

The Nature and Political Significance of Preemption

The United States Constitution incorporated elements of the unitary and confederate systems of government to form simultaneously a compound republic, the world's first federal governance system, and a unitary government with complete control over the District of Columbia and territories. Specific powers were delegated to Congress and all other powers were reserved to the states and the people unless prohibited.

The delegation of powers in broad terms to Congress, to be employed in response to domestic and international challenges and problems, guaranteed the federal system would be a fluid one. The Framers also decided subnational governments would retain their regulatory powers and continue to be the providers of all public services within states, except the postal service, and Congress's domestic powers would be primarily those of regulation and taxation employable to promote domestic tranquility, the general welfare, and establishment of an economic

union.

Congress also is authorized to enact statutes not based upon a specifically delegated power, such as chartering a bank, if "necessary and proper for

carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department of officer thereof" (Art. I, §8). In consequence, the national legislature may enact a "field preemption" statute completely depriving state legislatures of the authority to enact regulatory statutes and state administrators to promulgate rules and regulations in a specified field.

The delegated powers are discretionary; commentators for decades referred to the "silence of Congress" with respect to interstate commerce regulation. Furthermore, Congress is free to devolve its legislative powers, except coinage, upon states and has done so on five occasions (Zimmerman 2005).

Congress specifically was designed to be the supreme regulator within the fields entrusted to it subject to a court challenge that a statute exceeds the scope of the concerned delegated power. Opponents of the proposed constitution expressed fear that the broad regulatory powers assigned to Congress might be employed to

convert the new federal system into a unitary system.

The constitutional division of powers between Congress and the states and inclusion of concurrent powers immediately raised the question of how conflicts between congressional statutes and state statutes could be resolved. James Madison proposed at the constitutional convention a clause authorizing Congress to review and, if need be, disallow state statutes which would "disturb the system" (Farrand 1966, 27). His proposal was not accepted, but the following substitute clause was inserted in Article VI of the Constitution:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

It is important to note treaties entered into by the United States are the supreme law of the land and the clause does not delegate a power to Congress. Congressional regulatory statutes in theory supersede conflicting state regulatory statutes, but the Supreme Court does not always invalidate a conflicting state provision if the conflict is incidental and minor. Furthermore, court invalidation of a state statute or administrative regulation on the ground of a conflict with a congressional statute does not deprive the concerned state and sister states of all concurrent powers to regulate in the concerned field unless the statute expressly is a completely preemptive or a court determines Congress, in the absence of a preemption clause, intended to occupy the field. Subsequent state enactment in the same field, however, may be challenged in a federal or state court.

No provision was made for an automatic stabilizer to ensure a continuing balance of congressional and state powers, but the Supreme Court was established as the final referee with respect to national-state and interstate conflicts. Many preemption statutes lack an expressed preemption provision and courts are called upon to determine whether these statutes are preemptive and whether they preempt the entire concerned field.

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Congress at its will may employ its delegated powers prospectively and/or retrospectively to enact preemption statutes removing completely or partially regulatory powers from subnational governments subject to court challenges. In addition, Congress can preempt the regulatory powers of states absent a pertinent delegated or enumerated power by enacting statutes implementing treaties constitutionally entered into by the United States with foreign nations. Preemption provisions can be as short as a sentence or two attached as a rider to a nearly 1,000-page appropriation act or included in a multi-title statute containing several hundred complex pages as illustrated by the 313-page *Clean Air Act Amendments of 1990* (104 Stat. 2399).

States under the Constitution are equal, but relations between the national government and individual states are asymmetrical for a variety of reasons, including the amount of territory within a state owned by the national government and the fact that a state may not have enacted statutes in each preempted area. Not all preemption statutes are state unfriendly and states on occasion request Congress to enact a supersession statute because interstate cooperation failed to solve a multi-state problem. The National Governors Association, for example, requested Congress to enact the *Commercial Motor Vehicle Safety Act of 1986* (100 Stat. 3207). Individual states were unable to cope with drivers of such vehicles who held operator licenses issued by several states and continued to operate vehicles after the suspension or revocation of a license by one or more states.

The relationship between Congress and the states appeared symbiotic during the early decades of the federal system as each tended to exercise its respective powers independently of the other, although Congress enacted complete preemption statutes in 1790 establishing nationally uniform copyright and patent systems (1 Stat. 109, 124). Daniel J. Elazar (1962), in a groundbreaking study, demonstrated that national-state cooperation was common from the early decades of the nineteenth century to 1913, and subsequently the extent of such cooperation expanded greatly.

Cooperative Federalism

The Framers of the United States Constitution assumed there would be cooperation between the general government and specifically authorized states to determine the qualifications for voters who cast ballots for the election of members of the House of Representatives, call elections to fill vacancies in the House of Representatives, and ratify or reject constitutional amendments proposed by Congress or a national constitutional convention convened by Congress.

