be acceptable, a five-year moratorium is "different in kind from a brief moratorium that is truly a 'temporary time-out.'"[74] The Court held that the moratorium impeded "what is intended to be a state-wide program of regulation."[75] It is also a "prohibition" and "not merely a regulation," which might be afforded more deference.[76]

Accordingly, the Court held that, like the Longmont ban, the Fort Collins moratorium conflicted with state law and was preempted.[77]

How Much Did *Longmont* Change Preemption Law?

Ryals and *Longmont* do not fit comfortably together. Practitioners are left with two inconsistent approaches to conflict preemption, issued within the span of four months in 2016. In their wake, no published opinion has yet revisited the issue.

The closest case involved the matter of preemption of a state law by a federal law: Justice Gabriel, writing for a 4-3 majority, found conflict preemption where a state law criminalized more activity than its federal counterpart, upsetting what the majority determined to be Congress's "uniform scheme of punishment."[78] The minority would instead have held that, "[b]ecause the federal and state laws take aim at different conduct, there can be no conflict between them."[79] That, in a nutshell, is the whole debate. While it would be a mistake to read local preemption messages from federal preemption tea leaves, the 4-3 split does not augur a reliable preemption doctrine emerging in the near future.

In all likelihood, the Court's approach to conflict preemption will be driven by the specific case in front of it. For conflict preemption, perhaps even more than normal, bad facts will make bad law. Rather than answering how conflict preemption works, *Ryals* and *Longmont* may serve for some time as conflicting archetypes of how the courts might address a specific question—or as conflicting geometries suspended uneasily in a cubist landscape.

In other words, conflict preemption is likely now a smell test more than anything else: "[T]he

most important item in the courtroom and all too seldom used is the judge's nose. Any trial judge will inevitably come to the conclusion on occasion that a certain case or claim or defense has a bad odor. Simply put, a matter smells. Some smell so bad they stink."[80] In a matter of law, an appellate court may just as readily employ its nose as a trial court does for a matter of fact.

Is this a new state of affairs? Probably not. Scholars have been calling preemption jurisprudence a Potemkin village for years, instructing that "preemption doctrine is, on its face, a complex, well-established body of doctrine. Look under the surface, however, and both logic and clarity vanish."[81]

Picasso himself may have said it best: "Do you think it interests me that this painting represents two figures? These two figures existed, they exist no more."[82]

Colorado's web of tests for conflict preemption originates, more than anywhere else, from the 1942 case of *Ray v. City and County of Denver*.[83] There, the Supreme Court laid out a number of tests for conflict preemption that still grace the pages of opinions (the forbids/authorizes test, the impossibility or irreconcilability test, etc.). The Court did not reject any of these tests. But it did conclude that, "as the criterion of destructive conflict . . . it seems evident that in the final analysis the courts revert to the determination of what might be called the *factual question* of whether the ordinance forbids the doing of a thing which the statute authorizes."[84]

That factual question has now unequivocally transformed into a question of law, and facts have become peripheral to the analysis.[85] That change, if carried through in future decisions, may reduce the potential for local governments to successfully defend their ordinances. Where the county in *Bowen/Edwards* won the right to present facts at an evidentiary hearing showing that its ordinance did not actually prevent the state from achieving its interests, local governments will now have to overcome a holding that "virtually" no cases will require a factual inquiry.[86]

Undoubtedly this change will conserve judicial resources. Whether it will further tilt the balance of intrastate power away from local governments and toward a monolithic state system remains to be seen. That Colorado trend, progressing despite the promise of the Home Rule Amendment to the constitution, has been amply documented elsewhere.[87]

Specifically for environmental law, this prevailing wind may counter another "powerful trend at the grassroots level of environmental policy-making" in service of "a more integrated system that incorporates the historical function of local governments in protecting the public from the perils of pollution and environmental degradation."[88] While the *Longmont* court took pains to avoid a policy discussion,[89] policy decisions underlie preemption law itself: "preemption may operate to invalidate local environmental protection efforts even though it is the case that neither the legislature nor the judiciary has considered the policy implications of such action. Thus, preemption doctrine as it is currently applied on the national level and in many states may be good law but not good policy."[90] What results, to the ongoing frustration of local residents,[91] is a reduced "ability to participate actively in the basic societal decisions that affect one's life," what Hannah Arendt called "public freedom."[92]

Conclusion: Implications for Practitioners

Colorado courts now have the approaches of both *Ryals* and *Longmont* to choose from in addressing questions of conflict preemption. Which approach they choose may determine the outcome of a case. Practitioners should therefore be careful not to hang their hat on either case.

