

Preemption and Local Authority to Regulate Firearms and Ammunition

Preemption occurs when a higher level of government removes regulatory power from a lower level of government. For example, Congress may remove legislative authority from the states in certain areas. Likewise, state governments may, in some cases, remove local legislative authority.

Federal Preemption

Under the Supremacy Clause of Article VI of the U.S. Constitution, a federal law is binding on all state and local governments so long as Congress duly enacted the law pursuant to one of its limited powers. When federal law removes state authority (and thus local authority) to regulate a specific subject matter, the process is called "federal preemption." Federal preemption of state law is uncommon in the area of firearms regulation.

Congress may make its intention to preempt an area of state law clear by expressly stating its intent in the language of a statute. Absent such a statement, when considering a challenge to a state or local law based on the claim that regulation of the subject has been preempted by Congress, courts presume that the federal government does not intend to preempt state and local authority.²⁸ When the challenged law is within an area of traditional state authority, the reviewing court will find preemption only when the court is "absolutely certain" that Congress intended to take away that authority.²⁹ Courts look for the existence of a pervasive scheme of federal legislation of the particular subject, or an irreconcilable conflict between the federal regulation and the challenged law, to determine congressional intent.³⁰

Congress has not expressly preempted the broad field of firearms or ammunition regulation. Furthermore, courts have held that congressional regulation of firearms does not create a scheme so pervasive that it leaves no room for state and local law.³¹ Thus, absent a specific, irreconcilable conflict between a challenged state or local firearms or ammunition law and a federal enactment, there is no federal preemption of that state or local law.

State Preemption

Most state constitutions allocate authority to local governments to regulate in the interests of the public health, safety and welfare (which generally includes regulation of firearms

²⁸ *Richmond Boro Gun Club, Inc. v. City of New York*, 896 F. Supp. 276, 285 (E.D.N.Y. 1995), *aff'd*, 97 F.3d 681 (2d Cir. 1996) (upholding New York City's assault weapon ban against a federal preemption challenge).

²⁹ *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (rejecting a federal preemption challenge to a Missouri law setting mandatory retirement age for state judges).

³⁰ *Richmond*, 896 F. Supp. at 285.

³¹ *Id.*

and ammunition). “State preemption” occurs when a state government removes a portion of a local government's legislative authority.

States differ considerably in how and to what extent they preempt the regulation of firearms and ammunition. Specific questions about whether a particular type of local regulation may be preempted in any given state involve complex inquiry and analysis of existing case law. The summary offered here is intended to be only an overview of an intricate and highly specialized area of law. LCAV is available to consult with officials and advocates on specific questions relating to their jurisdiction.

Generally, preemption occurs in two ways: through express preemption and implied preemption. Express preemption occurs when a state provides explicitly, in the language of a statute or constitutional provision, that it intends to remove a lower government’s regulatory authority. For example, the South Dakota legislature expressly preempts county legislative authority to regulate most aspects of firearms and ammunition with the following statutory language:

No county may pass any ordinance that restricts possession, transportation, sale, transfer, ownership, manufacture or repair of firearms or ammunition or their components. Any ordinances prohibited by this section are null and void.³²

Absent an express statement, courts may infer an intent to take over a field of regulation, even though there is no express legislative statement to that effect. This is referred to as implied preemption. In general, courts may find that a local law is preempted if it conflicts directly with state law by requiring what the state law prohibits, or prohibiting what the state law requires. In addition, when a comprehensive scheme of state regulation exists on a particular subject matter, many state courts find that the state legislature thereby indicated an implied intent to assert exclusive authority over that subject matter.³³

The existence and degree of express state preemption of local firearms and ammunition regulation varies from state to state, as do the tests courts use to determine whether implied preemption exists.

The discussion below groups the states into three categories based on the extent of **express** preemption of local authority to regulate firearms and ammunition and then comments on issues of **implied** preemption where appropriate:

- 1. States with no provision or statute expressly preempting local regulation of firearms or ammunition:**³⁴ *Connecticut, Hawaii, Illinois, Massachusetts, New Jersey, New York*

³² S.D. Codified Laws § 7-18A-36.

