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## Municipal Broadband

In February, the Federal Communications Commission voted along party lines, 3-2, to preempt portions of two state laws that restrict how municipalities may construct and deploy their own broadband Internet networks. Regardless of the pros and cons of municipal broadband, the FCC's decision is unconstitutional, writes Lawrence J. Spiwak, president of the Phoenix Center for Advanced Legal & Economic Public Policy Studies.

### The FCC's New Municipal Broadband Preemption Order Is Too Clever by Half

LAWRENCE J. SPIWAK

This March, the Federal Communications Commission, at the urging of the White House,<sup>1</sup> voted along party lines to preempt portions of Tennessee and North Carolina laws designed to delineate the terms and conditions under which municipalities may construct and deploy broadband Internet networks in order to offer advanced communications services to the general public.<sup>2</sup> Regardless of what one may think

about the merits of municipal broadband, the FCC's actions have raised a serious issue of Constitutional law: that is, can the federal government dictate to a state how it governs its municipal subdivisions? Twice in this space I set forth several reasons why the law does not support the FCC's actions.<sup>3</sup> After reading the FCC's new *Order*, I remain unconvinced that the agency will prevail in court: The agency's pre-emption *Order* is unconstitutional.

**The FCC's Only Preemption Authority: Section 253** One of the boldest provisions in the Telecommunications Act of 1996 was Section 253, which provided the FCC with the then-new and narrow authority to preempt state laws and regulations. Under Section 253(a), "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 telecommunications service."<sup>4</sup> (Emphasis supplied.) If the FCC determines that a "State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection

<sup>1</sup> Fact Sheet: *Broadband That Works: Promoting Competition & Local Choice In Next-Generation Connectivity*, The White House, Office of the Press Secretary (January 13, 2015) (available at: <http://www.whitehouse.gov/the-press-office/2015/01/13/fact-sheet-broadband-works-promoting-competition-local-choice-next-gener>); Statement by Chairman Tom Wheeler on Community Broadband (February 2, 2015) (available at: [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2015/db0202/DOC-331805A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0202/DOC-331805A1.pdf)).

<sup>2</sup> *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,*

**Lawrence J. Spiwak** is the President of the Phoenix Center for Advanced Legal & Economic Public Policy Studies (<http://www.phoenix-center.org>), a non-profit 501(c)(3) research organization that studies broad public-policy issues related to governance, social and economic conditions, with a particular emphasis on the law and economics of the digital age.

*Tennessee, Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, FCC 15-25, MEMORANDUM OPINION AND ORDER, \_\_ FCC Rcd \_\_, (rel. March 12, 2015) (hereinafter "March 2015 Order").

<sup>3</sup> See Lawrence J. Spiwak, *Why the FCC Can't Preempt States on Muni-Broadband*, *Bloomberg Law* (February 20, 2015) (available at: <http://www.bna.com/why-fcc-cant-n17179923260>); Lawrence J. Spiwak, *FCC Has No Authority to Preempt State Municipal Broadband Laws*, *BLOOMBERG BNA* (August 6, 2014) (available at: <http://www.bna.com/fcc-no-authority-n17179893367>).

<sup>4</sup> 47 U.S.C. § 253(a).

(a)” then the “Commission shall preempt . . . to the extent necessary. . . .”<sup>5</sup> Using this authority, the FCC has a successful track record of preempting state laws and regulations which have deterred entry for private-sector network deployment.<sup>6</sup>

Seizing upon the language of Section 253(a), in 2001 proponents of municipal broadband argued that because municipal providers are an “entity,” the FCC should preempt those state laws which either prohibit or restrict municipal broadband deployment. While there was tremendous political pressure to preempt state legislatures at the time, a Democrat-controlled FCC unanimously (albeit “reluctantly”) ruled that the agency lacked any legal authority to preempt such laws.<sup>7</sup>

Undeterred, proponents of municipal broadband appealed the FCC’s rejection all the way to the U.S. Supreme Court in the case of *Nixon v. Missouri Municipal League*.<sup>8</sup> The Court, however, agreed with the FCC, finding that Section 253 does not provide the agency with preemption authority in this instance.

