Congressional Pre-emption Trends

By Audrey Wall [1]
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Congress slowly exercised its power of pre-emption to remove regulatory powers from state and local governments commencing from 1790 through the mid-1960s, when the pace accelerated. A significant number of acts contain mandates requiring state and/or local governments to initiate a compliance action(s) or impose prohibitions. No pre-emption mandate relief act has been enacted since 1996. This article focuses on the pre-emption acts signed by President Barack Obama since January 2009.

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The U.S. Constitution delegates to Congress a number of broad pre-emption powers which remove regulatory powers from states completely, partially or contingently without guidelines or restrictions other than the presidential veto or court invalidation of pre-emption acts. The number of such statutes totaled 678 on Nov. 1, 2011, and produced a silent revolution that restructured in a fundamental manner national and state-local governmental regulation.

Pre-emption Types

There are 10 types of pre-emption: (1) complete pre-emption removes all regulatory power in a field from states (Copyright Act of 1790); (2) partial pre-emption removes some, but not all, regulatory powers in a field from states and may assume the form of a savings clause (Commodity Futures Act of 2000); (3) national minimum regulatory standards permit a state to continue to regulate in a given field provided the state standards meet or exceed the national standards and the state has qualified personnel and necessary equipment (Air Quality Act of 1967); (4) maximum standards place caps on the stringency of state regulations (Gramm-Leach-Bliley Financial Modernization Act of 1999); (5) procedural pre-emption specifies the appeals procedure (Gramm-Leach-Bliley Financial Modernization Act of 1999); (6) contingent pre-emption applies to a state or a local government only if a specified condition(s) exists (Voting Rights Act of 1965); (7) complete pre-emption may provide for a limited regulatory authority turn-back to states (United States Grain Standards Act of 1968); (8) complete pre-emption may authorize cooperative state enforcement (Consumer Credit Reporting Reform Act of 1996); (9) complete pre-emption may exempt from pre-emption a state whose legislature enacted a specified uniform state law (Electronic Signatures in Global and National Commerce Act of 2000); and (10) complete pre-emption may allow states to enact only a regulatory
standard identical to the federal standard (*Health and Safety Act of 1968*).

**The Obama Pre-emption Record**
President Obama has not held a state or a local government executive office, and his views on preemption were not known when he assumed the presidency. He signed 49 pre-emption acts between Jan. 20, 2009, and Nov. 1, 2011.

**Antiterrorism**
The four antiterrorism acts removed little power from state and local governments as most had been removed by earlier antiterrorism acts and two acts simply extended earlier acts.

**Banking, Commerce, Energy and Finance**
President Obama signed 11 bills relating to banking, commerce, energy and finance. The most important one is the complex 847-page *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*. *The Credit Card Accountability Responsibility and Disclosure Act* was enacted in 2009 and was amended later in the year to extend its effective date to Jan. 31, 2013. The act provides greater protection for credit and prepaid gift cardholders; places limits on increases in interest rates, fees and finance charges; enhances consumer information disclosures; and provides special protection for young consumers. The other acts removed relatively little power from states.

**Environment, Health and Safety**
President Obama signed 19 pre-emption bills pertaining to environment, health and safety, and a health bill that may or may not be pre-emptive depending upon a forthcoming U.S. Supreme Court decision. The 905-page *Patient Protection and Affordable Care Act of 2010* is the most controversial pre-emption act because of its requirement that everyone not covered by another person’s insurance policy—with specified exceptions—must purchase health insurance or pay a penalty. The other acts removed small amounts of powers from subnational governments.

**Foreign Affairs**
President Obama signed 10 foreign affairs preemption bills, including free trade agreements with Columbia, Panama and South Korea. Three acts extend the Burmese import restrictions and three acts extend the *Andean Trade Preference Act*. The *Securing the Protection of Our Enduring and Established Constitutional Heritage Act of 2010* seeks to protect freedom of speech and the press against individuals who obstruct the free expression of U.S. authors and publishers by filing lawsuits in foreign jurisdictions offering less protection to authors and publishers than they have in the United States.

