

Congressional Preemption: Removal of State Regulatory Powers

The balance of national and state powers has undergone continuous readjustment since 1790, without a constitutional amendment by means of numerous congressional preemption statutes superseding completely or partially certain regulatory powers of the states and thereby effectuating a major transformation in the federal system. Congress since 1978 has increased its regulation of subnational governments as polities by enacting preemption statutes containing mandates and restraints (Zimmerman 1994) while simultaneously enacting other statutes providing for extensive deregulation of the banking and communications industries and complete economic deregulation of the air, bus, and rail transportation companies.

Courts, including the United States Supreme Court, generally have interpreted broadly Congress's delegated powers, particularly the power to regulate "commerce . . . among the several states." The Supreme Court in *Elrod v. Ashcroft* (537 U.S. 186), in 2003, for example, upheld the constitutionality of the *Sonny Bono Copyright Term Extension Act of 1998* (112 Stat. 2827) against the charge that Congress

abused its constitutional authority to offer copyright protection to authors "for limited times" by extending such protection from 20 to 70 years after the death of an author and to 95

years from the publication of works created for or by corporations. The Walt Disney Company was a prime beneficiary of the act.

A complete preemption statute may not deny states a role in the regulatory field as Congress recognized they could play helpful roles including enforcement of such a statute. The *United States Grain Standards Act of 1968* (82 Stat.769), for example, allows the administrator of the Federal Grain Inspection Service to delegate authority to state agencies to perform official inspection and weighing. And the *Age Discrimination in Employment Amendments of 1986* (100 Stat. 3342) authorizes the Equal Employment Opportunity Commission to sign cooperative enforcement agreements with state or local fair-employment agencies.

Preemption Statutes Enactment Pace

The Constitution's Framers apparently assumed Congress would employ the various delegated powers shortly after the fundamental

document was ratified by the states. Congress in 1790 enacted two complete preemption statutes— *Copyright Act* (1 Stat. 124) and *Patent Act* (1 Stat. 109)—and subsequently enacted a total of only 29 such statutes by 1900. Many preemption statutes, including recent ones, were spurred by inventions and technological developments. Congress's reaction to inventions was not always rapid. *An Act to Regulate Interstate Commerce* (24 Stat. 379), creating the Interstate Commerce Commission to regulate railroad fares and tariffs, was not enacted until 1887. The Commission was abolished in 1996 (109 Stat. 803) because its most important functions were removed by economic deregulation preemption statutes and its remaining functions were transferred to other departments and agencies.

In the twentieth century Congress increasingly relied upon conditional grants-in-aid to encourage states to implement its policies until 1965 when heavy reliance began to be placed upon preemption statutes which were enacted at the following pace: 14 (1900–1909), 22 (1910–1919), 17 (1920–1929), 31 (1930–1939), 16 (1940–1949), 24 (1950–1959), 47 (1960–1969), 102 (1970–1979), 93 (1980–1989), 83 (1990–1999), and 42 (2000–2004) (Zimmerman and Lawrence 1992; Zimmerman 2005). A total of 520 such statutes have been enacted with several subsequently repealed. A significant number of these statutes were designed to eliminate interstate trade barriers (Zimmerman 2004). It should be noted that a few preemption statutes contain a sunset clause which Congress may extend. The *Internet Tax Freedom Act of 1998* (112 Stat. 2681) expired in 2003, but was renewed and extended in 2004 (117 Stat. 2615) for three years.

Congress at its discretion may broaden the coverage of a partial preemption statute, as it did in 1991 when it amended the *Employee Retirement Income Security Act of 1974* to include within its coverage telephone and electric cooperative welfare plans (105 Stat. 446). The act was amended again in 2000 "to clarify the application to a church plan that is a welfare plan to State insurance laws that require or solely relate to licensing, solvency, insolvency, or the status of such a plan as a single employer plan" (114 Stat. 499).

Commencing in 1965, Congress initiated a major federalism revolution as regulatory laws were enacted with increased frequency in a wide range of fields previously not preempted and a new type of preemption statute— minimum standards—was employed. Many statutes contain mandates requiring subnational

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governments to initiate specified expensive actions. Certain preemption statutes, primarily minimum standards preemptions, authorize grants-in-aid to assist subnational governments in financing their regulatory responsibilities. A small number of statutes contain restraints forbidding these governments to initiate a specific action, thereby necessitating a more expensive alternative, as illustrated by the *Ocean Dumping Ban Act of 1988* (102 Stat. 4139) which prevented New York City and other municipalities from continuing to dump sewage sludge in the Atlantic Ocean and necessitated the more expensive shipment of the sludge by dedicated trains to disposal sites in Texas (Zimmerman 1994). Fourteen preemption statutes devolve executive powers upon governors, thereby upsetting the constitutional balance of gubernatorial and legislative powers in each state.