To begin, the Court went out of its way to note that “it is well to put aside” the public policy arguments favoring municipal broadband to support any “generous conception of preemption.” Why? Because the issue of preemption is one of Constitutional law and, as such, “the issue does not turn on the merits of municipal telecommunications services.”<sup>9</sup> This holding is critical and helpful in sniffing out weak arguments for preemption. In essence, the Court determined that it matters not how sweet municipal broadband can be made to sound, nor how bountiful its alleged benefits—as a matter of Constitutional law, the FCC has no legal authority to preempt state laws restricting or prohibiting municipal broadband.<sup>10</sup>

Indeed, the Court’s rationale for rejection was straightforward: “[F]ederal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen

disposition of its own power. . . .”<sup>11</sup> Thus, reasoned the Court, permitting preemption in this circumstance “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.’ ”<sup>12</sup>

**A New Theory: Section 706** Despite this defeat in *Nixon*, proponents of municipal broadband have spent the last decade trying to find an alternative legal theory of preemption of the nineteen or so state laws controlling how municipalities offer such services and, with the D.C. Circuit’s recent ruling in *Verizon v. FCC*,<sup>13</sup> believe they now may have finally found one—namely, the FCC’s authority in Section 706 of the Telecommunications Act of 1996.<sup>14</sup>

Under Section 706(a), the FCC may use, “in a manner consistent with the public interest, convenience and necessity, . . . regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” Section 706(b), in turn, states that if the FCC determines that advanced telecommunications capability is not “being deployed to all Americans in a reasonable and timely fashion,” then the FCC “shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”<sup>15</sup> While the FCC for many years after the passage of the 1996 Act had proudly found that broadband was, in fact, being deployed on a “reasonable and timely” basis, during the Obama Administration the FCC has radically reversed course and engaged in variety of factual gerrymandering to claim that broadband is *not* being deployed on a “reasonable and timely” basis so that it may invoke 706 to achieve a wide variety of regulatory goals.<sup>16</sup>

<sup>5</sup> 47 U.S.C. § 253(b).

<sup>6</sup> See, e.g., *In the Matter of the Public Utility Commission of Texas*, FCC 97-346, 13 FCC Rcd 3460, MEMORANDUM OPINION AND ORDER (rel. Oct. 2007).

<sup>7</sup> *In re Missouri Municipal League*, FCC 00-443, 16 FCC Rcd 1157, MEMORANDUM OPINION AND ORDER (rel. January 12, 2001); Concurring Statement of William E. Kennard, *In re Missouri Municipal League*, *id.* (“We vote reluctantly to deny the preemption petition of the Missouri Municipals because we believe that HB 620 effectively eliminates municipally-owned utilities as a promising class of local telecommunications competitors in Missouri. Such a result, while legally required, is not the right result for consumers in Missouri. Unfortunately, the FCC is constrained in its authority to preempt HB 620 by the D.C. Circuit’s *City of Abilene* decision and the U.S. Supreme Court’s decision in *Gregory v. Ashcroft* that require Congress to state clearly in a federal statute that the statute is intended to address the sovereign power of a state to regulate the activities of its municipalities.”)

<sup>8</sup> *Nixon v. Missouri Municipal League*, 541 U.S. 124 (2004).

<sup>9</sup> *Nixon*, *id.*, 541 U.S. 131-32 (emphasis supplied).

<sup>10</sup> Indeed, given the Constitutional law question at bar, it is important to recognize that *Nixon* did not involve a question of *Chevron* deference. Thus, a reviewing court is under no obligation to give the agency any deference to its likely argument that Section 706 provides the FCC with a separate source of preemption authority.

<sup>11</sup> *Id.* at 140.

