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Virginia Uranium Reveals Justices' Differing Views about the Role of Legislative Intent in Implied Preemption

by Lawrence S. Ebner

The Supreme Court's federal preemption jurisprudence long has been a puzzle. Most of the Court's individual preemption decisions recite and apply what appear to be well-established principles. But from a broader perspective, attempting to piece together the Court's ever-expanding preemption case law into a coherent whole is a continual challenge—especially when implied preemption is part of the picture. The Court's decision in *Virginia Uranium, Inc. v. Warren*, No. 16-1275 (S. Ct. June 17, 2019), renews that challenge and makes it even more formidable.

Supreme Court decisions that involve the scope and application of express preemption provisions are relatively straightforward because they typically rely on traditional tools of statutory interpretation. *See, e.g.*, *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 459 (2012) ("The [Act's] preemption clause sweeps widely—and in so doing, blocks the applications of the [state law] challenged here."). But implied preemption—field preemption and conflict preemption (the latter encompassing both "obstacle preemption" and "impossibility preemption")—is where the Court's Supremacy Clause jurisprudence is riddled with inconsistencies. The differing and evolving views of a succession of justices during the past eight decades on how to determine whether, or to what extent, federal law impliedly supplants state regulatory or tort law only have exacerbated the problem.

Is State Legislative Purpose Relevant to Field Preemption?

Virginia Uranium illustrates one of the current preemption-related divisions within the Court: the question of what role, if any, the *purpose* or *intent* of a state statute should play in determining whether field preemption applies. Perhaps more significantly, the case's lead opinion suggests that Justice Thomas' fierce and long-time categorical opposition to obstacle preemption (also known as "purposes and objectives preemption") may be garnering the support of at least two other justices.

The issue addressed in *Virginia Uranium* is whether the Atomic Energy Act ("AEA"), 42 U.S.C. § 2011 *et seq.*, preempts a Virginia statute that bans uranium mining on private land. Because the AEA does not contain an express preemption provision, the petitioner mining company argued that the Virginia statute is preempted under both field and obstacle preemption principles. The Court held 6 to 3 that the state law is *not* preempted. But the justices actually split three ways: Justice Gorsuch, joined by Justices Thomas and Kavanaugh, wrote the lead opinion, finding no preemption; Justice Ginsburg, joined by Justices Sotomayor and Kagan, filed a separate opinion concurring only in the judgment; and Chief Justice Roberts, joined by Justices Breyer and Alito, authored the dissent.

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To protect the public from radiation hazards, the AEA, through the Nuclear Regulatory Commission ("NRC"), "regulates nearly every aspect of the nuclear fuel life cycle"—including uranium milling operations and tailings storage—"*except* mining." Gorsuch op. at 4. An AEA section "allowing the NRC to devolve certain of its regulatory powers to the States," *id.* at 5, contains what Justice Gorsuch describes as a "*non-preemption* clause." *Id.* at 6. That clause, 42 U.S.C. § 2021(k), declares that "Nothing in this section shall be construed to affect the authority of any State . . . to regulate activities *for purposes other than protection against radiation hazards*" (emphasis added).

Virginia Uranium not only argued that "Virginia's law bears just such an impermissible purpose," but also that § 2021(k) "greatly expands the preemptive effect of the AEA . . . demand[ing] the displacement of *any* state law . . . enacted for the purpose of protecting the public against 'radiation hazards.'" Gorsuch op. at 6. Indicating that "this reading nearly turns the provision on its head," *id.*, Justice Gorsuch *rejects* the idea that "inquiry into state legislative purposes" is relevant to field preemption analysis where a state statute (*e.g.*, Virginia's uranium mining ban) regulates a subject (*e.g.*, uranium mining on private land) that is beyond a federal regulatory statute's (*e.g.*, the AEA's) reach. *Id.* at 10.

Explaining that "this Court has generally treated field preemption inquiries . . . as depending on *what* the State did, not *why* it did it," *id.* at 11, the lead opinion discusses "some of the costs to cooperative federalism and individual liberty we would invite by inquiring into state legislative intentions too precipitately." *Id.* at 12. For example, "federal courts would have to allow depositions of state legislators and governors, and perhaps hale them into court for cross-examination at trial about their subjective motivations in passing a mining statute." *Id.* Moreover, "[s]tate legislatures are composed of individuals who often pursue legislation for multiple and unexpressed purposes, so what legal rules should determine when and how to ascribe a particular intention to a particular legislator?" *Id.* at 13.