³³ See, e.g., *Cal. Rifle & Pistol Ass’n v. City of W. Hollywood*, 78 Cal. Rptr. 2d 591 (Cal. Ct. App. 1998) (discussing the doctrine of implied preemption in California and rejecting a preemption challenge to a local ban on Saturday Night Specials).

³⁴ The District of Columbia receives its legislative authority from Congress, which has expressly given the District broad regulatory power over all aspects of firearms. D.C. Code § 1-303.43. In recent years, NRA-

In Connecticut, Hawaii, Illinois, Massachusetts, New Jersey and New York, there are no state laws expressly preempting local authority to regulate firearms or ammunition. In Connecticut, Illinois, Massachusetts, New Jersey and New York, courts have interpreted the degree to which local governments can regulate firearms in the absence of express preemption. Although each local law must be evaluated on a case-by-case basis, some general preemption principles for each state are outlined below.³⁵

Connecticut: In Connecticut, a local government is preempted from regulating a subject matter when the state has demonstrated an intent to occupy the entire field of regulation in that area or when the ordinance at issue irreconcilably conflicts with a state law.³⁶ Connecticut courts have not found that the legislature has demonstrated an intent to occupy the field of firearms and ammunition regulation.³⁷ Thus, absent a direct conflict with state law, broad local firearms and ammunition regulation appears to be possible.

Hawaii: Hawaii courts, like those in Connecticut, will generally find that a local ordinance is preempted when it addresses an area the state has intended to regulate exclusively and uniformly, and/or when it conflicts with state law.³⁸ LCAV is not aware of any published case interpreting the extent of local authority to regulate firearms and ammunition in Hawaii. In the absence of any contrary authority, it appears that local governments have broad authority to regulate firearms and ammunition unless there is a conflict with state law.

Illinois: Generally, local governments in Illinois, and “home rule units” in particular,³⁹ enjoy broad authority to regulate firearms and ammunition.⁴⁰ Illinois courts have rejected preemption challenges to local laws such as those banning handguns and requiring registration.⁴¹ In upholding a local handgun ban, the Illinois Supreme Court concluded that when the state enacted statutes relating to the ownership, possession and sale of firearms and ammunition, it did not preempt further regulation in this area.⁴²

backed proposals have been introduced in Congress to repeal and/or amend existing firearms laws in the District, and to remove its authority to regulate firearms in the future. The bill, known as the “District of Columbia Personal Protection Act,” passed the House in September 2004. Similar bills were introduced in both houses in 2005 and 2007. The 2005 bills were never heard and the 2007 bills have not come to the floor for a vote. A group of national organizations have teamed up with local District groups to form the “National Coalition for DC Democracy and Safety” to fight this effort.

³⁵ Please note that the authority enjoyed by different types of local governmental entities varies from state to state. (For example, a county may have less authority to regulate than that enjoyed by a city.)

³⁶ *Dwyer v. Farrell*, 475 A.2d 257 (Conn. 1984) (holding that a New Haven law regulating handgun sales conflicted with an existing state law and thus was preempted).

³⁷ Note that Connecticut courts have found that the area of hunting regulation has been occupied by the state. See, e.g., *Kaluszka v. Town of East Hartford*, 760 A.2d 1282 (Conn. Super. Ct. 1999).

³⁸ *Richardson v. City and County of Honolulu*, 868 P.2d 1193 (Haw. 1994) (holding that a local ordinance providing a mechanism for transfer of property interests was not preempted by state law).

³⁹ A “home rule unit” is a county with an elected chief executive officer, any municipality which has a population of more than 25,000, or a municipality that has become a home rule unit by referendum. Ill. Const. art. VII, § 6(a).

⁴⁰ 430 Ill. Comp. Stat. 65/13.1; Ill. Const. art. VII, § 6(a).