<sup>12</sup> *Id.*

<sup>13</sup> *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

<sup>14</sup> 47 U.S.C. § 1302. George S. Ford and Lawrence J. Spiwak, *Justifying the Ends: Section 706 and the Regulation of Broadband*, 16 JOURNAL OF INTERNET LAW 1 (January 2013).

<sup>15</sup> There is some debate whether Section 706(a) is independent from Section 706(b), which states that if the FCC determines that advanced telecommunications capability is not “being deployed to all Americans in a reasonable and timely fashion”, the FCC “shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” While the agency once believed that Section 706(b) was required to trigger Section 706(a), the FCC reads the D.C. Circuit’s opinion in *Verizon* to mean that Sections 706(a) and 706(b) are independent grants of authority. For a full discussion, see Lawrence J. Spiwak, *What Are the Bounds of the FCC’s Authority over Broadband Service Providers?—A Review of the Recent Case Law*, 18 JOURNAL OF INTERNET LAW 1 (2015);

<sup>16</sup> *Id.*, see also Ford and Spiwak, *supra* n. 14; Lawrence J. Spiwak, *The FCC’s Legal Gymnastics: Why Wheeler’s Title II Approach to Network Neutrality Will Lead to Litigation*, MULTICHANNEL NEWS (February 22, 2015) (available at: <http://www.multichannel.com/blog/mcn-guest-blog/fccs-legal-gymnastics/388213>).

Among these goals is municipal broadband. Indeed, seizing upon this statutory language of Section 706, FCC Chairman Tom Wheeler, a vocal proponent of municipal broadband,<sup>17</sup> boldly stated last year that “I believe the FCC has the power—and I intend to exercise that power—to preempt state laws that ban competition from community broadband.”<sup>18</sup>

Taking up Chairman Wheeler’s invitation, last summer the municipal provider in Chattanooga, Tennessee, filed a petition with the FCC asking the agency to use its authority under Section 706 to preempt a Tennessee state law which, the municipal entity claims, prevents it from expanding beyond its existing franchise territory.<sup>19</sup> In addition, the City of Wilson, North Carolina, filed a similar petition for the FCC to preempt “level playing-field” requirements designed to prevent government-owned networks from “crowding out” private sector investment<sup>20</sup> (a risk, by the way, which the FCC specifically recognized in its *2010 National Broadband Plan*).<sup>21</sup> The White House, sensing political gold with its base, jumped on the bandwagon and incorporated by reference the Chattanooga and North Carolina petitions as part of President Obama’s 2015 State of the Union speech.<sup>22</sup> This past March, the FCC, although an independent agency, followed through on President Obama’s promise and granted both petitions under Section 706 of the Telecommunications Act.<sup>23</sup>

**The FCC’s March 2015 Order.** Recognizing that they were bound by the Supreme Court’s holding in *Nixon*, the FCC did not seek to preempt the Tennessee and North Carolina laws outright. Instead, the FCC came up with a rather innovative argument: According to the

FCC, once a state has made the decision to permit municipal broadband generally, then the FCC has the authority under Section 706 to preempt any state laws which impose restrictions on the ability of these municipalities to deploy broadband infrastructure—in the case of Tennessee, territorial restrictions; in the case of North Carolina, “level playing” field restrictions to ensure that municipal broadband providers did not crowd out private investment. The FCC’s argument was that such state laws were a “barrier to infrastructure investment” generally rather than an outright prohibition (the latter being the focus of the *Nixon* case).<sup>24</sup>

At the root of the FCC’s argument is the following, flawed logic: (1) broadband Internet access is inherently an inter-state service and thus subject exclusively to FCC jurisdiction; (2) Congress charged the FCC to promote the deployment of broadband “to all Americans” under Section 706; (3) under the Supremacy Clause of the Constitution federal laws trumps state laws<sup>25</sup>; and, therefore, (4) the FCC may use Section 706 to preempt state laws which restrict the deployment of municipal broadband overall. As the FCC explained, because in its view the state laws at issue were *not* enacted to protect taxpayers<sup>26</sup> but instead enacted “under pressure from national cable companies, telephone companies, and the American Legislative Exchange Council (ALEC),”<sup>27</sup> the “states here are deciding that incumbent broadband providers require protection from what they regard as unfair competition and regulating to restrict that competition.”<sup>28</sup> Thus, according to the FCC, such laws “step[] into the federal role in regulating interstate communications. Where those laws