The sharp increase in the number of post-1965 preemption statutes is a response to: (1) the failure of states by means of interstate cooperation to solve many multistate problems, including air and water pollution; (2) the ineffectiveness of conditional grants-in-aid in eliminating national problems; (3) the general failure of states to enact harmonious regulatory policies; (4) lobbying by industries, such as the motor vehicle industry, burdened with increasing nonharmonious state regulatory policies; (5) effective lobbying by public interest groups, particularly those representing civil liberties and environmental issues; (6) the election of members of Congress lacking state and local government experience; and (7) activism by certain members of Congress seeking to establish a leadership record in solving major problems as part of their respective strategy of winning the presidency in a future election. The pace of enactment of such statutes slowed somewhat after the Republican party assumed control of Congress in 1995, with 76 enacted by 2004.

Interest Group Lobbying

A positive correlation exists between the increased number of preemption statutes enacted by Congress and the growing influence of private and public interest groups, which naturally transferred part of their attention from state capitols to the national capitol as Congress became more deeply involved in traditional state and local governmental functions. Groups unable to achieve fully or partially their goals by lobbying state legislatures and governors redirected resources to influence Congress, the president, and national bureaucrats with varying degrees of success.

How can states protect their regulatory authority against potential congressional preemption? Chief Justice John Marshall of the United States Supreme Court in *Gibbons v. Ogden* provided an answer in 1824, relative to the interstate commerce clause, when he opined: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example of declaring war, the sole restraint on which they have relied to secure them from its abuse" (22 U.S. 1 at 197).

Herbert Wechsler in 1953 employed this thesis to develop the political safeguard of federalism theory, holding that states can engage in the national political process to help elect members of Congress who will protect the states' reserved regulatory powers. Justice Harry A. Blackman of the Supreme Court endorsed this theory in 1985 in *Garcia v. San Antonio Metropolitan Transit Authority* (469 U.S. 528 at 556) when he wrote "the principal and basic limits on the federal commerce power is inherent in all state participation in federal government action." He urged states to seek protection of their regulatory powers not in the courts, but in the political branch of government, i.e., the Congress.

Subnational government officers often lobby Congress for relief from burdensome mandates. The 104th Congress responded by enacting the *Unfunded Mandates Reform Act of 1995* (109 Stat. 48) establishing new congressional procedures for enactment of mandates. The next year Congress provided relief from expensive directives contained in the *Safe Drinking Water Amendments of 1986* (110 Stat. 1613) which threatened numerous small local governments with the choice of bankruptcy or abandonment of their drinking water supply system.

Each of the following four sections contains a brief description of the roles played by interest groups in the enactment of a devolution or a preemption statute.

Insurance Industry Regulation

Congress took no action to regulate the business of insurance and the Supreme Court in 1868 in *Paul v. Virginia* (75 Stat. 168) opined such business did not involve interstate commerce and therefore was exempt from congressional regulation. Subsequent nonharmonious state regulation of insurance companies led to a major court challenge. The Supreme Court in 1944 reversed its earlier decision and held that the business of insurance involves interstate commerce and was subject to congressional regulation (322 U.S. 533). The potential loss of substantial amounts of revenue derived from such regulation induced states to lobby Congress to reverse the Court's decision. Congress responded by enacting the *McCarran-Ferguson Act of 1945* (59 Stat. 33) devolving authority to states to regulate the business of insurance. Continuation of disharmonious state regulatory powers encouraged the insurance industry to lobby Congress successfully to provide relief in 1999 (113 Stat. 1415, 1419) in the form of the establishment of national minimum standards in 13 areas and threatened to establish a national licensing system for insurance agents if 26 states did not establish a harmonious licensing system by 2002. A national licensing system was avoided when 35 states were certified as having a harmonious licensing system.

Water Quality

Citizens, growing increasingly concerned with environmental pollution, organized national associations which, by 1965, persuaded Congress to enact its first environmental regulatory act, the *Water Quality Act* (79 Stat. 903), now known as the *Clean Water Act*. Farm organizations were successful in ensuring the act would be relatively weak. Water quality today in many areas is poor because Congress did not address the animal manure problem. A 2004 report revealed animals in one Maryland-Pennsylvania watershed produce annually 77 million gallons of liquid manure and more than 58,000 tons of solid manure which are discharged into the Chesapeake Bay (Jarrett 2004, 22).

Motor Vehicle Safety Equipment

The motor vehicle industry in the mid-1960s changed its view relative to governmental regulation as it feared public demands for specific motor vehicle safety equipment would result in state legislatures enacting nonharmonious safety equipment requirements. Absent preemption the industry would be faced with the prospect it would have to manufacture vehicles with specific safety features for sale in each state to comply with the different regulatory standards. The industry lobbied Congress to enact the *National Traffic and Motor Vehicle Safety Act of 1966* (80 Stat. 719) which completely preempted state regulatory power over motor vehicle safety equipment with the exceptions

of motor vehicles operated by a state or local government which met higher safety standards.

Air Quality Act

State legislatures commenced to regulate emissions from motor vehicles in the 1960s. This regulation concerned the motor vehicle industry, which feared a different engine emission control system would have to be manufactured to meet the different emissions standards in each state. The industry and its allies—glass, plastics, rubber, and steel industries—encouraged Congress to include a provision in the *Air Quality Act of 1967* (81 Stat. 485), now known as the *Clean Air Act*, totally preempting state regulatory authority over motor vehicle emissions. California had stricter standards than the proposed federal ones and successfully lobbied Congress for an exception from the preemption provision, thereby necessitating the industry to build two engine emissions control systems for several years until new emission control systems were developed enabling all new vehicles to meet the California standards.

