Telecommunications & Electronic Media

FCC Preemption of State Restrictions on Government-owned Broadband Networks: An Affront to Federalism

By Randolph J. May & Seth L. Cooper***

Note from the Editor:

This article is about the Federal Communications Commission's Order preempting state restrictions on government-owned broadband networks. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. Generally the Federalist Society refrains from publishing pieces that advocate for or against particular policies. However, in some cases, such as with this article, we will do so because of some aspect of the specific issue. In the spirit of debate, whenever we do that we will offer links to other perspectives on the issue, including ones in opposition to the arguments put forth in the article. We also invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

• *Memorandum Order and Opinion*, In the Matter of City of Wilson, North Carolina, Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq.; The Electric Power Board of Chattanooga, Tennessee, Petition for Preemption of Tennessee Code Annotated Sections 7-52-601, WC Docket Nos. 14-115, 14-116 (adopted Feb. 26, 2015; released Mar. 12, 2015): http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-25A1.pdf

• Comments of the National League of Cities et al, Federal Communications Commission, Docket Nos. 14-115 & 14-116, Aug. 28, 2014: http://apps.fcc.gov/ecfs/comment/view?id=6018325527

Introduction

The Federal Communications Commission's February 2015 Order preempting state law restrictions on local government ownership of broadband networks constitutes one of the most significant overreaches in the agency's history—a history which already includes plenty of overreaches. From the standpoint of constitutional federalism, the action is one of the most problematic ever taken by the Commission.

The FCC's claims of preemptive authority to interfere with the exercise of states' discretion over their political subdivisions clash with fundamental principles of constitutional federalism. The Supreme Court's jurisprudence has long recognized that states have broad discretion to delineate the powers local governments may exercise. Because Congress nowhere expressly has granted the FCC such preemptive authority over local government broadband networks, canons of statutory interpretation informed by constitutional principles mean that the FCC's action likely will be struck down in court.

I. Background

Over the last dozen years, a number of local governments have entered into the broadband Internet service business. Typically, local governments eager to construct and operate broadband networks offer rosy scenarios predicting high-quality services and low prices. Government-owned broadband networks usually receive start-up funding from municipal bond issues. In some instances, they receive funding directly from local taxes or fees.

Despite optimistic sales pitches by local politicians, a number of high-profile government-owned broadband networks have ended in financial failure. In such instances, significant debts from unsuccessful government-owned broadband projects have put strains on local government budgetary resources. For example, Burlington Telecom (BT) in Vermont failed to meet its service goals and borrowed $17 million from the city cash pool without permission from city officials or taxpayers. This prompted the city's mayor to settle with Citibank in 2013 for $10.5 million over additional debts.[1] Even after spending $40 million, iProvo, the broadband network started by Provo, Utah, was so financially troubled it was sold to Google for $1, requiring taxpayers to pay off its enormous start-up costs in the years ahead.[2] Lafayette Utilities Service's LUS Fiber network began operations in Lafayette, Louisiana in 2009. It has failed to produce its promised profitability, and Lafayette utilities customers faced the prospect of repaying debts of over $150 million.[3]

Government-owned broadband networks present additional concerns. A threshold issue is the problematic nature of government assuming the dual role of both enforcer of public law and competitor to private sector providers. This duality poses inherent conflicts-of-interest. For example, local governments may excuse their own networks from running the bureaucratic permitting and licensing gauntlet through which private providers must pass. Fear of disfavored treatment deters private market investment in broadband infrastructure. In addition, questions concerning the institutional incentives and

***Randolph J. May is President of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.*

*** Seth L. Cooper is a Senior Fellow of the Free State Foundation.*

competency of local governments operating capital-intensive advanced communications networks in rapidly innovating markets heighten the concerns of local taxpayers. And speech restrictions that are common in the terms of services of government-owned networks raise significant First Amendment issues.[4]

Whatever upsides government networks promise, the potential downsides have prompted approximately twenty states to restrict, in one way or another, local government entry into the broadband business. Several states outright prohibit government-owned broadband networks.[5] Short of an outright ban, other states impose procedural safeguards or conditions, such as public hearing requirements, preparation of business plans subject to public disclosure, and local voter approval.[6]

