

Congressional Preemption and the States

By Joseph F. Zimmerman

National-state relations have undergone a major transformation since 1965, when Congress sharply increased the pace of enactment of regulatory preemption statutes including those in regulatory areas that had been the exclusive preserves of the states.¹ Protection of the reserved regulatory powers of the states against further congressional encroachment will necessitate enactment of new interstate regulatory compacts and/or uniform state laws.

Ratification of the proposed U.S. Constitution by the requisite number of states in 1788 established the world's first federal system and created a Congress possessing broad powers exercisable to remove completely or partially the regulatory powers of the states.¹ It should be noted that Congress may devolve most of its regulatory powers upon the states. During its first session in 1789, Congress for the first time devolved a power (1 Stat. 54) to states by authorizing them to regulate marine port pilots.

In the same year, Congress exercised its powers of complete supersession of existing and prospective conflicting state laws by enacting the *Copyright Act* (1 Stat. 124) and the *Patent Act* (1 Stat. 109). A total of 535 complete or partial preemption statutes were enacted in the period 1789 to 2005 with 145 enacted since 1990. A number of these statutes contain preemptive provisions in two or more regulatory areas or amend earlier preemption statutes on the same subject. The importance and goal(s) effectiveness of the statutes vary greatly. Preemption statutes may include a sunset clause. The *Internet Tax Nondiscrimination Act of 2001* (115 Stat. 703) contained a Dec. 31, 2003 sunset date, but was renewed retroactively and prospectively by Congress (118 Stat. 2615), effective Dec. 4, 2004, for a period of three years.

The U.S. Constitution established the first federal system and thereby created potentially serious problems that do not exist in a unitary nation—non-uniform state statutes and conflicting national and state statutes. The problems were not serious ones until the post-Civil War period when industrialization and railroads made the market a national one and necessitated expanded national and state regulation.

Nature of Preemption

Section 8 of Article I of the Constitution and six constitutional amendments delegate to Congress, in very broad terms, latent powers that may be employed to

remove regulatory powers from states completely or partially. The most commonly employed preemption power is based upon the authority of Congress to regulate interstate commerce and trade with foreign nations and the Indian tribes on reservations. Although the U.S. Supreme Court on a number of occasions urged Congress to exercise its delegated interstate commerce power, it is exercised on a discretionary basis by the national legislature which may not be forced to exercise this power.² The failure of Congress to employ this power until 1887 led to the term the “silence of Congress” as it relied upon the judicial system to protect the economic union from interstate trade barriers. Congressional preemption statutes are subject to court challenges alleging the statutes exceed the limits of delegated powers by encroaching, for example, upon the powers reserved to the states and the people by the 10th Amendment to the constitution.³

The delegated powers are supplemented by the necessary and proper clause (Art. I, §8) authorizing Congress to enact statutes necessary to effectuate the delegated powers, but the clause does not delegate a specific power to Congress. Similarly, the Constitution's supremacy of the laws clause (Art. VI) does not delegate a power to Congress, but simply provides for the displacement of a state law or any of its provisions directly conflicting with a provision of a national law as determined by a court.

Preemption Statutes

Congressional statutes superseding state statutes are classifiable as (1) complete, (2) partial, and (3) contingent. A complete preemption statute removes all regulatory powers in a given field, such as motor vehicle safety standards, from states. There are 18 subtypes of complete preemption statutes. A trade treaty validly entered into by the United States with a foreign nation, for example, is the supreme law of the land and is implemented by an act of Congress

that negates all conflicting state constitutional and statutory provisions.⁴ Several statutes, including the 1968 amendments (100 Stat. 3342) to the *Age Discrimination Act*, authorize the administering department or agency to enter into an agreement with individual states providing them with authority to enforce the provisions of the statutes. And the *Federal Railroad Safety Act of 1970* (84 Stat. 971) permits the administrative delegation of authority to states to perform railroad safety inspections utilizing federal standards.

The first of 12 types of partial preemption statutes invalidates only part of the regulatory powers of states in a specified field, thereby allowing states to continue to regulate the remainder of the field. The second type, minimum standards preemption, has had a major impact on national-state relations by generally fostering a cooperative national-state partnership to solve major problems such as air and water pollution. Congress employs this type by authorizing the concerned federal department or agency to promulgate minimum regulatory standards and to delegate regulatory primacy to states submitting a plan containing standards at least as stringent as the national ones and evidence that states possess the necessary qualified personnel and equipment. Regulatory primacy avoids dual regulation by the national government and state governments since only the latter regulate and the national agency is limited to monitoring state performance and revoking regulatory primacy if states fail to enforce their standards.