⁴¹ *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266 (Ill. 1984) (upholding local handgun ban); *City of Chicago v. Taylor*, 774 N.E.2d 22 (Ill. App. Ct. 2002) (upholding local firearms registration ordinance).

⁴² *Kalodimos*, 470 N.E.2d at 276-77.

Massachusetts: When presented with a preemption challenge, Massachusetts courts consider whether an inference can be made that the legislature intended to preempt the subject matter addressed by the ordinance at issue. Courts may infer such intent when a local law frustrates the purpose of a state law either directly or due to a comprehensive scheme enacted by the legislature.⁴³ Courts also may find that local law is preempted if it conflicts with state law.⁴⁴ Thus, so long as there is no conflict with state law, it appears that local governments may regulate broadly in the area of firearms and ammunition. Furthermore, even when a state law and a local law address the same subject area, a stricter local law may be permissible. For example, the Supreme Judicial Court of Massachusetts upheld a local firearm discharge ban, finding that it did not frustrate the state's hunting license law even though it was more stringent than state law concerning the safe use of firearms.⁴⁵

New Jersey: New Jersey municipalities enjoy express authority to regulate and prohibit the sale and use of firearms.⁴⁶ However, local governments may not enact regulation that conflicts with any policy of the state.⁴⁷ In the absence of a conflict, local governments appear to have broad authority to regulate firearms and ammunition, and at least in one area of firearms regulation, are authorized to enact local laws that are stricter than state laws addressing the same subject.⁴⁸ In a case upholding a local firearms discharge ordinance, the New Jersey Supreme Court concluded that a state law regulating hunting was not intended to preempt a stricter local law.⁴⁹

New York: New York courts use a test to evaluate preemption challenges which is similar to many of those described above – a local law may not conflict with a state law or regulate in an area that is occupied by the state.⁵⁰ New York courts have not found that the state has preempted the broad field of firearms and ammunition regulation. Courts have upheld several local firearms laws against preemption challenges and have

⁴³ *Connors v. City of Boston*, 714 N.E.2d 335, 337-38 (Mass. 1999).

⁴⁴ *Id.*

⁴⁵ *Town of Amherst v. Att'y Gen.*, 502 N.E.2d 128 (Mass. 1986).

⁴⁶ N.J. Stat. Ann. § 40:48-1(18). "Municipalities" refers to cities, towns, townships, villages and boroughs, but not counties. N.J. Stat. Ann. § 40:42-1. For additional sources of authority for municipalities and for counties, see N.J. Stat. Ann. §§ 40:48-2, 40:41A-27; N.J. Const. art. IV, § VII, ¶ 11.

⁴⁷ N.J. Stat. Ann. § 2C:1-5(d). A local law may conflict with a state policy by "exclusion" or "inclusion." See, e.g., *State v. Crawley*, 447 A.2d 565 (N.J. 1982); *Mack Paramus Co. v. Mayor and Council of Borough of Paramus*, 511 A.2d 1179 (N.J. 1986). See also *Overlook Terrace Management Corp. v. West New York Rent Control Bd.*, 366 A.2d 321 (N.J. 1976), in which the Supreme Court of New Jersey developed a five-part test for determining whether a local law is preempted by state law.

⁴⁸ *Township of Chester v. Panicucci*, 299 A.2d 385, 389 (N.J. 1973) ("[T]he prohibition against possession of a loaded gun, for the purpose of hunting, within a prescribed distance of an occupied dwelling or school playground simply represents a declaration of statewide policy of minimum regulation."). Despite this statutory and case law supporting municipal authority to regulate firearms, a recent superior court case invalidated a local firearms ordinance limiting handgun sales and purchases to one per person per 30-day period, on preemption grounds. *Ass'n of N.J. Rifle & Pistol Clubs v. City of Jersey City*, Docket No. HUD-L-3600-06 (N.J. Super. Ct. Law Div., Dec. 13, 2006), *appeal docketed*, No. A-004443-06T2 (N.J. Super. Ct. App. Div. 2007). The decision was rendered without a written opinion. The City's appeal is pending.