On July 24, 2014, local government-owned broadband projects in North Carolina and Tennessee petitioned the FCC to preempt aspects of their own states' legal restrictions.[7] The Electric Power Board of Chattanooga, Tennessee and the City of Wilson, North Carolina requested that the FCC preempt certain state law restrictions on municipal broadband networks pursuant to Section 706 of the Communications Act.[8]

In the months prior to the filing of the petitions, FCC Chairman Tom Wheeler publicly had stated his support for preemption.[9] On July 28, 2014, the FCC solicited public comments on the petitions.[10] That the FCC would consider preemption was widely expected following President Obama's January 13, 2015 speech explicitly touting government-owned networks.[11]

II. Analysis

A. The FCC's Preemption Order

On February 26, 2015, the FCC voted 3-2 to approve an order preempting certain provisions of Tennessee and North Carolina laws restricting government-owned networks.[12] The FCC "conclude[d] that the Tennessee and North Carolina laws are barriers to broadband infrastructure investment and that preemption will promote competition in the telecommunications market by removing statutory barriers to such competition."[13]

In support of its action, the FCC pointed to five sources of authority: (1) "Article I, section 8 of the Constitution gives Congress the power to regulate interstate commerce"; (2) "Internet access unquestionably involves interstate communications, and thus interstate commerce"; (3) "Congress has given the Federal Communications Commission the authority to regulate interstate communications"; (4) "The Commission has previously exercised its authority to preempt state laws that conflict with federal regulation of interstate commerce"; and (5) "section 706 of the 1996 Act directs the Commission to take action to remove barriers to broadband investment, deployment and competition."[14] In particular, the FCC asserted that "[S]ection 706 authorizes the Commission to preempt state laws that specifically regulate the provision of broadband by the state's political subdivision, where those laws stand as barriers to broadband investment and competition."[15]

The FCC maintained that it has authority to preempt "where a state has authorized municipalities to provide broadband, and then chooses to impose regulations on that municipal provider in order to effectuate the state's preferred communications policy objectives."[16] The Order characterized the Tennessee and North Carolina statutory provisions as merely "state-law communications policy regulations, as opposed to a state core function in controlling political subdivisions."[17] As indicated, two FCC Commissioners dissented from the Order.[18] Neither addressed the policy merits or demerits of government-owned networks. Rather, both dissenters insisted the FCC lacks the legal authority to preempt the state restrictions.

On March 20, 2015, the State of Tennessee filed a lawsuit in the Sixth Circuit challenging the FCC's decision.[19] Tennessee's petition argues the Order is contrary to the Constitution, exceeds the FCC's authority, is arbitrary and capricious and an abuse of discretion under the Administrative Procedures Act, and is otherwise contrary to law.

B. Section 706 Does Not Confer Preemptive Power on the FCC

The most obvious difficulty with basing preemptive authority on Section 706 is that the statute's language nowhere authorizes it. Section 706(a) provides:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans...by utilizing, 'in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[20]

Preemption is *not* one of the enumerated measures or methods. Inferring preemption from Section 706(a) is also difficult because of its poor fit with the statutory structure. Section 706(a) recognizes a role both for "[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services." Federal preemption of state laws imposing geographic or other forms of restrictions or safeguards on government ownership of broadband networks disregards the role of state officials that the statute explicitly acknowledges.

Under Section 706(b), if the Commission concludes that advanced telecommunications services are not being deployed to all Americans on a reasonable and timely basis, then both "[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services" shall "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[21] Controversially, the FCC has made negative findings under Section 706(b) in recent years.[22] But Section 706(b) similarly contemplates a role for state policymakers that would be rendered null by federal preemption. Further, as Commissioner Ajit Pai pointed out in dissent, even under the majority's analysis, federal preemptive power under Section 706(b) would appear to exist only so long as negative findings persisted.[23] Preemptive power would vanish should the FCC make a subsequent finding that broadband is being deployed to all Americans on a reasonable and timely basis. That odd result suggests preemption should not be read

into Section 706(b).

