Trends in Congressional Preemption

By Joseph F. Zimmerman

Congressional preemption of state governments' regulatory powers dates to 1790, but it generally did not have a major impact until 1965, when the number of preemptive statutes increased sharply. Most congressional preemptions involve commerce, the environment, finance and health. Technological developments and interest group lobbying will result in the enactment of new preemption statutes — particularly in the areas of banking, communications, finance services, insurance and taxation — unless states initiate actions producing harmonious interstate regulatory policies.

The U.S. Constitution established an *Imperium in Imperio* (division of powers) by delegating important powers to Congress, reserving other important powers to the states, and authorizing concurrent powers, including the power to tax. No constitutional attempt was made to maintain a balance of powers between the national government and the states. The Constitution grants Congress certain exclusive powers, such as coinage, and reserves other exclusive powers to the states, such as the police power. Congressional powers are latent ones and may be devolved to states. The best-known and most important devolution statute is the McCarran-Ferguson Act of 1945 (59 Stat. 33), which authorizes states to regulate the insurance industry.

The Constitution (Art. I, Section 10) contains preemption provisions removing powers from states: "No State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility." This section also lists other actions states may take only with the consent of Congress, including entering into an interstate compact. Furthermore, treaties entered into by the United States, such as the North American Free Trade Agreement of 1993 (107 Stat. 2057), preempt state impediments to international trade.

The Constitution's framers did not intend the initial constitutional division of powers to be permanent, as evidenced by inclusion of Article V, which details procedures for constitutional amendments and authorizes Congress to use the powers delegated in Article I, Section 8 to remove regulatory powers from the states. Six constitutional amendments — the 13th, 14th, 15th, 19th, 24th and 26th — each delegates power to Congress to enforce the amendment. The privileges and immunities, due process of law, and equal protection of the laws clauses of the 14th Amendment have had a great impact on states as they have been employed by Congress and/or courts to preempt concurrent and reserved powers of the states.

This article focuses on trends in Congress' use of its constitutionally delegated powers to totally or partially remove state regulatory powers and to achieve harmonious interstate regulatory policies by employing innovative incentives in lieu of preemption. Congress' failure to include an express preemption clause — the "silence of Congress" — in a number of statutes has led courts, particularly the U.S. Supreme Court, to determine whether statutes are preemptive.

Preemption Powers

The Constitution assigns Congress the responsibility to enact laws, based upon its delegated powers, including the necessary and proper clause, adjusting its regulatory competence and the competence of states to enable the economic and political union to respond effectively to many domestic and foreign developments without the need for a constitutional amendment. The Constitution grants power to Congress in broad terms, thereby facilitating Congress' role as the principal architect for redesigning aspects of the federal system on a continuing basis — subject, of course, to court challenges that allege congressional statutes encroach upon powers reserved for the states in the 10th Amendment.

Authors commonly cite the interstate commerce clause and the supremacy of the laws clause as the sources of Congress' constitutional authority to exercise preemption powers. The former clause is not the only one that can be used to remove authority from states, as evidenced by references below to the copyright and patent acts. The latter clause is limited to "conflict preemption"; *i.e.*, a court may invalidate a state constitutional or statutory provision if it conflicts with a congressional statute based upon a delegated power.

The invalidation of a specific state statute on the ground of a conflict does not deprive states of all concurrent powers to regulate in the given field. Of course, subsequent state laws enacted in the field may be subject to court challenges if they result in new conflicts. The reader should note that the courts, not Congress, decide whether there is a direct conflict between a federal law and a state law of a magnitude to trigger activation of the supremacy of the laws clause.

Congress is not limited to "conflict preemption" and prospectively can totally or partially preempt state regulatory authority in the absence of state constitutional and statutory provisions by exercising its delegated powers, including the necessary and proper clause, which allows enactment of preemption and other laws not based upon a specifically delegated power. Chief Justice John Marshall opined in *McCulloch v. Maryland* in 1819 "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end ... are constitutional."[1] In consequence, Congress may enact a "field preemption" statute totally depriving state legislatures of authority to enact regulatory statutes in a specified field for the first time.