The Constitution contains no provision specifically authorizing Congress to grant funds, land, and/or loans to subnational governments or to attach conditions to grants. Grants-in-aid initially sought to encourage states to provide additional services and later were utilized to influence service delivery and to implement national regulatory policies (Elazar 1962). The products of grants are many significant changes in the federal system. The early grants—distribution of a treasury surplus in 1837 and grant of swamp lands in 1850—contained no conditions. The *Morrill Act of 1862* (12 Stat. 503) contained the first condition; *i.e.*, the lands granted could be sold only to raise funds for establishment of colleges of agricultural and mechanical arts. The subsequent grants were relatively small until Congress enacted the *Federal Road Aid Act of 1916* (39 Stat. 355) and the *Federal Road Aid Act of 1921* (42 Stat. 212) to encourage states to construct highways as part of a national system. A sharp increase in the number of conditional grants occurred during the Great Depression, yet such aid was less than 10% of annual federal appropriations. An explosion in the number of grants occurred in the period 1961 to 1966, which leads to a seven-

fold increase in appropriations from \$7 billion in 1966 to over \$91 billion by 1980. Such appropriations today total approximately \$350 billion. Currently, states derive approximately 22% of their revenues from federal grants and have been successful in persuading Congress to provide a degree of regulatory relief in certain program areas principally by consolidation of categorical grants in a number of functional fields into block grants.

Congress decided additional national policy goals could be achieved by attaching new conditions to existing grant programs and by providing sanctions for violations of the conditions. The first type of sanction, dating to 1921, is the cross-cutting sanction applicable to all grant-in-aid programs and is illustrated by the affirmative action condition. The cross-over sanction, the second type, dates to 1974 when Congress threatened to withhold 10% of the highway grants to any state failing to establish 55 miles per hour as the maximum highway speed limit (87 Stat. 1046). A 1982 cross-over sanction contains a similar penalty if a state fails to increase its minimum alcoholic beverage purchase age to 21 (98 Stat. 437). Congress since 1926 (44 Stat. 9) has offered conditional tax credits to states to encourage their establishment of a specified program such as the current national system of state-operated unemployment insurance. Similarly, Congress has employed tax sanctions since 1982 (96 Stat. 324) to encourage subnational governments to issue only registered bonds in place of traditional bearer bonds.

Preemption

Although the interstate commerce clause is the most common clause employed to preempt state regulatory powers, there are others—bankruptcy, copyright, foreign commerce, naturalization, patent, and taxation—which may serve as the basis for a supersession statute. The preemption implications of foreign commerce treaties are often overlooked. Since 2002, President George W. Bush has negotiated five foreign commerce treaties which Congress has implemented and other treaties are under negotiation.

The nature of congressional preemption is complex. There are three broad types of preemption statutes—complete, partial, and contingent (Zimmerman 2005). The first type, a complete preemption statute, removes all state regulatory powers in a specified field. There are 18 subtypes of complete preemption statutes including those needing state cooperation for their success. The second type, a partial preemption statute, either removes state regulatory authority from part of a field or establishes minimum standards allowing states to continue to regulate provided they establish and enforce standards at least as stringent as the national standards. There are 12 subtypes of partial preemption statutes. The third type, a contingent preemption statute, is applicable to a state or local government only if a specified condition(s) exists within the unit or states fail to enact harmonious regulatory policies in a field by a congressionally stipulated date. A preemption statute occasionally contains a sunset clause providing the statute will expire automatically on a specified date unless extended. The *Violent Crime Control and Law Enforcement Act of 1994* (108 Stat. 1796) banned the sale of semiautomatic assault weapons, but sunset in 2004.

A preemption statute may broaden the coverage of an existing statute as illustrated by the *Fair Labor Standards Act Amendments of 1974* (88 Stat. 55) which expanded coverage of the original act to include state and local government employees. A savings or exception clause may be contained in a preemption statute and convert it from a complete to a partial preemption statute. State and local governments, for example, are forbidden by a 1991 amendment to the *Commercial Motor Vehicle Safety Act of 1986* (105 Stat. 960) to enact a statute inconsistent with regulations promulgated by the secretary of transportation

“except that the regulations . . . shall not be construed to preempt provisions of state criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury, and damage to property.”

An innovative subtype of a partial preemption statute establishes and/or authorizes heads of national departments and agencies to promulgate rules and regulations establishing minimum national regulatory standards subject to supersession by state standards provided they are as strict or stricter and are enforced. This subtype dates to the Water Quality Act of 1965 (79 Stat. 903), now the Clean Water Act, which is a contingent total preemption statute threatening each state with the loss of all regulatory powers over the quality of interstate waters for failure to initiate action to meet national minimum standards. A state, to continue to exercise regulatory authority, must submit to the concerned national agency a plan containing standards, evidence of qualified personnel and equipment, and enforcement mechanisms. Approval of the plan results in the agency delegating regulatory primacy to the state with the agency limited to a monitoring role. Paradoxically, this subtype encourages states to activate dormant regulatory powers or to exercise more fully such powers. This preemption type forges a national-state partnership and has had the greatest impact upon the nature of the federal system. On occasion, a state has returned primacy or threatened to do so and national bureaucrats engage in negotiations with their state counterparts to encourage them to reaccept or to not return primacy.