Section 601(c)(1) of the Telecommunications Act of 1996 also renders implausible the Order's interpretation of Section 706. It reads: "NO IMPLIED EFFECT- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."[24] Curiously, although the Order concedes that "[b]y its terms, section 601(c) prevents 'implied' preemption," it interprets the provision to implicitly give such preemptive powers to the FCC.[25] Such a reading is decidedly counter-intuitive. As Commissioner Pai wrote: "It is difficult to believe that Congress would have been concerned about implicitly superseding state law in the text of the Act yet would implicitly give the Commission the authority to do the exact same thing."[26]

Section 706 is best understood as a statement of Congressional policy to guide the FCC in carrying out its other statutory responsibilities. From Congress's highly consequential and unique grant of general regulatory forbearance authority in Section 10 of the Telecommunications Act of 1996,[27] it follows that Congress's express reference in Section 706 to the use of regulatory forbearance is also consequential, signaling the deregulatory thrust of the Commission's obligation to encourage broadband deployment on a reasonable and timely basis. Prior FCC precedents had determined that Section 706 is *not* an independent grant of agency authority but rather a deregulatory policy statement to guide agency action. In particular, the Commission's *Advanced Services Order* (1998) concluded: "[T]he most logical statutory interpretation is that section 706 does not constitute an independent grant of authority."[28]

In an effort to bolster its claims of authority to regulate broadband Internet services, the FCC's present majority, over dissent, now interprets Section 706 to be a source of regulatory power.[29] In *Verizon v. FCC* (2014), the D.C. Circuit deferred to the FCC's reinterpretation.[30] However, *Verizon v. FCC* did not decisively define the boundaries of the FCC's Section 706 authority or adjudicate any particular exercises of such authority. The D.C. Circuit's decision should not be regarded as the last word on the meaning of Section 706. The Sixth Circuit remains free to reach a different conclusion regarding Section 706's meaning. As indicated, even if Section 706 is regarded as a source of regulatory power rather than as a guide to policy implementation there is ample reason for concluding the Commission lacks authority for its preemption Order. But a deregulatory interpretation that rejects Section 706 as a source of regulatory power would be fatal to claims of authority on which the FCC's Order depends.

C. The FCC's Order Is Contrary to Agency Precedent Rejecting Preemption of Restrictions on Government-Owned Networks

In a 1997 Order, the FCC rejected a petition requesting it to preempt state law restrictions on municipal telecommunications networks based on Section 253(a) of the Communications Act.[31] This provision states: "No State or local statute or regulation, or other State or local legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service."[32]

As the FCC's 1997 Order declared: "[S]tates maintain authority to determine, as an initial matter, whether or to what extent their political subdivisions may engage in proprietary activities."[33] It also observed that preemption "effectively would prevent states from prohibiting their political subdivisions from providing telecommunications services, despite the fact that states could limit the authority of their political subdivisions in all other respects."[34]

This agency precedent cannot be avoided simply because Section 706 is now invoked as opposed to Section 253. The states' authority to decide "whether or to what extent their political subdivisions may engage in proprietary activities" is not altered just because a particular FCC majority wants local governments to offer broadband services. Federalism principles previously recognized by the FCC, grounded in the Constitution, do not lend themselves to dismissals based on "reasonable explanations" about current Commission policy objectives. For that matter, the 1997 Order recommended states consider restrictions on government-owned networks rather than total bans.[35] The FCC's present about-face regarding such restrictions hardly seems reasonable. Indeed, it seems arbitrary and capricious.

D. No Clear Statement of Congressional Intent to Preempt State Control Over Local Governments Exists

The clear statement doctrine requires that Congress speak with unmistakable clarity before federal preemption of "a decision of the most fundamental sort for a sovereign entity" will be considered.[36] The rule is in "acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." In *Gregory v. Ashcroft* (1991), the Court reiterated its longstanding jurisprudential requirement that "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute,'" and that "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States."[37]

Perhaps the most glaring analytical problem with the FCC's Order is its rejection of the clear statement doctrine's applicability. By employing hair-splitting arguments regarding state law restrictions on government-owned networks as well as core state sovereign powers, the FCC declined to analyze its Section 706-based preemptive action in light of the doctrine.