<sup>17</sup> Tom Wheeler, *Removing Barriers to Competitive Community Broadband*, *Official FCC Blog* (June 10, 2014) (available at: <http://www.fcc.gov/blog/removing-barriers-competitive-community-broadband>).

<sup>18</sup> Remarks of Tom Wheeler, Chairman, Federal Communications Commission, before the National Cable & Telecommunications Association (April 30, 2014) (available at: [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0430/DOC-326852A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0430/DOC-326852A1.pdf)).

<sup>19</sup> *In the Matter of The Electric Power Board of Chattanooga, Tennessee* (filed July 24, 2014) (available at <https://www.epb.net/downloads/legal/EPB-FCCPetition.pdf>). With a speed generally unheard of for the FCC, four days later the agency established its pleading cycle. See 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, WCB Docket Nos. 14-115 and 14-116 (July 28, 2014) (available at: [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0728/DA-14-1072A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0728/DA-14-1072A1.pdf)).

<sup>20</sup> 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) (available at: <http://apps.fcc.gov/ecfs/document/view?id=7521737310>).

<sup>21</sup> CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, Federal Communications Commission (March 16, 2010) (available at: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-296935A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf)) at p. 153 (“Municipal broadband has risks. Municipally financed service may discourage investment by private companies. Before embarking on any type of broadband buildout, whether wired or wireless, towns and cities should try to attract private sector broadband investment.”)

<sup>22</sup> See *supra* n. 1.

<sup>23</sup> *Supra* n. 2.

<sup>24</sup> See, e.g., *March 2015 Order*, *id.* at ¶ 147. (“To be sure, as explained below, a different question would be presented if we were asked to preempt under section 706 a law that goes to a state’s power to withhold altogether the authority to provide broadband. But 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, we find that such laws fall within our authority to preempt.”)

<sup>25</sup> See, e.g., *City of New York v. FCC*, 486 U.S. 57 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, (1984).

<sup>26</sup> Indeed, the FCC was quick to dismiss any argument that such laws were designed to protect taxpayers from the well-documented record of municipal broadband failures. (For some good summaries of municipal broadband failures, see, e.g., George S. Ford, *Why Chattanooga is not the “Poster Child” for Municipal Broadband*, *PHOENIX CENTER POLICY PERSPECTIVE* No. 15-01 (January 20, 2015) (available at: <http://www.phoenix-center.org/perspectives/Perspective15-01Final.pdf>); Charles M. Davidson and Michael J. Santorelli, *Understanding the Debate Over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policy Makers*, *Advanced Communications Law & Policy Institute* (June 2014) (available at: <http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/ACLP-Government-Owned-Broadband-Networks-FINAL-June-2014.pdf>.) Instead, employing a rather remarkable bit of circular logic, the FCC turned the taxpayer protection argument on its head, arguing that “even if we focus on taxpayer protection, as some request, the evidence before us suggests that the Tennessee and North Carolina laws before us actually increase the likelihood of failure because of the barriers that they erect to the successful deployment of broadband infrastructure by these entities.” *March 2015 Order*, *supra* n. 2 at ¶ 62.

<sup>27</sup> *Id.* at ¶ 37.

<sup>28</sup> *Id.* at ¶ 147.

conflict with federal communications policy and regulation, they may be preempted.”<sup>29</sup>

**Legal Problems with the FCC’s March 2015 Order.** While clever, the agency’s legal arguments are perhaps too clever by half. Indeed, despite its protestations to the contrary, the FCC still has multiple *Nixon* problems.