Justice Ginsburg's separate opinion concurs only in the judgment. Implying that she disagrees with Justice Gorsuch's view that state legislative purpose generally should be excluded from field preemption analysis, Justice Ginsburg asserts that his "discussion of the perils of inquiring into legislative motive . . . sweeps well beyond the confines of this case, and therefore seems . . . inappropriate in an opinion speaking for the Court, rather than for individual members of the Court." Ginsburg op. at 1; *but see* Gorsuch op. at 11 n.2 ("these considerations are, to us, essential to [the case's] resolution").

Justice Ginsburg's field preemption analysis focuses narrowly on § 2021(k), rejecting the dissent's reading "to include within the preempted sphere *all* state laws motivated by concerns about the radiation hazards of NRC-regulated activities," and concluding that "the better reading" of § 2021(k) is to "exclude from federal foreclosure state laws directed to activities not regulated by the NRC." Ginsburg op. at 7. Further, Justice Ginsburg was "not persuaded by the Solicitor General's views," on behalf of the United States as *amicus curiae*, that Virginia's "mining ban is preempted because it is a pretext for regulating the radiological safety hazards of milling and tailings storage." *Id.* at 10.

Chief Justice Roberts' dissent takes a different approach, asserting that "the lead opinion sets out to defeat an argument that no one made, reaching a conclusion with which no one disagrees." Roberts op. at 1. More specifically, "no party disputes" that "the field of uranium mining safety is preempted under the Atomic Energy Act." *Id.*

Instead, the dissent reframes the question presented: "[T]he question we agreed to address is whether a State can purport to regulate a field that is *not* preempted (uranium mining safety) as an indirect means of regulating other fields that *are* preempted (safety concerns about uranium milling and tailings)." *Id*. The dissent's answer to this question is no. "Under our AEA precedents, a state law is preempted not only when it 'conflicts with federal law,' but also when its *purpose* is to regulate within a preempted field."

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Id. at 3 (citing *Pacific Gas & Elec. Co. v. State Energy Res. Cons. Comm'n*, 461 U.S. 190 (1983) (holding that "if the purpose of California's ban on nuclear plant construction was to regulate radiological safety, it would be preempted").

"For example, even though a State may generally regulate its roads, it may not shut down all of the roads to a nuclear power plant simply because it disagrees with the NRC's nuclear safety regulations." *Id.* at 4. Chief Justice Roberts explains that under the majority's holding, however, "so long as the State is not boneheaded enough to express its real purpose in the statute, the State will have free rein to subvert Congress's judgment." *Id.* at 7. Thus, according to Chief Justice Roberts, a "purpose inquiry is most useful precisely when the challenged state law does *not* purport to regulate a preempted field." *Id.* at 6-7. In other words, "the whole point of the purpose inquiry mandated by *Pacific Gas*" is that "States may try to regulate one activity by exercising their authority over another." *Id.* at 6. As to "the difficulties about inquiring into legislative motive," the dissent asserts that "the difficulty of the task does not permit us to choose an easier way." *Id.* at 9.

In short, Chief Justice Roberts' dissenting view is that "preemption cannot turn on the label a State affixes to its regulations. That approach would simply invite evasion, which is why we have rejected it in our preemption cases more generally." *Id.* at 7. "Regardless of whether the state regulation is downstream . . . upstream like here . . . or entirely out of stream . . . States may not legislate with the purpose and effect of regulating a federally preempted field." *Id.* at 8.

Is Obstacle Preemption on the Way Out?

Virginia Uranium also addresses the potentially more far-reaching issue of what role *congressional* purposes and objectives should play in implied preemption analysis. The Court repeatedly has stated that "[o]ur inquiry into the scope of a [federal] statute's pre-emptive effect is guided by the rule that the purpose of Congress is the ultimate touchstone in every pre-emption case." *Altria Group, Inc. v. Good,* 555 U.S. 70, 76 (2008). Along the same lines, the Court, long has indicated that one type of conflict preemption is where state law "stands as an impermissible 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Gorsuch op. at 14 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