No fair reading of Section 706 can find any clear statement of congressional intent that the FCC can interpose itself between states and their political subdivisions. And Section 706 cannot be read to clearly state that Congress intended to preempt state authority over decisions about whether and to what extent to allow its political subdivisions to offer proprietary services.

The FCC attempts to dodge the clear statement doctrine by claiming "the issue before us concerns federal oversight of interstate commerce—'an area where there has been a history of significant federal presence'—not the inherent structure of state government itself."[38] According to the FCC, core state sovereignty concerns about control over political subdivisions

cease once such an outright ban on government networks is removed: "Because we read section 706 to give preemptive authority for state laws that target the regulation of broadband once a state has permitted cities to provide service, as opposed to laws that go to the 'historic police powers of the States,' the *Gregory* clear statement rule does not apply in this context."[39]

But, as explained below, the Order's overly narrow conception of state sovereignty concerns cannot be squared with the extremely broad concept of states' control over their political subdivisions, long recognized in Supreme Court decisions. Nor does the Order's rejection of the clear statement rule square with the Supreme Court precedent that is most on point.

E. The FCC Order Is Contrary to U.S. Supreme Court Precedent

The conclusion that Section 706 lacks a clear statement, and the FCC's corresponding lack of preemptive authority, is bolstered by *Nixon v. Missouri Municipal League* (2004).[40] In *Nixon*, the Supreme Court rejected federal preemption of Missouri's statute prohibiting its local governments from offering telecommunications services. More particularly, the Court expressly rejected claims that a clear statement of Congressional intent to delegate preemptive authority to the FCC was contained in Section 253(a)'s provision that "No State or local statute or regulation, or other State or local legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service." Unlike Section 706(a), Section 253(a) contains language prohibiting certain kinds of state or local laws or regulations. The Court nonetheless determined that application of the clear statement doctrine was required in light of the traditional state power that would be implicated by preemption, namely states' control over their own political subdivisions.

Relying on a long string of decisions, *Nixon* squarely recognized the problem that "preemption would come only by imposing interposing federal authority between a State and its municipal subdivisions, which our precedents teach 'are created as convenient agencies for exercising such of the government powers of the states as may be entrusted to them in its absolute discretion.'"[41] According to the Court, "[t]here is, after all, no argument that the Telecommunications Act of 1996 is itself a source of federal authority granting municipalities local power that state law does not."[42]

In *Nixon*, the Supreme Court also expressed concern over the federal "one-way ratchet" resulting from local governments being able to provide services without accountability to state legislative control.[43] Suppose a local government failed to operate its broadband networks in a financially responsible manner or abused its powers to give its network an unfair competitive advantage. If preempted, a state would be forbidden from changing policy by withdrawing its local governments from the broadband business.

By declining to preempt state laws that ban outright government networks, the FCC suggested the "one-way ratchet" concern was avoided. This hinges on the Order's supposed distinction between outright bans on the one hand and various types of restrictions short of an outright ban on the other. But as Commissioner Pai wrote, the distinction is "artificial and thus untenable" because "all conditions on the provision of services are effectively prohibitions when those specified conditions are not satisfied."[44] Certainly, the one-way ratchet is not avoided to the extent states seeking to withdraw their local governments from the broadband business find it prudent to grandfather existing networks while winding down or prohibiting others.

F. Constitutional Federalism Principles Prohibit FCC Preemption of State Law Restrictions on Government Broadband Networks

Finally, and most importantly, the FCC's preemption of state restrictions on government-owned broadband networks violates constitutional federalism principles. The Supreme Court has stressed that: "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."[45] The Constitution established "two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."[46] Indeed, "[t]he Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."[47]

Local governments are created by state constitutions through state legislation. They are accountable to the citizens of the respective states in which they exist. Thus, the Supreme Court has long recognized that "[s]tate political subdivisions are 'merely ... department[s] of the State, and the State may withhold, grant, or withdraw powers and privileges as it sees fit.'"[48] Our constitutional regime does not recognize, as a matter of legal status, "citizens" of Chattanooga or Wilson. It does recognize citizens of Tennessee and North Carolina. And the Constitution confers upon these citizens of states the authority to exert their will through their elected representatives to adopt laws that restrict municipal activities. In essence, this is what the Supreme Court reaffirmed in *Nixon,* declaring that "preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, 'are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'"[49] Preempting states' decision-making about whether or to what extent to grant powers to local governments is impermissible. A federal agency cannot turn local governments into separatist enclaves by granting them powers that their respective states never delegated in the first place.