As noted a moment ago, while the FCC concedes that it lacks the authority to preempt state laws that prohibit municipal broadband outright, the FCC argued that it has the authority to preempt the state laws in question because “a state has permitted a political subdivision to enter the market as a broadband provider, but also seeks to impose regulations on the municipal provider in order to effect separate communications policy goals.” In this particular case, argues the FCC, “the state has crossed from a ‘decision of the most fundamental sort for a sovereign entity’ into a matter in which conflicting federal law is presumed to preempt under the Commerce Clause.”<sup>30</sup> However, while the FCC is correct that federal law generally trumps inconsistent state law when it comes to communications policy, the focus of the FCC’s preemption efforts here—i.e., territorial restrictions and “level playing field” rules—go directly to a state’s control of its political subdivisions and, by extension, how it governs its citizens.

*Nixon* also comes up in the agency’s overall interpretation of Section 706.

At bottom, it is important to recognize the simple fact that nowhere in Section 706 does any derivation of the word “preemption” appear—only the word “forbearance”—and there is a big legal difference between the two concepts.

To wit, Black’s Law Dictionary defines the concept of forbearance simply as “refraining from action.” In contrast, Black’s defines preemption as the “doctrine adopted by the U.S. Supreme Court holding that certain matters are of such a national, as opposed to local character that federal laws preempt or take precedence over state laws.” Given the Constitutional implications of preemption, therefore, there is a much higher legal standard to meet if an agency of the federal government would like to preempt a state law. Indeed, as the Supreme Court observed in *Wyeth v. Levine*, there are

two cornerstones of our pre-emption jurisprudence. First, “the purpose of Congress is the ultimate touchstone in every pre-emption case.” Second, “[i]n all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ . . . we ‘start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’ ”<sup>31</sup>

So, given that Congress deliberately chose to exclude the term “preemption” from Section 706(a), it is difficult to see how the FCC’s use of Section 706 to preempt state laws would reflect a “clear and manifest purpose of Congress.”

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at ¶ 156 (citations omitted).

<sup>31</sup> *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citations omitted); see also *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (“[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.’ ”) (citations omitted).

In its *Order*, the FCC side-stepped this point by arguing that “Congress need not ‘explicitly delegate’ the authority to preempt”<sup>32</sup> because “Congress delegated the authority [to the FCC] to act in this sphere.”<sup>33</sup> According to the FCC,

Our preemption authority falls within the “measures to promote competition in the local telecommunications market” and “other regulating methods” of section 706(a) that Congress directed the FCC to use to remove barriers to infrastructure investment. It likewise falls within the available “action[s] to accelerate deployment” we may take in order to “remove barriers to infrastructure investment” and to “promote competition” described in section 706(b). As Congress would have been aware in passing the 1996 Act, the FCC has in the past used preemption as a regulatory tool where state regulation conflicts with federal communications policy. Given this history against which Congress legislated, the best reading of section 706 is therefore that Congress understood preemption to be among the regulatory tools that the FCC might use to act under section 706.<sup>34</sup>

The FCC’s logic is a bit of a stretch for two fundamental reasons.

First, the FCC’s logic rests upon the notion that Section 706 provides a wholly-independent source of preemption authority. A simple reading of the case law reveals that it does not.

According to the clear language of the D.C. Circuit’s holding in *Verizon*, “any regulatory action authorized by Section 706(a) [must] fall within the FCC’s subject matter jurisdiction over such communications—a limitation whose importance this court has recognized in delineating the reach of the Commission’s ancillary jurisdiction.”<sup>35</sup> According to the D.C. Circuit’s holding in *Comcast v. FCC*, this means that any use of Section 706 must be tied directly to a specific delegation of authority in “Title II, Title III, or Title VI. . . .”<sup>36</sup>

So what does this language mean in practice? It means if the FCC wants to preempt under its Section 706 mandate, then it needs to look exclusively at Section 253—Section 706 does not provide an independent source of authority.

