Chapter 1

CONGRESSIONAL PREEMPTION

The extent to which political power should be confided to the national government has been a controversial issue since the drafting of the U.S. Constitution in 1787 with no consensus reached at any time on the optimal degree of power centralization. The Constitution's drafters decided a static division of regulatory powers between the national government and the states would be undesirable and hence formulated a lithe document generally enabling Congress to employ its delegated powers, including the necessary and proper clause, to respond effectively to new regulatory challenges—brought about by domestic, foreign, and technological developments—without the need for a constitutional amendment. In particular, incorporation in the fundamental document of provisions for formal constitutional amendments, delegation of expressed powers to Congress in broad terms, and inclusion of the necessary and proper clause and the supremacy of the laws clause ensures there will be continuing changes in the distribution of regulatory powers between the two planes of government. The latter clause is of great importance as it authorizes Congress to enact statutes invalidating regulatory statutes and regulations of subnational governments that conflict with congressional statutes. Hence, Congress can employ its constitutional powers to remove completely or partially concurrent and reserved regulatory powers of the states. A total of 522 preemption statutes were enacted in the period 1790–2004.

Authors commonly cite the interstate commerce clause and the supremacy of the laws clause as sources of authority for Congress to

enact preemption statutes. The former clause is not the only delegated power employable to remove authority from states. Congress also is authorized to enact preemption statutes relating to bankruptcy, naturalization, copyrights, patents, and taxation. It is important to note the supremacy of the laws clause does not delegate a power to Congress and is limited to "conflict preemption," that is, a court may invalidate a state constitutional or statutory provision if it conflicts with a congressional statute based upon a delegated power. Does invalidation of a specific state statute on the ground of a conflict deprive this state and sister states of all concurrent powers to regulate in the given field? The answer is no, but state law enactments in the field subsequent to a court's conflict decision, of course, may be subject to court challenges if they conflict with a congressional statute. The reader should note it is the courts, not Congress, that determine whether there is a direct conflict between a federal law and a state law of a magnitude triggering activation of the supremacy of the laws clause (see chapter 6).

"Conflict preemption" is not the only source of statutory preemption. Congress prospectively can preempt completely or to a limited extent state regulatory authority in the absence of any conflicting state constitutional and statutory provisions by exercising its delegated powers; the necessary and proper clause also allows enactment of preemption and other laws not based upon a specifically delegated power. In 1819, Chief Justice John Marshall of the U.S. Supreme Court in *McCulloch v. Maryland* opined "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, the national legislature may enact a "field preemption" statute completely depriving state legislatures of authority to enact regulatory statutes and state administrators to promulgate rules and regulations in a specified field for the first time. This type of preemption has a major impact on the nature of the federal system (see chapter 4).

Can Congress be required to exercise any of its delegated powers? The answer is no and for decades commentators referred to the "silence of Congress." Furthermore, there is no constitutional provision forbidding Congress to devolve one or more of its delegated powers upon the states with the exception of coinage. The initial Congress in 1789 decided to devolve to states authority to regulate marine port pilots.[2] The current Shipping Statute, last revised in 1983, contains a provision nearly identical to one contained in the 1789 devolution act and stipulates "pilots in the bays, rivers, harbors, and ports of the United States shall be regulated only in conformity with the laws of the States."[3]

Of greater importance is the *McCarran-Ferguson Act of 1945*, which specifically reversed the 1944 decision of the U.S. Supreme Court holding insurance was interstate commerce by devolving authority to states to regulate the insurance industry.[4] In 1999, Congress, as described in chapter 5, enacted a statute preempting thirteen specified areas of state insurance regulation and threatening to establish a national system of licensing insurance agents if twenty-six state legislatures failed to establish a uniform licensing system by November 12, 2002.[5]

A third example of congressional devolution of powers is a minor one and dates to 1978 when Congress authorized states to preempt to a limited extent the congressional prohibition of interstate off-track wagering.[6] The statute allows interstate simulcasts of horse races provided the concerned state regulatory agency and the concerned horsemen's association do not object to the simulcast. The U.S. District Court for the Eastern District of Kentucky in 1993 agreed with a plaintiff's contentions that the act violated the First Amendment's guarantee of freedom of speech and is unconstitutionally vague.[7] The decision was appealed and the U.S. Court of Appeals for the 6th Circuit in 1994 reversed the lower court decision by finding that the act does not regulate commercial speech in view of the fact off-track betting can take place in the absence of simulcasting, the act regulates a very narrow subject and consequently a "less strict vagueness test" is applicable to the act, and it "does not delegate legislative power to private parties."[8]

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. Preemption statutes may be placed in three broad classes: complete, partial, and contingent. The latter refers to preemption statutes applicable to a state or local government only if a specified condition or conditions exist within the unit or states failed to enact harmonious regulatory policies in a field by a stipulated date.