Related to the clear statement doctrine is the canon of constitutional avoidance which demands a "clear indication" by Congress "where an administrative interpretation of a statute invokes the outer limits of Congress' power."[50] Indeed, "[t]his concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."[51] Under the constitutional avoidance doctrine, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[52] Rather than conclusively settle the constitutional issues, a reviewing court need only recognize

the serious constitutional issues presented in order to adopt a narrower reading of Section 706 that precludes the FCC's preemption claim.

III. Conclusion

The FCC's Order preempting state law restrictions on local government ownership of broadband networks is under review by the Sixth Circuit. The Order likely exceeds the agency's statutory authority and violates principles of constitutional federalism. The FCC's asserted authority to interfere with states' autonomy and discretion over the powers of their subdivisions is rather remarkable. A judicial ruling in the Commission's favor would constitute a severe shake-up to the structures of the Constitution's federalist system.

Endnotes

1 *See* Christopher Mitchell, *Learning from Burlington Telecom: Some Lessons For Community Networks*, Institute for Local Self-Reliance (August 2011), available at: http://www.muninetworks.org/reports/learning-burlington-telecom-some-lessons-community-networks; Mike Dooghue, *Citibank, Burlington reach settlement in $33M lawsuit*, Burlington Free Press (February 3, 2014), *available at* http://www.burlingtonfreepress.com/story/news/2014/02/03/mayor-to-announce-burlington-telecom-update/5182741/.

2 *See* Randolph J. May, *Google Goes to a Dollar Store*, FSF Blog (April 22, 2013), *available at* http://freestatefoundation.blogspot.com/2013/04/google-goes-to-dollar-store.html.

3 *See* Charles M. Davidson & Michael J. Santorelli, *Understanding the Debate Over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policy Makers: Lafayette Case Study*, Advanced Communications Law & Policy Institute at New York Law School (June 2014), *available at* http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/ACLP---Lafayette-Case-Study---June-2014.pdf; Steve Titch, Lessons in Municipal Broadband From Lafayette, Louisiana, Policy Study 424, Reason Foundation (November 2013), *available at* http://reason.org/files/municipal_broadband_lafayette.pdf.

4 *See* Enrique Armijo, *Municipal Broadband Networks Present Serious First Amendment Problems, Perspectives from FSF Scholars*, Vol. 10, No. 11 (February 23, 2015), available at: http://freestatefoundation.org/images/Municipal_Broadband_Networks_Present_Serious_First_Amendment_Problems_022015.pdf.

5 *See, e.g.*, Mo. Rev. Stat. § 392.410(7); Nev. Rev. Stat. § 268.086, § 710.147; Tx. Util. Code Ann. § 54.201 et seq.

6 *See, e.g.* Colo. Rev. Stat. Ann. § 29-27-201 et seq; Minn. Stat. Ann. § 237.19; N.C. Gen. Stat. §160A, article 16A.

7 Petition of the Electric Power Board of Chattanooga, Tennessee, Pursuant to Section 706 of the Telecommunications Act of 1996, for Removal of Barriers to Broadband Investment and Competition, WC Docket No. 14-116 (filed July 24, 2014); Petition of the City of Wilson, North Carolina, Pursuant to Section 706 of the Telecommunications Act of 1996, for Removal of Barriers to Broadband Investment and Competition, WC Docket No. 14-115 (filed July 24, 2014).

8 The Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996), as amended by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008), codified at 47 U.S.C. §§ 1302, 1303 ("Section 706").

9 *See, e.g.*, Tom Wheeler, *Remarks of Tom Wheeler, Chairman, Federal Communications Commission*, National Cable & Telecommunications Association (April 30, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-326852A1.pdf.

10 Public Notice: Pleading Cycle Established for Comments on Electric Power Board and City of Wilson Petitions, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks, WC Docket Nos. 14-115 and 14-116 (released July 28, 2014).