This reading of Section 706 is nothing new to the courts. In fact, the D.C. Circuit’s ruling in *Ad Hoc Telecommunications Users Committee v. FCC*—a case the FCC cites with approval several times in its *March 2015 Order*—is directly on point.<sup>37</sup>

In *Ad Hoc*, the court was asked to rule on the FCC’s decision to use its Section 10 authority to forbear from dominant carrier price regulation for special access services. To support its decision to forbear, the FCC also argued that its actions would further Section 706’s goals of promoting broadband deployment. After review, the court held that the “general and generous phrasing of § 706 means that the FCC possesses significant, albeit not unfettered, authority and discretion to

<sup>32</sup> *March 2015 Order*, *supra* n. 2 at ¶ 145.

<sup>33</sup> *Id.* at ¶ 142.

<sup>34</sup> *Id.* at ¶ 144.

<sup>35</sup> *Verizon*, *supra* n. 13, 740 F.3d 623 at 639-40 (emphasis supplied). It is interesting to note that when the FCC cited this exact passage from *Verizon* in its *Order*, the agency specifically omitted the italicized language above. See *March 2015 Order* at ¶ 138.

<sup>36</sup> *Comcast v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010) (emphasis supplied).

<sup>37</sup> *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903 (D.C. Cir. 2009).

settle on the best regulatory or deregulatory approach to broadband—a statutory reality that assumes great importance when parties impose courts to overrule FCC decision on this topic.”<sup>38</sup> However, the court made it crystal clear that the FCC’s forbearance authority did not lie in Section 706 itself, but exclusively in Section 10. As the court stated bluntly, “As contemplated by § 706 . . . [f]orbearance decisions are governed by the Communications Act’s § 10. . . .”<sup>39</sup>

Given the court’s ruling in *Ad Hoc*, the FCC’s argument that Section 706 provides the agency with independent preemption authority falls apart. Section 706’s explicit forbearance authority is governed by Section 10, which means that Section 706’s implicit preemption authority (to the extent it exists) is governed by Section 253. And, if Section 706’s preemption authority is, in fact, grounded in Section 253, then *Nixon* is directly on point and the FCC loses in court.

Finally, the FCC’s argument that it need not have an express indication of Congressional intent to preempt using Section 706 is also belied by the plain language of *Nixon*. As the Court observed, while the FCC has ample authority to preempt state laws and regulations that create barriers to entry for *private* entities, the Court in *Nixon* specifically found that “neither statutory structure nor legislative history [of Telecommunications Act of 1996] points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms.” Thus, reasoned the Court, the “want of any ‘unmistakably clear’ statement to that effect is fatal” to any argument that Congress in-

tended the FCC to have any authority to preempt state laws which restrict municipal broadband.<sup>40</sup>

**Conclusion.** Promoting the rapid deployment of broadband to all Americans, as Section 706 commands, is certainly a worthy social goal. And, in some select cases, municipal broadband may even make a positive contribution towards achieving this goal. Yet, regardless of whatever one may feel about the pros and cons of municipal broadband, it is *completely irrelevant* to the Constitutional issue raised by the FCC’s *March 2015 Order*. As Justice Sandra Day O’Connor wrote for the majority in *Gregory*, if our federalist system “is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.”<sup>41</sup>

Again, we are not talking about the FCC’s clear authority to preempt local laws that would restrict *private sector* broadband investment and deployment. Quite to the contrary, this case involves the discrete legal question of whether the FCC has the authority to preempt the definitive policy choices of the Tennessee and North Carolina legislatures—acting to protect the welfare of their respective citizens—to delineate the exact terms and conditions under which their political subdivisions may engage in retail commerce.

To date, the courts have respected this basic principle of federalism. And when this case is reviewed, I fully expect them to do so again.

<sup>38</sup> *Id.* at 906-07.

<sup>39</sup> *Id.* at 907.

<sup>40</sup> *Nixon*, *supra* n. 8, 541 U.S. at 141.

<sup>41</sup> *Gregory*, *supra* n. 31, 501 U.S. at 459.