Commencing with *Fletcher v. Peck* in 1810, the U.S. Supreme Court relied upon "conflict preemption" in striking down state statutes until 1912.[2] In that year, the Court declared in *Southern Railway Company v. Reid* the supremacy of the Interstate Commerce Act of 1887 over a conflicting North Carolina law that mandated all railroad companies to carry freight "tendered at a regular station" and removed from state legislatures the power to enact any law on the subject because "Congress has taken possession of the field of regulation."[3]

States are not always opposed to preemption statutes. For example, Congress enacted the Commercial Motor Vehicle Safety Act of 1986 (100 Stat. 3207) at the request of states. The states were unable to cooperatively solve the problem created by commercial-vehicle drivers who hold operator licenses issued by a number of states and have had their license suspended or revoked by one state, but who continue to drive with a second license issued by another state.

Total Preemption

Preemption powers may be classified as total, partial and contingent in terms of their effect. A total congressional preemption statute, or "field preemption," removes all state regulatory powers in a given field and may assign responsibility for regulation to a national government department or agency, unless the statute relates to deregulation. States, however, may continue to play a role related to the preempted field if authorized by Congress or in emergency situations. Experience with the totally preemptive Atomic Energy Act of 1946 (60 Stat. 755), for example, revealed that the U.S. Nuclear Regulatory Commission lacks adequate resources to protect public health and safety in the event of a radioactive discharge at a nuclear power plant and must rely upon state and local governments for an immediate response.

There are 14 classes of total preemption statutes, including "restraints" that remove all regulatory authority from states and ones that allow states to cooperate with federal departments and agencies to conduct inspections and/or enforce national regulatory standards. The Bus Regulatory Reform Act of 1982 (96 Stat. 1102), for example, prohibits states from regulating economic aspects of bus companies (such as fares and routes), but allows states to remain responsible for bus safety. Congress enacted four total preemption statutes authorizing a limited turn-back of regulatory authority to states commencing with the Atomic Energy Act of 1959 (73 Stat. 688) and including the United States Grain Standards Act of 1968 (82 Stat. 769), which permits states to request the administrator of the Federal Grain Inspection Service to delegate to them authority to perform official inspection and weighing. A small number of total preemption statutes — such as the Age Discrimination in Employment Amendments of 1986 (100 Stat. 3342) — authorize federal administrators to enter into cooperative enforcement agreements with state counterpart administrators without turning back regulatory authority to the states.

Partial Preemption

A partial preemption statute removes part of state regulatory authority in a specified field while leaving undisturbed other regulatory powers. For example, the Occupational Safety and Health Act of 1970 (84 Stat. 1590) allows states to promulgate standards, such as ergonomic ones, in the absence of a federal standard. A number of otherwise total preemption statutes contain a savings clause stipulating that a state law is not preempted "unless there is a direct and positive conflict" between it and the federal law. The Gun Control Act of 1968 (82 Stat. 1226) is a good example.

Contingent Preemption

In 1965, Congress developed a new type of partial preemption statute, which I termed "minimum standards preemption," and it has produced a revolution in national-state relations.[4] The Water Quality Act of 1965 (79 Stat. 903) authorizes the secretary of the interior (now the Environmental Protection Agency administrator) to establish national water-quality standards and to assign "regulatory primacy" to each state submitting a plan with standards equal to or exceeding the national ones and an adequate enforcement plan. In other words, a state may continue to be entirely responsible for determining water-quality standards and enforcing them if the submitted plan is approved, provided the standards do not place an undue burden on interstate commerce. The statute also may be viewed as a "contingent" total preemption one because the U.S. EPA is responsible for enforcing the national standards within in a state if it does not apply for or returns regulatory primacy. EPA monitors states with regulatory primacy and may intervene if a state is not enforcing minimum standards. There have been a number of instances where states either have not applied for regulatory primacy or have returned it.

This type of partial preemption seeks to form a national-state partnership and allows a state to tailor its regulatory program to address unique conditions. Federal bureaucrats play a central regulatory role, because this type of preemption statute is a "skeleton" one, outlining a general policy and authorizing department and agency heads to draft and promulgate implementing rules and regulations detailing the policy. Considerable bargaining occurs between federal and state administrators prior to the promulgation of federal rules and regulations. Economic interest groups also lobby federal administrators responsible for promulgating rules.