**Intellectual Property**
President Obama signed one intellectual property act. The 57-page *Leahy-Smith America Invents Act of 2011* is a major revision of patent law that includes provisions relating to the first inventor to file a patent application, derived patents, appeal to the patent and trial and appeal board, inter partes review, among others. The act also stipulates “no patent may issue on a claim directed to or encompassing a human organism.”

**Political Privileges**
The *Military and Overseas Voter Empowerment Act of 2009* seeks to facilitate voting in federal elections by military personnel and civilians residing in other nations. The *Military Spouses Residency Relief Act of 2009* applies to voting for federal offices, and provides that a spouse accompanying a member of the U.S. armed forces does not lose residency in a state regardless of whether the person intends to return to the state, and the spouse is deemed not to have become a resident of another state.
Telecommunications
President Obama signed five telecommunications bills. The most important one is the Twenty-First Century Communications and Video Accessibility Act of 2010 that seeks, among other goals, to ensure that hearing aids are compatible with telephones and relay services utilized by deaf-blind individuals. Shortly thereafter, the act was amended to make technical corrections. Two acts extended three existing acts, and the other two acts removed little state regulatory authority.

Pre-emption Impact
The number of complete pre-emption acts and other acts containing a pre-emption provision(s) during any time period is not an accurate indicator of the amount and importance of discretionary regulatory authority removed from state and local governments. Ten bills signed by President Obama simply extend the sunset provisions of acts. An 11th act redefined a switchblade knife. A 12th act made technical corrections to a 2010 act. The Formaldehyde Standards for Composite Wood Products Act of 2010 applies only to composite wood. Many of the other acts made relatively minor changes to existing laws. Republican control of the U.S. House of Representatives following the 2010 general elections will lead to the enactment of fewer pre-emption acts in 2011 and 2012 because of the differing views of the House and the Democrat-controlled Senate on important issues.

Two major 2010 pre-emption acts have, or will have, a major impact on the federal system.

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
The Dodd-Frank act affects nearly every aspect of financial markets, does not seek the reform of regulatory agencies and cannot be explained adequately in a short article.

The act amends a relatively large number of existing acts containing pre-emption provisions, generally strengthening them, and directs 11 federal financial departments and agencies to promulgate 385 new administrative regulations.

The act focuses primarily on financial services companies and neglects the “parallel (shadow) banking sector” consisting of “money market funds collecting uninsured short-term deposits and funding financial firms ...” The act establishes a Financial Stability Oversight Council, composed of federal regulators and chaired by the secretary of the Treasury. All 26 bank holding companies with consolidated assets equal to or exceeding $50 billion as of Jan. 1, 2010, that “received financial assistance under the Capital Purchase Program established under the Troubled Asset Relief Program” are subject to more stringent regulations than smaller bank holding companies. The council determines the financial market utilities that are systemically important.

The act seeks to “mitigate systemic risk in the financial system and promote financial stability” by granting the Board of Governors “an enhanced role in the supervision of risk management standards for systemically important payment, clearing, and settlement activities by financial institutions.” The terms “systemically important” and “systemic importance” are defined as “a situation where the failure of or a disruption to the functioning of a financial market utility or the conduct of a payment, clearing, or settlement activity could create, or increase, the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States.” Section 1044 clarifies state law applicable to national banks and subsidiaries by stipulating, “State consumer financial laws are pre-empted, only if (A) application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State; (B) ...the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; (C) the State consumer financial law is pre-empted by a provision of Federal law other than this title.”
The act created a federal Bureau of Consumer Financial Protection, an independent agency within the Federal Reserve System, with authority to regulate “the offering and provision of consumer financial products or services under the Federal consumer financial laws.” It also mandated the agency director to establish an Office of Fair Lending and Equal Opportunity to oversee and to enforce federal laws “to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities.” The act delegated broad rulemaking authority subject to exceptions and exceptions to exceptions to the director.