Particular attention is placed upon (1) criteria utilized by the U.S. Supreme Court to determine whether a congressional statute lacking an explicit preemption clause is preemptive, (2) national goal achievement, (3) fiscal implications of congressional mandates and restraints placed on subnational governments, (4) accountability for action or inaction where responsibility for the performance of governmental functions is shared

by two or three planes of government, and (5) modification of the dual and cooperative theories of U.S. federalism.

Centralization of Political Power

The newly drafted United States Constitution was not a universally revered fundamental law in 1787–1788. Opponents, termed anti-federalists, raised numerous objections against the proposed document and were particularly disturbed by a provision in Article VII: "The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the States so ratifying the same." They specifically maintained the document was illegitimate and violated Article XIII of the Articles of Confederation and Perpetual Union, which required that any amendment to the articles be subject to the approval of the unicameral Congress and each state legislature.

An even greater fear was generated by the constitutional delegation to Congress of preemption powers whose employment could result in the conversion, without a constitutional amendment, of the federal system into a unitary system governed by the English common law ultra vires doctrine. The states in effect would be subject to the complete domination of Congress as local governments were subject to the complete control of state legislatures at the time. In a letter, Elbridge Gerry, a Massachusetts delegate to the 1787 Philadelphia constitutional convention, reflected the views of many citizens:

> My principal objections to the plan, are, that there is no adequate provision for a representation of the people—that they have no security for the right of election—that some of the powers of the Legislature are ambiguous, and others indefinite and dangerous—that the Executive is blended with and will have an undue influence over the Legislature—that the judicial department will be oppressive—that treaties of the highest importance may be formed by the President with the advice of two thirds of a quorum of the Senate—and that the system is without the security of a bill of rights.[9]

Chapter 2 explains Alexander Hamilton, John Jay, and James Madison wrote eighty-five letters to editors of New York City newspapers (subsequently published as *The Federalist Papers*) to allay anti-federalist fears of over-centralization of political powers, and the Bill of Rights was proposed and ratified as amendments to the U.S. Constitution in response to these fears.

Concern continued in the late eighteenth and early nineteenth centuries that a federal leviathan would devour the states. A change in attitudes was in part a product of Roger B. Taney replacing John Marshall

as chief justice of the U.S. Supreme Court in 1835. Under Marshall, the Court tended to give an expansive reading to the delegated powers of Congress. The Taney Court, on the other hand, issued a series of rulings commonly described as dual federalism ones enhancing the powers of the states. In general, the court was protective of "states rights" until 1937, as explained in chapter 6.

Congress and state legislatures to a large extent exercised their respective powers independently of each other during the early decades of the federal system, although Congress enacted two complete preemption statutes in 1790 establishing a uniform copyright system and a uniform patent system.[10] The federal system during this period could be described accurately as largely "symbiotic" in terms of national-state relations: the two planes of government coexisted in close proximity, yet had relatively little contact with each other and one plane generally did not encroach seriously upon the preserve of the other. Although it was not recognized at the time, ratification of the Fourteenth, Fifteenth, and Sixteenth Amendments, which delegated additional powers to Congress, in the period 1868 to 1913, enhanced greatly the prospects the federal system in the future would undergo significant structural changes. Furthermore, ratification of the seventeenth amendment, providing for popular election of U.S. senators, reduced the influence of state legislatures over congressional enactment since the legislatures no longer elected the senators.