A contingent preemption statute is effective only if a specified condition(s) exists. Two such preemption statutes have been enacted: *Voting Rights Act of 1965* (79 Stat. 437) and *Gramm-Leach-Bliley Financial Modernization Act of 1999* (113 Stat. 1338). The latter act contains a provision threatening to establish a national licensing system for insurance agents if 26 states failed to develop a uniform licensing system by Nov. 12, 2002. Thirty-five states were certified on Sept. 10, 2002, as having uniform licensing statutes and preemption was avoided.

A preemption statute may be short and easily understood or several hundred pages in length and exceptionally complex as illustrated by the *Clean Air Act Amendments of 1990* (104 Stat. 2399). Numerous preemption statutes authorize the administering department or agency to promulgate administrative rules and regulations to implement the act fully. Such rules and regulations often are lengthy and technical in nature, and may invalidate conflicting state statutes and administrative rules and regulations.

An increasing trend is the inclusion of several preemption statutes in appropriations acts that are hundreds of pages in length. Examples include the *Commodities Futures Modernization Act of 2000* (114 Stat. 2763A-365) in the *Consolidated Appropriations Act for Fiscal Year 2001*, *Satellite Home Viewer Extension and Reauthorization Act of 2004* (117 Stat. 3393) in the *Consolidated Appropriations Act of 2005*, and the *Improved Security for Drivers' Licenses and Personal Identification Cards Acts of 2005* (119 Stat. 311) in the *Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act of 2005*.

Plaintiffs may request a state court or the U.S. District Court to interpret the provisions of a preemption statute or its implementing rules and regulations and determine whether there is a direct conflict triggering activation of the supremacy of the laws clause.⁵

Preemption Trends

Most preemption statutes are products of interest group lobbying. The motor vehicle industry, faced with differing air quality standards regulations promulgated by states, lobbied Congress to completely remove air quality regulatory authority from states by enacting the *Air Quality Act of 1967* (81 Stat. 485) in order to avoid the possibility that each manufacturer would have to develop 50 emission control systems to meet different states' standards. California's air quality standards were stricter than the proposed national standards contained in the bill. Those proposed standards would have been superseded and the state lobbied for an exemption that was incorporated in the act. On occasion, state officers request Congress to enact a preemption statute because of the failure of cooperative state efforts to solve the national problem such as commercial vehicle operators who continue to drive after revocation of their license(s) by one or more states. Governors requested enactment of the *Commercial Motor Vehicle Safety Act of 1986* (100 Stat. 3207) that makes it a federal crime for the operator of a commercial motor vehicle to hold a commercial operator's license issued by more than one state.

As noted, the first Congress enacted two preemption statutes and it appeared that such statutes might be enacted on a regular basis. Nevertheless, only 29 such statutes were enacted during the following 110 years. Subsequently, such statutes were enacted at the following pace: 14 (1900–09), 22 (1910–19), 17 (1920–29), 31 (1930–39), 16 (1940–49), 24 (1950–59), 47 (1960–69), 102 (1970–79), 93 (1980–89), 87 (1990–99), and 58 (2000–05).

FEDERAL-STATE RELATIONS

The Republican-Controlled Congress

The Republican Party, often viewed as favoring states' rights, has controlled Congress since 1995. The pace of enactment of preemption statutes by the Republican-controlled Congress declined to 86 from 102 statutes enacted during the 11-year period ending in 1994.

Several trends are evident. Increased emphasis has been placed on protecting consumers as evidenced by the *Consumer Credit Reporting Act of 1996* (110 Stat. 3000-426), *Consumer Leasing Act Amendments of 1996* (110 Stat. 3009-471), *Consumer Reporting Employment Clarification Act of 1998* (112 Stat. 3208), *Securities Litigation Uniform Standards Act of 1998* (112 Stat. 3227), and *ATM Fee Reform Act of 1999* (113 Stat. 1601). In contrast, only two civil rights acts were enacted: *Age Discrimination in Employment Amendments of 1996* (110 Stat. 3009-23) and the *Religious Land Use and Institutionalized Persons Act of 2000* (114 Stat. 803).