Motor Truck Size and Weight

The trucking industry and the Teamsters Union simultaneously lobbied Congress successfully to remove state authority to establish maximum truck sizes and weights by enacting the *Surface Transportation Assistance Act of 1982* (96 Stat. 2097) allowing heavy trucks, including tandem and triple trailers, to operate on interstate highways, certain federally aided primary routes (designated by the secretary of transportation), and local “access” routes

to service stations, motels, restaurants, and terminals. The act’s purpose was to eliminate the patchwork quilt of conflicting state truck-size and weight limits which often required a driver to detach one or two trailers prior to entering a state. The act, however, contains no criteria for determining whether older interstate and federally aided primary highways were capable of accommodating the larger and heavier trucks safely or identifying the local roads that are *bona fide* “access” routes.

State highway officers protested that the traffic congestion and substandard design and condition of many highways with interstate designations constructed prior to the enactment of the *National Defense and Interstate Highway Act of 1956* (70 Stat. 374) could not accommodate safely larger and heavier trucks including tandem-trailer trucks. Congress responded to state lobbying by enacting the *Tandem Truck Safety Act of 1984* (98 Stat. 2829-830) and the *Motor Carrier Safety Act of 1984* (98 Stat. 2829-832).

The first act established a procedure allowing a governor, after consulting concerned local governments, to notify the secretary of transportation that a specific segment(s) of an interstate highway can not accommodate safely large trucks and also per-

mitting state officers to place reasonable restrictions on use of “access” roads by heavy trucks. The second act directs the secretary to promulgate rules and regulations establishing minimum safety standards for commercial motor vehicles, establish a safety panel to advise the secretary relative to whether state laws or regulations are incompatible with regulations promulgated by the secretary, and authorizes any person, in addition to a state, to petition the secretary for issuance of a waiver from his/her determination that a state law or regulation is preempted.

Federalism Theory

Theory has not kept pace with developments in the federal system. The theory of dual federalism is a simple one explaining a complete separation of national and state powers. The theory of cooperative federalism builds upon this theory by emphasizing the cooperative nature of national-state relations. Dissatisfaction with the explanatory values of these theories, commencing in the 1960s, led to a myriad of new terms. William H. Stewart (1984, 4) identified 497 figurative descriptors. Neither the two current theories nor the descriptors adequately

explain the impact of complete, partial, contingent, and innovative preemption statutes on the current nature of the federal system.

An example of an innovative statute is the *Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994* (108 Stat. 2338) which respects the long history of the dual banking system by including several exemptions and savings provisions excluding state statutes from preemption. The act also contains an “opt-in” section permitting interstate branching through *de novo* branches provided the state law “applies equally to all banks; and expressly permits out-of-state banks to establish *de novo* branches”

(108 Stat. 1352). In addition, the act has an “opt-out” section (108 Stat. 2343) allowing a state legislature to prohibit interstate branching within the state otherwise authorized by the act.

There are three broad spheres of power: a national-controlling sphere, a state-controlling sphere, and a shared national-state-local sphere. The boundaries of the spheres change as Congress places more or less emphasis upon its three intergovernmental roles—facilitator, inhibitor, and initiator. A comprehensive non-equilibrium federalism theory must include elements of *imperium in imperio*; cooperative interplane interactions; informal congressional preemption in the form of conditional grants-in-aid, tax credits, and tax sanctions; and contingent, complete, partial preemption statutes (Zimmerman 2005).

Conclusions

Several original features of the federal system are observable today with states performing essential roles in an extremely complex and rapidly changing governance system as Congress displaces completely or partially their regulatory powers in an



Industry successfully lobbied for provisions in the *Clean Air Act* that totally preempted preexisting state regulatory authority over motor vehicle emissions.

increasing number of fields. Congress in effect has become a unitary government in completely preempted regulatory fields and finances in part its policies in several other fields by imposing burdensome mandates on subnational governments.

Preemption statutes have produced fundamental changes in the nature of the federal system, yet it has not been converted into a unitary system. States retain numerous important regulatory powers that often are employed effectively in partially preempted fields. New York State Attorney General Eliot Spitzer, for example, embarrassed the United States Securities and Exchange Commission by employing a 1921 state law (chap. 649) as the basis for successful fraud suits against the 10 largest Wall Street brokerage firms. The firms' salespersons had urged clients to purchase specified stocks knowing they

were a poor investment so the firms could rake in the lucrative investment banking business and associated fees of companies preparing new stock issues. The firms paid \$1.4 billion in fines to the State of New York and were forced to change their practices.

In sum, growing globalization of the economy, international trade agreements, interest group lobbying, and technological developments ensure Congress will play an increasingly dominant role in domestic governance by enacting preemption statutes particularly in the fields of banking, communications, financial services, and taxation. The federal system today is in a perpetual state of locomotion describable as kaleidoscopic rather than linear in nature.

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