A "standard contingent" preemption statute is suspensive in nature and does not remove state powers unless specified conditions exist. The Voting Rights Act of 1965 (79 Stat. 437) applies to a state or a local government only if two conditions exist within the jurisdiction: less than 50 percent of the voters participated in the previous presidential election and a voting device, such as a literacy test, was in effect when the statute was enacted.

Preemption Trends

Inventions and technological developments have spurred the enactment of many preemption statutes. Congress enacted the first two such statutes in 1790, establishing a uniform copyright system and a uniform patent system. Congress' response to inventions, however, is not always rapid. The Interstate Commerce Act (24 Stat. 379), which created the Interstate Commerce Commission to regulate railroad fares and tariffs, was not enacted until 1887.

For more than a century, Congress exercised preemption powers on a limited basis, enacting only 29 such statutes by 1900. Several of these were subsequently repealed.[5] The primary foci of these statutes were commerce, health and safety. However, it is important to note that between 1866 and 1875, Congress enacted seven civil- and voting-rights preemption statutes, based on the 14th and 15th Amendments. In 1875, the U.S. Supreme Court in *State v. Reese* (91 U.S. 214) invalidated most provisions of the 1870 and 1871 Voting Rights Acts on the ground that they also protected the voting rights of white citizens, while the 15th Amendment protects only the voting rights of blacks.

In the 20th century, Congress increasingly relied upon conditional grants-in-aid to persuade states to implement national policies through the early 1960s, while continuing to enact a limited number of preemption statutes. Only 16 preemption statutes were enacted during the 1940s and 24 were enacted during the 1950s, with most relating to commerce and health.

Starting in 1965, the number of preemption statutes exploded, with 36 enacted between 1965 and 1969. Many were related to civil rights and environmental protection. Congress enacted a total of 102 preemption statutes during the 1970s, 93 during the 1980s, and 65 during the 1990s. The bulk of these statutes involved commerce, finance and health, but banking also emerged as an important preempted area.

The reasons for the sharply increased use of congressional preemption powers included: the growing awareness of the interstate nature of many public problems; the states' general failure to enact harmonious regulatory statutes and form effective cooperative programs to solve problems; activism by certain members of Congress seeking to establish a leadership record by solving major problems as part of their strategy to win a future presidential election; and public and private interest groups successfully lobbing Congress to enact preemption statutes.

Although the number of unfunded mandates enacted decreased after the Republican Party assumed control of Congress in 1995, the number of preemption statutes enacted did not; 47 such statutes were enacted between 1995 and 2002. Several of these were important ones. The Telecommunications Act of 1996 (110 Stat. 61) preempts all state and local government legal barriers to firms providing any interstate or intrastate telecommunications service, but authorizes states to manage their public rights-of-way and to require providers to pay reasonable fees for the use of rights-of-way on a nondiscriminatory basis. The act (110 Stat. 124-25) also stipulates that local governments cannot require or prohibit the provision of telecommunications services by a cable operator. And the Internet Nondiscrimination Act of 2001 (115 Stat.703) forbids subnational governments to tax Internet sales.

The 104th Congress was sensitive to state and local officials' criticisms of unfunded federal mandates and enacted the Unfunded Mandates Reform Act of 1995 (109 Stat. 48), establishing new mandatory congressional procedures for enacting such mandates. The following year, Congress enacted the Safe Drinking Water Act Amendments of 1996 (110 Stat. 1613), providing relief from expensive directives contained in the Safe Drinking Water Act Amendments of 1986 (100 Stat. 651), which threatened numerous small local governments with the choice of either bankruptcy or abandoning their drinking water supply systems, and also placed major financial burdens on larger local governments.