⁴⁹ *Id.*

⁵⁰ *DJL Restaurant Corp. v. City of New York*, 749 N.E.2d 186, 190 (N.Y. 2001).

found that the state has intended to occupy only limited areas of firearms regulation.⁵¹ Thus, local governments in New York appear to have broad authority to regulate firearms and ammunition absent conflict with state law.

2. States with provisions expressly preempting local regulation of one or more aspects of firearms or ammunition but otherwise permitting broad regulation of firearms and ammunition at the local level:
California, Nebraska

In California and Nebraska, local governments retain authority to regulate firearms and ammunition, but the state legislature has expressly removed this authority in certain areas.

California: California expressly preempts local governments from regulating in the areas of registration or licensing of firearms; manufacture, sale or possession of imitation firearms; and licensing or permitting with respect to the purchase, ownership, possession or carrying of a concealable firearm in the home or place of business.⁵² In other areas, courts have found that local governments have a great deal of authority to regulate firearms and ammunition in their communities.⁵³ For example, courts have rejected preemption challenges to many local firearms and ammunition laws, including ordinances regulating junk guns, the location and operation of firearms dealers, and the sale and possession of firearms and ammunition on county-owned property.⁵⁴

⁵¹ See, e.g., *People v. Stagnitto*, 691 N.Y.S.2d 223 (N.Y. App. Div. 1999) (rejecting preemption challenge to city ordinance regulating assault weapons); *Citizens for a Safer Community v. City of Rochester*, 627 N.Y.S.2d 193 (N.Y. Sup. Ct. 1994) (rejecting preemption challenge to ordinance banning assault weapons but finding regulation of manufacture, sale, and possession of air guns preempted by state law); *Grimm v. City of New York*, 289 N.Y.S.2d 358 (N.Y. Sup. Ct. 1968) (rejecting preemption challenge to ordinance requiring licensing and registration of rifles and shotguns); *People v. Del Gardo*, 146 N.Y.S.2d 350 (City Magis. Ct. 1955) (finding ordinance banning imitation handguns preempted by state law).

⁵² California Gov't Code § 53071 (preempting registration or licensing of commercially manufactured firearms); Cal. Gov't Code § 53071.5 (preempting regulation of the manufacture, sale or possession of imitation firearms); Cal. Penal Code § 12026(b) (prohibiting permit or license with respect to the purchase, ownership, possession or carrying of a handgun in a residence or place of business).

⁵³ See, e.g., *Suter v. City of Lafayette*, 67 Cal. Rptr. 2d 420, 425 (Cal. Ct. App. 1997) (“That state law tends to concentrate on specific areas, leaving unregulated other substantial areas relating to the control of firearms, indicates an intent to permit local governments to tailor firearms legislation to the particular needs of their communities.” Note however, that while the *Suter* court upheld an ordinance regulating the location and operation of firearms dealers, it struck down the portion of the ordinance regulating firearm storage).

⁵⁴ *Cal. Rifle and Pistol Ass'n, Inc. v. City of W. Hollywood*, 78 Cal. Rptr. 2d 591 (Cal. Ct. App. 1998) (upholding ordinance banning junk guns); *Suter*, 67 Cal. Rptr. 2d at 425 (upholding ordinance regulating the location and operation of firearms dealers); *Great Western Shows, Inc. v. County of Los Angeles*, 44 P.3d 120 (Cal. 2002) (upholding ordinance banning the sale of firearms and ammunition on county-owned property); *Nordyke v. King*, 44 P.3d 133 (Cal. 2002) (upholding ordinance banning possession of firearms and ammunition on county-owned property). In contrast, in *Doe v. City and County of San Francisco*, 186 Cal. Rptr. 380 (Cal. Ct. App. 1982), the court held that California Gov't Code § 53071 and Cal. Penal Code § 12026 preempted a San Francisco ordinance banning handgun possession. Because the ordinance contained an exception for concealed weapons licensees, the court found the measure had the effect of creating a new class of persons who would be required to obtain a license in order to possess a handgun in their home or place of business.