Congress enacted only 29 preemption statutes by 1900. The number of such statutes enacted remained relatively small in the first half of the twentieth century with only 16 enacted during the 1940s and 24 during the 1950s. What may be termed a preemption revolution dates to 1965 when Congress began to enact such statutes more frequently, and in new regulatory fields, and first employed minimum standards preemption. Congress has enacted 522 preemption statutes since 1790 with 356 enacted in the period 1965–2004.

The pace of enactment of preemption statutes slowed somewhat after the Republican Party gained control of Congress in 1995. Seventy-five such laws, including several important ones, were enacted in the period 1995–2004 and reflected in part the Republican-controlled Congress’s responses to pressure from business interest groups for the establishment of harmonious regulatory policies.

The 104th Congress was sensitive to criticisms of unfunded federal mandates by subnational governmental officers and enacted the *Unfunded Mandates Reform Act of 1995* (109 Stat. 48) establishing new mandatory congressional procedures for the enactment of mandates. The following year, Congress enacted the *Safe Drinking Water Act Amendments of 1996* (110 Stat. 1613) providing relief from expensive mandates threatening numerous small local governments with the choice of either bankruptcy or abandonment of their drinking water supply systems and also placing major financial burdens on larger local governments.

In this symposium, Timothy J. Conlan and Robert L. Dudley analyze the preemption decisions of the U.S. Supreme Court under Chief Justice William Rehnquist strengthening the positions of states, ranging from low level nuclear waste disposal to Indian gambling casinos. They place particular emphasis on the court’s decisions protecting state sovereignty, but also explain the Court has been Janus-faced by upholding the constitutional-ity of other important congressional preemption statutes.

Paul Teske examines the dynamics involving the politics of select preemption bills in Congress and develops an interaction model emphasizing the importance of state regulation. He explains, however, that Congress has enacted several deregulation statutes preempting state regulatory authority and in some instances also providing for federal deregulation. Congressional

preemption has promoted efforts by states to utilize other reserved powers to regulate, as illustrated by New York Attorney General Eliot Spitzer’s policing segments of the economy by means of investigations of Merrill Lynch and other investment banks, which lead to the firms paying large fines to the state.

Paul L. Posner reviews increased congressional use of its preemption powers and the prospects for states retaining regulatory powers as globalization of the economy continues. He emphasizes the importance of states retaining their capacity to innovate in an era of direct order mandates, crosscutting requirements, crossover sanctions, program specific grant conditions, and preemption statutes. Posner highlights policy activism by the president and members of Congress crossing partisan lines, the shift of many business firms from supporting state regulation to advocating preemption of state regulatory powers, and the failure of state and local government associations to agree upon common policies. One of his findings is that the federal government lacks the ability to implement its multitudinous programs and hence its reliance upon state and local governments, nonprofit corporations, and private corporations as implementers.

I present data on the pace of enactment of the 522 preemption statutes, explain the reasons for the sharp increase in the number of such statutes since 1965, note the federal-state partnerships created by minimum standard preemption statutes, examine interest group lobbying, and test the validity of Herbert Wechsler’s political safeguards of federalism theory. I also present five brief case studies of the role played by interest groups in the enactment of preemption statutes. I conclude that increasing globalization of the United States economy, interest group lobbying, and technological developments will result in enactment of additional preemption statutes making the federal system continually more kaleidoscopic in terms of national-state relations.

Democratic Theory

Participation in the public policy process by active and informed citizens is a key premise of democratic theory, but generally is ineffective when Congress makes preemption decisions. The process of enacting congressional statutes often includes public hearings, but they do not offer significant opportunities for input by citizens who lack funds and time to travel to Washington, D.C. and detailed technical information and staff support in comparison to resource-rich special interest groups.

Many preemption statutes are outline or skeleton laws authorizing the heads of departments and agencies to promulgate implementing rules and regulations. The enhanced role of bureaucrats in the governance process also raises questions of democratic policy making as citizens have limited opportunities to influence the rule making process.

The local government plane, with its relatively small geographical scale, affords citizens the greatest opportunity to exert effective influence in the policy making process. To the extent congressional preemption, directly or indirectly through the states, limits the discretionary authority of general purpose local governments, participatory democracy will suffer. This conclusion is borne out as reflected in public opinion polls consistently revealing the citizenry generally has the highest respect for these governments and the least respect for the national government.

Conclusions

The federal system today approximates a mutuality model reflecting the interdependence of the governmental planes—national, state, and local—and the general reliance of one

plane upon the others for the performance of certain functions such as emergency assistance, enforcement, financial assistance, planning, standard setting, and technical assistance. The Constitution's framers sought "a more perfect union" of the states by authorizing congressional unifying action as conditions change. The national government currently administers directly few programs it did not administer prior to the mid-1960s, but plays an enlarged role in subnational government-administered regulatory programs primarily designed to reduce negative externalities and in subnational government provision of services.

Preemption has produced fundamental changes in the federal system, yet several original features remain in place with states, as residuary sovereigns, playing key roles in an extremely complex and continually changing governance system as Congress displaces completely or partially their regulatory powers in various fields. Congress has become a unitary government in regulatory fields where it has exercised its power of complete supersession of state authority and finances its policies in several other fields by imposing costly and un-reimbursed mandates on state and local governments.

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