Eight banking, commerce and finance preemption statutes were enacted: *Riegle-Neal Clarification Act of 1997* (111 Stat. 238), *Securities Litigation Uniform Standards Act of 1998* (112 Stat. 3227), *Gramm-Leach-Bliley Financial Modernization Act of 1999* (113 Stat. 1338), *Commodity Futures Modernization Act of 2000* (114 Stat. 2763A-65), *Public Company Accounting Reform and Corporate Responsibility Act of 2002* (116 Stat. 746), *Check Clearing for the 21st Century Act of 2003* (117 Stat. 1177), *Internet Tax Freedom Act of 2004* (118 Stat. 2615), and *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (119 Stat. 23). The *Gramm-Leach-Bliley Act* is a particularly important one in that it removed many of the legal barriers, national and state, separating the banking and insurance industries established by the *Glass-Steagall Act of 1933* (48 Stat. 162). Nevertheless, banks have been slow to enter the insurance and investment banking areas. Insurance companies also have been slow to enter the banking and investment banking areas although MetLife—and State Farm—established subsidiary banks. The *Internet Tax Freedom Act of 2004* is of particular importance as it deprives states and local governments that levy a sales tax of revenues totaling in excess of an estimated \$16 billion annually.

Congress enacted six free trade agreements with foreign nations since President George W. Bush assumed office in 2001. These agreements are part of the supreme law of the land and negate all conflicting state constitutional, statutory and administrative provisions of the states. Currently, the president is promoting a free trade agreement for all nations in

the western hemisphere and a similar agreement with Mongolia.

The terrorists' assaults on the United States on Sept. 11, 2001, were responsible for the enactment of four important preemption statutes: *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* (USA Patriot Act) (115 Stat. 396), *Homeland Security Act of 2002* (116 Stat. 2135), *Terrorism Risk Insurance Act of 2002* (116 Stat. 2322), and *Improved Security for Drivers' Licenses and Personal Identification Cards Act of 2005* (119 Stat. 311). The latter act in particular will be expensive for states to implement.

Eleven health and safety preemption statutes were enacted: *Food Quality Protection Act of 1996* (110 Stat. 1489), *Health Insurance Portability Act of 1996* (110 Stat. 1936), *Mental Health Parity Act of 1996* (110 Stat. 2945), *Newborn and Mother's Health Protection Act of 1996* (110 Stat. 2935), *Professional Boxing Safety Act of 1996* (110 Stat. 327), *Safe Drinking Water Amendments of 1996* (110 Stat. 1613), *Campus Sex Crimes Prevention Act of 2000* (114 Stat. 1537), *Violence Against Women Act of 2000* (114 Stat. 1491), *DNA Sexual Assault Justice Act of 2004* (118 Stat. 2271), *Food Allergen Labeling and Consumer Protection Act of 2004* (118 Stat. 905), and *Partial Birth Abortion Ban Act of 2004* (117 Stat. 1201).

Three preemption acts are designed to protect children and eliminate pornography: *Child Pornography Prevention Act of 1996* (110 Stat. 3009-26), *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003* (117 Stat. 2699), and *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003* (117 Stat. 676).

Conclusions

The large number of congressional preemption statutes enacted in recent decades superficially suggests Congress is riding roughshod over the states. A closer inspection of national-state relations reveals they generally are good and the role of the states has increased since the terrorist attacks on Sept. 11, 2001. Congress is well aware the national government is incapable of solving all national problems, including terrorism, without the assistance of subnational governments. Minimum environmental standards acts in particular have fostered a close national-state partnership to solve problems.

Admittedly, certain preemption statutes have adverse consequences for many states in the form of loss of tax revenues attributable to the *Internet Tax*

Freedom Act of 2004 and implementation costs as illustrated by the *Clean Air Act* and the *Clean Water Act*. It should be noted, however, that Congress provides conditional grants-in-aid to assist states in achieving clean air and clean water goals. Forty-five states levying a corporate franchise or income tax also are concerned they may be faced with additional loss of tax revenues if Congress enacts the proposed *Business Activity Tax Simplification Act of 2005* (H.R. 1956) that would prohibit each state to tax the net income of an out-of-state business firm unless it has a physical nexus to the state as defined in the proposed act.

How effective are congressional preemption statutes? Not all have been examined in-depth, but the effectiveness of air and water quality statutes has been limited and has necessitated congressional extensions of the deadlines for achievement of the mandated quality standards. New York Attorney General Eliot Spitzer's investigations of large investment banking and other financial firms led to negotiated settlements and revealed the inadequacies of the U.S. Securities and Exchange Commission implementation of ten congressional regulatory securities acts. And the *Junk Fax Prevention Act of 2005* does little to prevent junk facsimile transmissions because business firms may send such transmissions to everyone with whom they have an "established business relationship."