Nebraska: A 1991 Nebraska statute requiring the licensing of handgun purchasers provides that “the state has a valid interest in the regulation of the purchase, lease, rental, and transfer of handguns,”⁵⁵ and that “[a]ny city or village ordinance existing on September 6, 1991, shall not be preempted” by state laws requiring handgun licensing.⁵⁶ Other state laws grant Nebraska cities (to varying degrees depending on their size) express statutory authority to regulate several aspects of firearms, including use, discharge and carrying concealed weapons.⁵⁷ There are no published cases addressing preemption of local firearms laws in Nebraska, nor are there any published opinions discussing the relationship between the statutes granting express authority to regulate firearms and the handgun licensing law.⁵⁸

3. States that have enacted broad preemption statutes

In the remaining 42 states, local governments possess limited authority to regulate firearms and ammunition. The preemption statutes in these states vary, but each one expressly preempts all, or substantially all, aspects of local firearms and/or ammunition regulation. In many of these states there are statutory exceptions that may permit some local firearms and/or ammunition regulation. LCAV is available to assist public officials and activists in evaluating potential local strategies to prevent gun violence.

Home Rule Provisions⁵⁹

“Home rule” generally refers to local governments’ authority to regulate, usually within limitations set out by the state constitution or legislation, and is closely tied to the issue of preemption. Local governments in most states enjoy home rule power to varying degrees. In some jurisdictions, home rule power may supersede a state’s authority to preempt local law in a given area.⁶⁰

⁵⁵ Neb. Rev. Stat. Ann. § 69-2401.

⁵⁶ Neb. Rev. Stat. Ann. § 69-2425 (quoted as amended).

⁵⁷ Neb. Rev. Stat. Ann. §§ 14-102, 15-255, 16-227, 17-556.

⁵⁸ In a 1992 Nebraska Attorney General opinion upholding Omaha’s registration ordinance, the Attorney General opined, “by providing that state law shall not preempt ordinances existing before September 6, 1991, the statute contains a negative inference that state law does preempt or ‘occupy the field’ as against all future municipal legislation.” Att’y Gen. Op. No. 92079 (June 11, 1992), 1992 Neb. AG LEXIS 69. As noted above, there is no published Nebraska case law on this issue.

⁵⁹ LCAV has not yet conducted a comprehensive 50-state analysis of home rule authority to evaluate the extent to which home rule jurisdictions have the authority to regulate firearms notwithstanding preemption of firearms regulation under their respective state laws.

⁶⁰ In a recent 3-3 decision, the Colorado Supreme Court affirmed a trial court decision which found state laws expressly preempting firearms regulation unconstitutionally infringed on Denver’s home rule authority with respect to Denver’s ordinances addressing the open carrying of firearms and banning assault weapons and Saturday night specials. *State v. City and County of Denver*, 139 P.3d 635 (Colo. 2006). Ordinances and portions of ordinances addressing juvenile possession of firearms, carrying concealed firearms with a permit in a public park, and concealed weapon permitting were determined to involve matters of mixed local and state concern and were found invalid where they conflicted with state law.

In 2006, the Ohio Legislature passed House Bill 347 (overriding the Governor’s veto), which created Ohio Rev. Code Ann. § 9.68(A), a provision that purports to preempt all local authority to regulate firearms with few, limited exceptions. The City of Cleveland has challenged the law as a violation of the Ohio Constitution’s Home Rule Amendment. Complaint for Declaratory Judgment, *City of Cleveland v. Ohio*, No. CV 07 618492 (Ct. of C.P. Cuyahoga County, filed March 14, 2007). The Ohio Supreme Court recently accepted an appeal from the City of Clyde, Ohio, from a decision finding that an ordinance

prohibiting carrying firearms in a city park was preempted by section 9.68. *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 2007-Ohio-1733, 2007 Ohio App. LEXIS 1600 (Ohio Ct. App. 2007), *appeal accepted for review*, 115 Ohio St. 3d 1408, 2007 Ohio 4884, 873 N.E.2d 1314 (Ohio 2007).