Various lines of precedent give courts a wealth of choices in how to address these matters. It may be tempting to try to resolve them and present the court a clean answer on how conflict preemption works. But if the inquiry is now truly a smell test, *logos* will only go so far. Prudent pinches of pathos belong in the argument, perhaps more crucially than usual. As always, "[t]here is a distinction between appeal to emotion and appeal to the judge's sense of justice—which, as we have said, is essential. *Of course* you should argue that your proposed rule of law produces a more just result, both in the present case and in the generality of cases. . . . But don't make an overt, passionate attempt to play upon the judicial heartstring. It can have a nasty backlash."[93]

Still, as Picasso described his work: "Colors, like features, follow the changes of the emotions."[94] CL

The views and opinions expressed in this article are those of the author and do not reflect the opinions of his employer or anyone else.

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NOTES

1. *Webb v. City of Black Hawk*, 295 P.3d 480, 486 (Colo. 2013).
2. *Bd. of Cty. Comm'rs, La Plata Cty. v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1056–57 (Colo. 1992).
3. *Id.*
4. *Id.*
5. Vaubel, "Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule," 24 *Stetson L. Rev.* 417, 419, 422, 439 (1995).
6. *Bd. of Cty. Comm'rs of Gunnison Cty. v. BDS Int'l, LLC.*, 159 P.3d 773, 779 (Colo.App. 2006).
7. *See Ray v. City and Cty. of Denver*, 121 P.2d 886, 888 (1942).
8. *Id.* (adopting the reasoning of *Vill. of Struthers v. Sokol*, 140 N.E. 519, 521 (1923)).
9. Allow, *Black's Law Dictionary* (10th ed. 2014).
10. *Rancho Lobo, Ltd. v. Devargas*, 303 F.3d 1195, 1205 (10th Cir. 2002); *Colo. Mining Ass'n v. Bd. of Cty. Comm'rs of Summit County*, 199 P.3d 718, 725 (Colo. 2009); *Sant v. Stephens*, 753 P.2d 752, 756 (Colo. 1988) (quoting *Aurora v. Martin*, 507 P.2d 868, 869–70 (1973)).
11. *Gibbons v. Ogden*, 22 U.S. 1, 209–10 (1824) ("Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the Court will enter upon the inquiry, whether the laws of New-York, as expounded by the highest tribunal of that State, have, in their application

to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him.").

12. *Savage v. Jones*, 225 U.S. 501, 533 (1912) ("If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.").

13. *Bowen/Edwards*, 830 P.2d 1045, 1060.

14. *Ryals v. City of Englewood*, 364 P.3d 900, 903–04.

15. *Id.* at 904.

16. *Id.*

17. *Id.*

18. *Ryals v. Englewood*, 962 F.Supp. 2d 1236, 1241 (D.Colo. 2013).

19. *Id.* at 1242.

20. *Id.* at 1249.

21. *Ryals*, 364 P.3d at 903.

22. *Id.* at 905 (internal quotation marks removed).

23. *Id.*

24. *Id.* at 905–06.

25. *Id.* at 906, 915 (quoting CRS § 16-22-108(1)(a)(I) (2015)).

26. *Id.* at 906 (quoting CRS § 17-22.5-403 (2015)).

27. *Id.* at 906, 908 (emphasis in original).

28. *Id.* at 907, 908–09.

29. *Id.* at 909.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* (emphasis added) (citation omitted).

35. *Id.*

36. *Id.* at 909–10.

37. *Id.* at 909 ("If legislative silence amounted to authorization, then it would be virtually impossible for local governments to restrict anything.").

38. *Id.* at 909, 915 (emphasis in original) (quoting CRS § 16-22-108(1)(a)(I) (2015)).

39. *Id.* at 909.

40. *Id.* at 910.

41. *Id.*

42. *Id.* at 915–16.

43. *Id.* at 911.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 912.

48. *Id.*

49. *Id.* (emphasis added).

50. *Id.* at 914.

51. *City of Longmont v. Colo. Oil and Gas Ass'n*, 369 p.3d 573, 577 (Colo. 2016).

52. *Id.*

53. Rather than hear the case, the Court of Appeals certified it immediately to the Supreme Court. Order of Court, No. 2014CA1759 (Colo. App. Aug. 17, 2015).

54. *Longmont*, 369 p.3d at 580–81.

55. *Id.* at 583–84. The Court rejected a novel argument that a "sufficiently dominant" state interest in a matter, standing alone, can impliedly preempt a local regulation. *Id.* at 584.

56. *Id.* at 583.

57. *Id.*

58. *Bowen/Edwards*, 830 P.2d at 1060.

59. *Longmont*, 369 P.3d at 583.

60. *Id.*

61. *Id.* at 584.

62. *Id.* at 576. *See Colo. Oil and Gas Conservation Comm'n v. Martinez*, 2019 CO 3 (Commission properly declined to engage in rulemaking on proposed rule because (among other things) the legislative history of the Colorado Oil and Gas Conservation Act does not condition further oil and gas development on a finding of no cumulative adverse impacts to public health or the environment).