For more than a decade, Justice Thomas, however, has been categorically opposed to purposes and objectives (i.e., obstacle) preemption. *See Wyeth v. Levine*, 555 U.S. 555, 594 (2009) (Thomas, J., concurring in the judgment) ("This Court's entire body of 'purposes and objectives' pre-emption is inherently flawed. The cases improperly rely on legislative history, broad atextual notions of congressional purpose, and even congressional inaction in order to pre-empt state law."). According to Justice Thomas, "this brand of the Court's pre-emption jurisprudence facilitates freewheeling, extratextual, and broad evaluations of the 'purposes and objectives' embodied within federal law. This, in turn, leads to decisions giving improperly broad pre-emptive effect to judicially manufactured policies, rather than to the statutory text enacted by Congress pursuant to the Constitution and the agency actions authorized thereby." *Id.* at 604.[1] "The Court's 'purposes and objectives' pre-emption jurisprudence is also problematic because it encourages an overly expansive reading of statutory text." *Id.* at 601. "[S]uch a sweeping approach to pre-emption leads to the illegitimate—and thus, unconstitutional—invalidation of state laws . . . ." *Id.*

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[1] *See also* Daniel J. Meltzer, *Preemption and Textualism*, 112 Mich. L. Rev. 1, 35 (2013) (discussing "four key elements to Justice Thomas's critique of obstacle preemption"); Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Thomas the Lone Principled Federalist?*, 5 N.Y.U. J. of Law & Liberty 63 (2010) (" Justice Thomas goes further . . . by shutting the door altogether on the theory of 'implied obstacle preemption,' an expansive route whereby state law tort claims are ousted not by express statutory text, but rather on account of their implied conflict with the purposes and objectives of the federal regulatory scheme.").

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In *Virginia Uranium*, the petitioner argued, as an alternative to field preemption, that "Virginia's [uranium mining] moratorium disrupts the delicate 'balance' Congress sought to achieve between" the "benefits of developing nuclear power while mitigating its safety and environmental costs." Gorsuch op. at 14. Justice Gorsuch (joined by Justices Thomas and Kavanaugh) opined, however, that "[a] sound preemption analysis cannot be as simplistic as that." *Id.* More specifically, "[n]o more than in field preemption, can the Supremacy Clause be deployed here to elevate abstract and unenacted legislative desires above state law." *Id.* "Efforts to ascribe unenacted purposes and objectives to a federal statute face many of the same challenges as inquiries into state legislative intent." *Id.* at 15. "Worse yet, in piling inference upon inference about hidden legislative wishes we risk displacing the legislative compromises actually reflected in the statutory text. . . . The only thing a court can be sure of is what can be found in the law itself." *Id.* at 15, 16.

These statements suggest that the Court's two newest justices—Justices Gorsuch and Kavanaugh—may be developing the sort of skepticism about the "freewheeling" doctrine of obstacle preemption that already had led Justice Thomas to unequivocally condemn it. Taking a more restrained approach, Justice Ginsburg in her separate opinion states that "Virginia Uranium's obstacle preemption arguments fail under existing doctrine, so there is little reason to question, as JUSTICE GORSUCH does . . . whether that doctrine should be retained." Ginsburg op. at 1; *see id.* at 12-15 (discussing why none of Virginia Uranium's or the Solicitor General's obstacle preemption arguments "carry the day"). Chief Justice Roberts' dissenting opinion does not directly address obstacle preemption.

Conclusion

Because federal preemption cases are statute-specific, it is reasonable to read a case like *Virginia Uranium* narrowly, especially where the issue is preemption of a state statute or regulation, rather displacement of a type of state tort law, such as a failure-to-warn claim. But sometimes, as in *Virginia Uranium*, debate over a seemingly narrow issue reveals a much wider fissure within the Court.

It appears from *Virginia Uranium* that a majority of the current justices believe that state legislative purpose may be relevant, if not determinative, of whether a state statute occupies a federally preempted field. As a result, while statutory text always should be the first line of attack (or defense) in a preemption-based challenge to state law, the purpose of the state law still can be taken into account.

And at least for now, obstacle preemption continues to be a viable basis for challenging state law. In framing an obstacle preemption strategy, however, especially when an issue percolates to the Supreme Court, Justice Thomas' opposition to obstacle preemption, and the possible support that he may garner from Justices Gorsuch and Kavanaugh, should be considered. Although it was not argued in *Virginia Uranium*, *see* Gorsuch op. at 17, impossibility preemption—arguing that congressional intent to preempt can be inferred if a state law makes it impossible to comply with a federal statute—may, at least in some cases, be a viable, closely related alternative to obstacle preemption.

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