Innovative Trends

Several innovative congressional statutes are designed to encourage states to initiate a specific common regulatory action under the threat of preemption. The Port and Tanker Safety Act of 1978 (92 Stat. 1475) authorizes the secretary of transportation to require a federally licensed pilot on each ship "engaged in foreign trade" in navigable waters where a pilot is not required by state law. This requirement is automatically terminated when a state legislature enacts a law requiring a state-licensed pilot.

The Coast Guard Authorization Act of 1984 (98 Stat. 2862) directs the U.S. secretary of transportation to develop standards for determining whether the operator of a marine recreational vessel is intoxicated. The Coast Guard responded in 1987 by promulgating a rule (33 CFR §95.025) stipulating that if a state blood alcohol content (BAC) standard exists, it is the national standard within that state. In consequence, the national standard (currently 0.8 BAC) applies only if there is no state standard. This statute was designed to encourage each state legislature to enact a BAC standard for operators of such vessels.

The 1986 amendments to the Atlantic Striped Bass Conservation Act (100 Stat. 989) contains a contingent provision requiring states to comply with the management plan developed by the Atlantic States Marine Fisheries Commission or be subject to a striped bass fishing moratorium imposed by the U.S. Fish and Wildlife Service. The commission, created by an interstate compact, lacks enforcement powers.

The Abandoned Shipwreck Act of 1987 (102 Stat. 432) is an example of a state-friendly total preemption statute. Technological developments have helped to locate abandoned historic shipwrecks, but this has raised a legal question about who owns the wrecked ships once they are located. The act asserts a federal government title to each such shipwreck and directs that the federal title be transferred to the state in which it is located.

The Department of Transportation Appropriation Act of 1990 (104 Stat. 2185) includes a section effectively preempting state regulatory power by requiring each state legislature to enact a statute providing that a motor-vehicle driver convicted of a drug-related crime will automatically have his or her operator license revoked. This statute is innovative because it allows a state to "opt out" of the directive; to do so, the legislature must enact a resolution and the governor must send a concurrence letter to the secretary of transportation. Congress assumed that few, if any, state legislatures would vote to "opt out" of the directive.

The Riegel-Neal Interstate Banking and Branching Efficiency Act of 1994 (108 Stat. 2343) also contains an "opt out" section and authorizes a state legislature to prohibit interstate branching within the state otherwise authorized by the act. In addition, this act contains an "opt in" section (108 Stat. 2352) allowing a legislature to permit interstate branching through *de novo* branches, provided that the state law "applies equally to all banks; and expressly permits all out-of-state banks to establish *de novo* branches" in the state.

The Gramm-Leach-Bliley Act of 1999 preempted state insurance statutes and regulations in 13 regulatory areas and threatened to establish a national system for licensing insurance agents if 26 state legislatures did not enact harmonious licensing statutes (as determined by the National Association of Insurance Commissioners) by November 12, 2002. On September 10, 2002, the association certified that 35 states had enacted such statutes. In an attempt to forestall future congressional preemption, the association drafted an Interstate Insurance Product Regulation Compact in 2002 that would establish a commission with power to promulgate uniform rules relating to individual and group annuity, life insurance, disability income, and long-term care insurance policies. This proposed compact authorizes a member state to "opt out" of a regulation promulgated by the commission. Should the compact become effective, extensive state utilization of the "opt out" provision could result in nonharmonious laws and might encourage additional congressional preemption of state insurance regulatory laws.

The Electronic Signatures in Global and National Commerce Act of 2000 (114 Stat. 464) preempted

44 state digital signatures laws with respect to interstate and foreign commerce. The act, however, exempts from preemption (114 Stat. 468) any state statute or rule constituting "an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999." This statute is another example of Congress using its preemption power to encourage states to enact harmonious regulatory laws.

Conclusions

The sharp increase in the number of total and partial preemption statutes during the past four decades suggests states have been deprived of a significant portion of their original reserved powers. A paradox, however, is involved. States today are exercising more powers than they exercised a few decades ago. Minimum standards preemption statutes have encouraged state legislatures to enact regulatory statutes in functional fields, particularly environmental ones, they generally had neglected in the past.