11 Barack Obama, Remarks by the President on Promoting Community Broadband, The White House, Office of the Press Secretary (January 15, 2015), available at: https://www.whitehouse.gov/the-press-office/2015/01/14/remarks-president-promoting-community-broadband.

12 *Memorandum Order and Opinion*, In the Matter of City of Wilson, North Carolina, Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq.; The Electric Power Board of Chattanooga, Tennessee, Petition for Preemption of Tennessee Code Annotated Sections 7-52-601, WC Docket Nos. 14-115, 14-116 (adopted Feb. 26, 2015; released Mar. 12, 2015) ("Order").

13 *Id.* §5.

14 *Id.* §6.

15 *Id.* §11.

16 *Id.* §11.

17 *Id.* §13.

18 *See id.* at 100-113 (Dissenting Statement of Commissioner Ajit Pai); *id.* at 114-116 (Dissenting Statement of Commissioner Michael O'Rielly).

19 *See* Tennessee v. FCC, Case No. 15-3291 (6th Cir.) (petition for review filed March 20, 2015).

20 Section 706(a).

21 Section 706(b).

22 *2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment*, In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, GN Docket No. 14-126 (adopted January 29, 2015; released February 4, 2015), available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-10A1.pdf.

23 Order at 107 (Pai dissent).

24 Codified at 47 U.S.C. § 152.

25 Order at § 153.

26 *Id.* at 106 (Pai dissent).

27 Codified at 47 U.S.C. §160(a).

28 *Opinion and Order and Notice of Proposed Rulemaking*, Deployment of Wireline Services Offering Advanced Telecommunications Capability et al., ("Advanced Services Order"), 13 FCC Rcd 2401 (1998), § 77.

29 *See, e.g.*, Order at 108-112 (Pai dissent); Randolph J. May and Michael O'Rielly, Conversation with Commission Michael O'Rielly, Free State Foundation's Sixth Annual Telecom Policy Conference, (March 18, 2018), available at http://www.freestatefoundation.org/images/March_18_2014_Agenda_030514.pdf; http://www.c- span.org/video/?318351-4/interview-michael-orielly.

30 740 F.3d 623, 639-40 (D.C. Cir. 2014).

31 *See Memorandum Opinion and Order* ("1997 Order"), In re Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, 13 FCC Rcd 3360, 3467 § 16, 3543-3548 §§ 179-188 (2007).

32 Codified at 47 U.S.C. § 253(a).

33 1997 Order, 13 FCC Rcd at 3548 § 186.

34 *Id.* at 3548 § 186.

35 *Id.* at 3549, § 190 (quoted in Order at 105 n.35 (Pai dissent)).

36 Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

37 *Id.* at 461 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

38 Order at § 12.

39 *Id.* at § 155.

40 541 U.S. 124.

41 *Id*. at 140 (quoting Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 607-608 (1991) and citing Columbus v. Ours Garage & Wrecker Service, *Inc*., 536 U.S. 424, 433 (2002)).

42 541 U.S. at 135.

43 *See* 541 U.S. at 135-137.

44 Order at § 105 (Pai dissent).

45 Printz v. U.S., 521 U.S. 898, 920 (1997) (quoting New York v. U.S., 505 U.S. 144, 166 (1992)).

46 *Id*. at 920 (quoting U. S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

47 *Id*. at 920 (citing *New York*, 505 U.S. at 168-169) (additional cites omitted).

48 Ysursa v. Pocatello Education Association, 555 U.S. 353, 362 (2009) (quoting Trenton v. New Jersey, 262 U.S. 182, 187 (1923). *See also* Louisiana ex rel. Folsom v. Mayor and Administrators of New Orleans, 109 U.S. 285, 287, (1883) ("Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits") (quoted in *Ysursa*, 555 U.S. at 362).

49 541 U.S. at 140 (quoting *Mortier*, 501 U.S. at 607-608).

50 Solid Waste Agency of Northern Cook Cty v. Army Corps. of Engineers, 531 U.S. 159, 172 (2001) (internal cites omitted).

51 *Id*. at 572.

52 DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988).