Subtitle D, preservation of state law, stipulates Title X of the act with the exceptions of five sections “may not be construed as annulling, altering or affecting, or exempting any persons subject to the provisions of this title from complying with the statutes, regulations, orders or interpretations in effect in any State, except to the extent that any such provision of law is inconsistent with the provisions of this title, and then only to the extent of the inconsistency.” In addition, the act stipulates a state statute, regulation or order is not inconsistent with the title if the protection offered is greater than the protection provided under the title. The provision in effect is a national minimum standards one. The act also specifically preserves the enforcement powers of the states by allowing state attorneys general to bring a civil action in any U.S. District Court located in their state.

The section also contains a savings clause providing this title of the act and section of 24 of the Federal Reserve Act do not pre-empt state banking laws applicable to a subsidiary or affiliate of a national bank with the exceptions of a subsidiary or an affiliate chartered as a national bank. Furthermore, the comptroller of the currency is directed to review every five years a determination that a provision of federal law pre-empts a state consumer financial law, and to publish a notice in the Federal Register to continue or rescind the determination or advance a proposal to amend the determination. In addition, a section stipulates the act, relative to federal savings associations, “does not occupy the field in any area of State law.”

The act’s proponents contend it will prevent another financial crisis as severe as the most recent one. Opponents disagree, with some contending the act is unworkable.

**Patient Protection and Affordable Care Act of 2010**

The Affordable Care Act and its companion, Health Care and Education Reconciliation Act of 2010, are primarily conditional grant-in-aid programs in terms of their impact on state and local governments, with the exception of the mandate that individuals with specified exceptions must purchase health insurance, effective Jan. 1, 2014. The mandate pre-empts current state law in Idaho, Utah and Virginia.

McKinsey & Co. in 2011 released a report, based on a survey of business owners, concluding “that nearly a third of employers would definitely or probably drop coverage for employees” when the act’s provisions take effect. Other reports, including one by the Urban Institute, reached conflicting conclusions.

The act’s most controversial provision is the individual mandate to purchase health insurance, which was included because of the fear numerous healthy young individuals would delay purchasing insurance for many years until they become ill, thereby threatening to bankrupt the national health care system. Shortly after the act’s enactment, Congress enacted the Health Care and Education Reconciliation Act of 2010, which amended several provisions of the act and lowered the penalty for not purchasing insurance from $750 to $695.

The act contains two religious exemptions from the individual mandate for people of a denomination, such as the Amish and the Christian Scientists, whose religious conscience bars the acceptance of
the benefits of private or public insurance, and members of a health-sharing ministry “that share a common set of ethical and religious beliefs and share medical expenses among members in accordance with those beliefs ...” Individuals who cannot afford the cost of the insurance coverage are also exempted from the mandate.

President Obama on April 14, 2011, signed the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011. This act, among other provisions, repealed the requirement in the Patient Protection and Affordable Care Act that all businesses must file a 1099 form with the Internal Revenue Service for each vendor with whom they have annual cumulative transactions of $600 or more, and a second 1099 reporting requirement imposed on owners of rental real estate. Small businesses in particular strongly opposed them. A second provision repealed the expansion of information reporting requirements for rental property expense payments.

Twenty-nine challenges to the law were filed by May 31, 2011, with nine pending in U.S. District Courts, seven awaiting action by circuits of the Court of Appeals, and 13 suits dismissed. States presented two types of challenges: They contend (1) the individual mandate is an unconstitutional regulation and (2) provisions of the act regulating the states violate the structural principles of federalism. The federal government, in its defense of the act, has relied primarily on the interstate commerce clause and, alternatively, on the necessary and proper clause and the taxation power.

Judge Henry Hudson of the United States District Court for the Eastern District of Virginia in 2010 invalidated the mandate, thereby continuing the validity of the Virginia law that stipulates: “No resident of this Commonwealth ... shall be required to obtain or maintain a policy of individual insurance coverage.” The law otherwise would have been invalidated under the supremacy of the law provision of article VI of the U.S. Constitution.

Judge Roger Vinson of the United States District Court for the Northern District of Florida in 2011 also struck down the mandate as unconstitutional and opined, “Because the individual mandate is unconstitutional and not severable, the entire Act must be declared void.”