Field preemption by Congress may have undesirable consequences. The 1992 U.S. Supreme Court decision holding that the Airlines Deregulation Act of 1978 (92 Stat. 1705) strips states of all regulatory authority in the field made it impossible for state attorneys general to individually or cooperatively enforce state deceptive practices suits against airlines.[6] It is incumbent upon Congress to reexamine total preemption statutes to determine whether state legislatures should be allowed to enact limited regulatory statutes to protect their citizens.

Experience also reveals that federal preemption laws do not always achieve their declared goals. Congress has preempted to a substantial degree the states' authority to regulate the financial securities industry. In April 2002, New York State Attorney General Eliot Spitzer demonstrated the regulatory inadequacy of the U.S. Securities and Exchange Commission's supervision of financial markets by using his state's 1921 Martin Act, authorizing him to exercise jurisdiction over trading in securities.[7] Spitzer's investigation of Merrill Lynch & Company revealed that some of its analysts had pretended to impartially recommend that clients purchase shares of "dot com" companies whose business Merrill Lynch's investment bankers were seeking, even though the analysts knew the stocks were not sound investments. The company negotiated a settlement with the attorney general involving the payment of $100 million in fines to 48 states and apologized to investors.

What are the implications of past preemption trends for the future? It is apparent that technological developments and interest group lobbying will result in the enactment of new preemption statutes — particularly in the areas of banking, communications, financial services, insurance and taxation. Major technological developments are generating pressures for congressional preemption of state regulatory statutes in other areas, as well. For example, telemedicine, including teleconferencing of medical experts, permits diagnosis and treatment of patients in rural and other areas lacking medical specialists. Unfortunately, current state licensure laws impede the use of this new technology, because specialists fear disciplinary actions if they practice medicine remotely in states in which they are not licensed.

State authority to license motor-vehicle operators also is subject to a growing challenge as the result of the fact that several of the September 11, 2001, terrorists held fraudulent licenses or ones issued by states with lax motor-vehicle licensing statutes or regulations. Bills have been introduced in Congress to establish national minimum state motor-vehicle operator license standards.

Multistate and multinational corporations have been pressuring Congress to preempt state taxing powers by establishing state tax jurisdiction standards, income apportionment rules, and tax-base definitions. The corporations argue that harmonious state tax policies would reduce the compliance burden and ensure greater tax equity.

State legislatures desiring to preserve their regulatory powers must seriously consider: 1) entering into interstate regulatory compacts, or enacting uniform or parallel regulatory state laws to forestall additional preemption; 2) urging Congress to include a provision in a preemption bill making it effective only if harmonious state laws are not enacted by a specified date; and 3) lobbying for authority permitting states to exercise a degree of regulatory authority in newly preempted fields.[8]

Notes

[1] *McCulloch v. Maryland*, 17 U.S. 316 at 421, 4 Wheat. 316 at 421 (1819).

[2] *Fletcher v. Peck*, 10 U.S. 87, 6 Cranch 87 (1810).

[3] *Southern Railway Company v. Reid*, 222 U.S. 424 at 442, 32 S.Ct. 140 at 144 (1912).

[4] Joseph F. Zimmerman, *Federal Preemption: The Silent Revolution* (Ames: Iowa State University Press, 1991), 92-96. See also Joseph F. Zimmerman, *American Federalism: The Growth of National Power* (Leicester: Leicester University Press, 1992).

[5] Joseph F. Zimmerman and Sharon Lawrence, *Federal*

Statutory Preemption of State and Local Authority: History, Inventory, and Issues (Washington, D.C.: U.S. Advisory Commission on Intergovernmental Relations, 1992), 45.

[6] *Morales v. Trans World Airlines Incorporated*, 504 U.S. 374, 112 S.Ct. 2031 (1992).

[7] *New York Laws of 1921*, chap. 649 and *New York General Business Law*, §§352 *et seq*. (2003 Supp.). See also Richard Perez-Pena and Patrick McGeehan, "Assault on Wall St. Misdeeds Raises Spitzer's U.S. Profile," *The New York Times*, November 4, 2002, 1, B6.

[8] Joseph F. Zimmerman, *Interstate Cooperation: Compacts and Administrative Agreements* (Westport, CT: Praeger Publishers, 2002).

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