On the other hand, the *Check Clearing for the 21st Century Act of 2003* has been implemented successfully with benefits accruing to banks in the form of reduced back-office processing costs and decreased processing time and to consumers in an improved flow of information and quicker access to deposited funds.

What do the trends since 1995 portend for future preemption statutes? A reasonable conclusion is that many of the most important laws will relate to banking, commerce, finance and taxation. The high business compliance costs associated with non-harmonious state tax laws will result in continued lobbying of Congress to establish tax jurisdictional standards and mandate the use of a common allocation and apportionment formula for state taxation of interstate commerce. The relative "silence of Congress" on this subject increasingly will be broken, thereby relieving the U.S. Supreme Court of the burden of conducting an original jurisdiction trial to settle interstate taxation disputes.

It is essential that states harmonize their regulatory tax statutes and administrative regulations if they wish to forestall additional congressional encroachment on their powers. Reciprocity statutes are helpful in removing discriminatory and nonhar-

monious provisions, but are limited in scope. Interstate compacts and uniform state laws have a greater potential for promoting harmonized state regulatory and taxation statutes and administrative regulations. Congress should enact statutes, including contingent ones, encouraging states to draft and enact uniform state laws and regulatory interstate compacts. Congressional grants-in-aid to states to draft such compacts could pay large dividends to the states and the nation. States can obtain professional assistance in drafting compacts by contracting with the National Center for Interstate Compacts.

In sum, the federal system has undergone a major transformation since 1789 yet retains its major characteristic: a strong national Congress and strong states. The interactions between the two have become more entangled, kaleidoscopic and cooperative in nature. The reserved powers of the states continue to be vast and often are employed in an innovative manner to meet emerging challenges.

Notes

¹Joseph F. Zimmerman, *Congressional Preemption: Regulatory Federalism* (Albany: State University of New York Press, 2005).

²Joseph F. Zimmerman, *Interstate Disputes: The Supreme Court's Original Jurisdiction* (Albany: State University of New York Press, 2006).

³An example is the U.S. Supreme Court's determination that the *Brady Handgun Violence Prevention Act of 1993* violated the Tenth Amendment. *Prinz v. United States*, 521 U.S. 898 at 935, 117 S.Ct. 2365 at 2384 (1997).

⁴See, for example, the *Dominican Republic-Central America-United States Free Trade Agreement Implementation Act of 2005*, 119 Stat. 462, 19 U.S.C. §4001.

⁵Timothy J. Conlan and Robert L. Dudley, "Janus-faced Federalism: State Sovereignty and Federal Preemption in the Rehnquist Court," *PS: Political Science and Politics* 38, July 2005, 363–66.

About the Author

Joseph F. Zimmerman is a professor of political science in Rockefeller College of the State University of New York at Albany. He is the author of numerous books including *Contemporary American Federalism: The Growth of National Power* (1992), *State-Local Relations* (1995), *Interstate Relations: The Neglected Dimension of Federalism* (1996), *Interstate Cooperation: Compacts and Administrative Agreements* (2002), *Interstate Economic Relations* (2004), and *Congressional Preemption: Regulatory Federalism* (2005).

Constitutional amendments and congressional preemption statutes removing regulatory powers from subnational governments have produced a major restructuring of the United States federal system, demonstrating the framers of the United States Constitution did not intend to establish a federal system with rigid national-state jurisdictional boundaries. This book focuses upon the continuous readjustment of the respective competences of Congress and the states resulting from the accretion of congressional powers by means of conditional grants-in-aid, crossover sanctions attached to conditional grants-in-aid, tax credits, tax sanctions, congressional preemption of state regulatory authority, and occasional congressional devolution of powers to states. Federal preemption of state law is a ubiquitous feature of the modern regulatory state and almost certainly the most frequently used doctrine of constitutional law in practice. Indeed, preemptive federal statutes shape the regulatory environment for most major industries, including drugs and medical devices, banking, air transportation, securities, automobile safety, and tobacco.⁴ As a result, debates over the federal. Federal Preemption: A Legal Primer. accountability that they believe accompanies state. The report begins by reviewing two general principles that have shaped the Court's preemption jurisprudence: the primacy of congressional intent and the presumption against preemption. Preemption is sometimes stated explicitly in a federal statute. Often, however, there is no explicit statement of preemption; consequently, the federal courts and administrative agencies infer preemption based on their own interpretations of congressional intent. This report finds that: The pace and breadth of federal preemptions of state and local authority have increased significantly since the late 1960s. Of the approximately 439 significant preemption statutes enacted by the Congress since 1789, more than 53 percent (233) have been enacted only since 1969. Many public officials are unaw