The U.S. District Court for the Eastern District of Michigan, the Western District of Virginia and the District of Columbia rejected challenges to the law. Judge Norman K. Moon of the District Court for the Western District of Virginia upheld the individual mandate on the ground the decision not to purchase insurance was an economic decision within the scope of Congress’ powers under the interstate commerce clause.

Judge Gladys Kessler of the U.S. District Court for the District of Columbia on Feb. 22, 2011, rejected challenges that the penalty provided by the act is a tax, and the individual mandate exceeds the scope of the interstate commerce clause and is a burden placed on religious freedom.

The Court of Appeals for the Sixth Circuit in Cincinnati on June 1, 2011, commenced oral hearings on a district court’s affirmation of the constitutionality of the act. Judge James L. Graham asked Acting U.S. Solicitor General Neal K. Katyal a most pertinent question: “Where, ultimately, is the limit on Congress’ power?” He replied the government did not suggest there are no limits. Graham responded by asking, “Where are they? I want to find them.” Katyal did not respond to the question directly, but contended the mandate “regulates the way they pay for health care they will inevitably consume.” He also argued the lawsuit should be dismissed because Jann DeMars, a plaintiff, purchased an insurance policy in October 2010. Her lawsuit filed in March 2010 maintained she had standing to sue because she did not have health insurance.

The Sixth Circuit of the Court of Appeals, by a 2-to-1 vote June 30, upheld the constitutionality of the
act, opining the mandate regulates economic activity and the decision to forego insurance “is no less economic than the activity of purchasing an insurance plan.” The 11th Circuit of the Court, by a 2-t-1 vote Aug. 12, opined the individual mandate exceeded Congress’s power under the interstate commerce clause, and was a civil penalty, not a tax, authorized by the constitution’s taxing and spending clause. The court held the mandate could be severed from the act.

Should the individual mandate survive constitutional scrutiny by the U.S. Supreme Court, collecting the penalties from defaulting individuals will be difficult since the act waived criminal penalties and prohibited the imposition of levies or liens on taxpayer property for failure to pay.

Conclusions
With the exception of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the pre-emption acts signed by President Obama did not remove important regulatory powers from state and local governments. Experience with the Dodd-Frank law is too limited to permit drawing firm conclusions relative to whether it will achieve its ambitious stated goals. Several television, radio and blog commentators do not anticipate the act will be successful in preventing another major recession. Nevertheless, it is reasonable to conclude various interest groups will continue to seek amendments to the act and will lobby energetically the federal agencies drafting implementing rules and regulations.

A strong possibility exists that the United States Supreme Court will invalidate the provision in the Patient Protection and Affordable Care Act of 2010 imposing a mandate on individuals, with a few exceptions, to purchase health insurance or to pay a penalty. Proponents maintain the mandate is within the scope of the power to regulate interstate commerce delegated by the U.S. Constitution to Congress or the necessary and proper clause, or the taxation clause. Contending a decision not to purchase health insurance is interstate commerce stretches the interstate commerce clause to unimaginable limits. Such an interpretation of the mandate bears only an extremely tenuous relationship with the interstate commerce clause. Proponents of the law rely upon what is labeled an aggregation theory, positing individual decisions not to purchase health insurance collectively impact interstate commerce.

Predicting the success of the act is impossible at this time as various provisions, including the key individual mandate, will be phased in over a period of several years.

Evidence suggests Congress will continue to enact new pre-emption statutes in response to inventions, technological developments, and lobbying by private and public sector groups. Such statutes primarily will involve banking, environmental protection, financial services, foreign trade, health and telecommunications. Although no transportation act, other than the transportation-related Pedestrian Safety Enhancement Act of 2010, has been enacted to date during the Obama administration, such a pre-emption act probably will be enacted in the future.

Congress generally continues to ignore the controversies over apportionment of the waters of major rivers and state taxation of interstate commerce, subjects Congress has plenary authority to address. Congress deliberately left the settlement of these controversies to the courts and, in particular, to the U.S. Supreme Court, which has opined on numerous occasions the political branch, not the judiciary, is best qualified to address these controversies.