63. *Longmont*, 369 P.3d at 583.

64. *Id.* at 584–85.

65. *Id.* at 585.

66. *Id.*

67. *See id.* at 583.

68. *Id.* at 583–84.

69. *See id.* at 585.

70. *Bowen/Edwards*, 830 P.2d at 1059.

71. *Longmont*, 369 P.3d at 584.

72. *See id.* at 585.

73. *City of Fort Collins v. Colo. Oil and Gas Ass'n*, 369 P.3d 586, 589 (Colo. 2016).

74. *Id.* at 594.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Fuentes-Espinoza v. People*, 408 P.3d 445, 453 (Colo. 2017).

79. *Id.* at 456.

80. *In re Merritt*, 211 F.3d 1269 (6th Cir. 2000) (quoting *Morgan Fiduciary. Ltd. v. Citizens & S. Int'l Bank*, 95 B.R. 232 (S.D.Fla.1988)).

81. Bhagwat, "Wyeth v. Levine and Agency Preemption: More Muddle, or Creeping to Clarity?" 45 *Tulsa L. Rev.* 197, 200 (2013). An empirical analysis at the U.S. Supreme Court level found that, as in other areas of law, preemption decisions fall generally along ideological lines. Dickinson, "An Empirical Study of Obstacle Preemption in the Supreme Court," 89 *Neb. L. Rev.* 682, 707–08 (2011). The irony with preemption is that the political polarities flip from justices' typical postures on federalism: "A decision against preemption in favor of states' rights, typically considered conservative, may have a liberal outcome, and vice versa." *Id.* at 685. Accordingly, "[c]onservatives can be expected to vote in favor of preemption and liberals to vote against it, with the odd result that the liberals find themselves promoting states' rights while conservatives counter with a plea for a robust national regulatory system." *Id.* at 686. The exception is Justice Thomas, who has renounced obstacle preemption, a federal name for conflict preemption, and has aligned with the Court's liberals in preemption cases. *Id.* Also, whether a state agency joins a challenge to a local ordinance may weigh heavily in a court's deliberations: "Perhaps the lesson learned from these cases is that without the federal agency's support, preemption may be difficult; with it, preemption is likely but not guaranteed." Troy and Wood, "Federal Preemption at the Supreme Court," *Cato Sup. Ct. Rev.* 257, 280 n.111 (2007–08). Another professor wasted no words: "Intrastate preemption is best understood less as a matter of abstract logic and more as one weapon among many used by interest groups to oppose local policies they dislike." Diller, "Intrastate Preemption," 87 *B.U. L. Rev.* 1113, 1133 (2007).

82. Friedenthal, *Letters of the Great Artists—From Blake to Pollock*, at 258 (Thames and Hudson 1963).

83. *Ray v. City and Cty. of Denver*, 121 P.2d 886 (Colo. 1942).

84. *Id.* at 888 (emphasis added).

85. *Longmont*, 369 p.3d at 578, 583.

86. *Id.* at 583.

87. Hayes and Hartl, "Home Rule in Colorado: Evolution or Devolution," 33 *Colorado Lawyer* 61 (Jan. 2004) ("Judicial and legislative attitudes regarding home-rule powers appear to be changing, with less deference being afforded local enactments and a greater tendency to declare matters to be of state or mixed state and local concern. This article reviews Colorado case law and legislative trends regarding home rule."). The change has been building over the course of centuries, culminating in "the current powerlessness of American cities." Frug, "The City as a Legal Concept," 93 *Harvard L. Rev.* 1059, 1059 (1980).

88. Nolon, "In Praise of Parochialism: The Advent of Local Environmental Law," 23 *Pace Envtl. L. Rev.* 705, 706 (2006).

89. *Longmont*, 369 P.3d at 576.

90. Weiland, "Federal and State Preemption of Environmental Law: A Critical Analysis," 24 *Harvard Envtl. L. Rev.* 237 (2000).

91. *See, e.g.*, Hahn, "Lafayette to meet with legal fund on fracking ban defense, over counsel's concerns," *Boulder Daily Camera* (Jan. 3, 2018), www.dailycamera.com/lafayette-news/ci_31567533/lafayette-meet-legal-fund-fracking-ban-defense-over (describing the City of Lafayette's struggles over whether to ban all oil and gas development, despite the *Longmont* decision).

92. Frug, *supra* note 87 at 1068 (quoting Arendt, *On Revolution* at 114–15, 119–20 (Penguin Books 1962)).

93. Scalia and Garner, *Making Your Case: The Art of Persuading Judges* at 32 (Thomson West 2008) (emphasis in original).

94. Barr, Jr., ed., *Picasso: Forty Years of His Art* at 15 (Museum of Modern Art, New York 1939), www.moma.org/documents/moma_catalogue_2843_300061942.pdf.