Inventions and technological developments have spurred enactment of many preemption statutes. Congressional response to inventions, however, is not always rapid. An Act to Regulate Commerce, creating the Interstate Commerce Commission (ICC) to regulate railroad fares and tariffs, was not enacted until 1887.[11] Congress responded to several subsequent technological developments by extending the jurisdiction of ICC to cover interstate telephone and telegraph companies, transoceanic cable companies, bus and trucking firms, and electric power transmission lines. In 1996, Congress abolished the commission as deregulation statutes removed many of its functions (see chapter 4).[12]

Preemption powers for more than a century were exercised on a limited basis with only twenty-nine such statutes enacted by 1900; several subsequently were repealed.[13] The primary foci of these statutes were commerce, health, and safety. It should be noted Congress enacted seven civil and voting rights preemption statutes, based on the Fourteenth and Fifteenth Amendments, in the period 1866 to 1875. The U.S. Supreme Court in the latter year, in *State v. Reese*, invalidated most provisions of the 1870 and 1871 Voting Rights Acts on the ground they also protected the voting rights of white citizens while the Fifteenth

Amendment protects only the voting rights of blacks.[14] Congress in 1890 repealed the remaining provisions of these acts and no voting rights act was enacted again until 1965.

The Great Depression of the 1930s revealed inadequate state government responses to immense economic and social problems and led to predictions that the states and the federal system would vanish. Luther Gulick, director of the Institute of Public Administration in 1933, concluded "the American State is finished" and added:

> The revolution has already taken place. The States have failed; the Federal Government has assumed responsibility for the work. The Constitution and the law must be made to conform to avoid needless complications, judicial squirmings, and great waste of time and money. Without clean-cut constitutional revisions, the States will continue to maintain their futile duplicating organizations at great expense
>
> All essential powers affecting economic planning and control must be taken from the States and given to the Nation. . . .
>
> What would the States then become? They would become organs of local government. They would abandon their wasteful and bungling endeavors and pretense of competency in the field of national economics and settle down to perform honestly and successfully their allotted tasks in creating and maintaining the organs of local government and service.[15]

Harold J. Laski, a British Fabian socialist and academic who examined the federal system, unconditionally declared in 1939 federalism was obsolete and in 1948 concluded "the States are provinces of which the sovereignty has never since 1789 been real."[16]

Felix Morley in 1959 reported Alexander Hamilton's forecast in *The Federalist Papers* was correct: Political power would shift to the national government if the states failed to "administer their affairs with uprightness and prudence."[17] Morley added: "State governments, with a few honorable exceptions, are both ill-designed and ill-equipped to cope with the problems which a dynamic society can not, or will not solve for itself. State constitutions are in many cases unduly restrictive. Their legislatures meet too briefly and have the most meager technical assistance. . . . Governors generally have inadequate executive control over a pattern of local government unnecessarily complex and confusing."[18]

Dennis W. Brogan, an English academic and commentator, in 1960 also concluded states possessed relatively few important powers, and explained:

> There is, of course, an irreducible minimum of federalism. The States can never be reduced to being mere counties, but in practice, they may be little more than mere counties. The Union may neglect to exercise powers that

> it has and so leave them to the States (subject to varying Supreme Court doctrines as to whether the States can legislate freely in the mere absence of federal legislation, on matters affecting interstate commerce for instance). But in a great many fields of modern legislation, States' rights are a fiction, because the economic and social integration of the United States has gone too far for them to remain a reality. They are, in fact, usually argued for, not by zealots believing that the States can do better than the Union in certain fields, but by prudent calculators who know that the States can do little or nothing, which is what the defenders of States' rights want them to do.[19]

The reader should note the above conclusions were drawn prior to the preemption revolution, explained below, which commenced in 1965. Congress subsequently removed partially or completely a large number of regulatory powers from the states, but today no federalism scholar would agree the federal system is obsolete or states are mere counties.

Congress in the twentieth century increasingly relied upon conditional grants-in-aid (see chapter 3) to persuade states to implement national policies while continuing to enact a limited number of preemption statutes. Only sixteen preemption statues were enacted during the 1940s and twenty-four during the 1950s, with most relating to commerce and health. The federal system underwent significant changes by 1950 as the result of congressional enactment of numerous conditional grant-in-aid statutes, which influenced the delivery of many services by subnational governments, and a number of preemption statutes that totally or partially removed regulatory authority from the states.[20] As a result, the federal system could be described accurately as a mutuality model reflecting the general interdependence of the governmental planes—national, state, and local—and the reliance of one plane upon the others for performance of a number of functions and/or functional components, standard setting, or financial assistance.

A federalism revolution commenced in 1965 as Congress enacted preemption statutes with greater frequency in a wide range of regulatory fields.[21] Thirty-six preemption statutes, many relating to civil rights and environmental protection, were enacted in the period 1965 through 1969. A total of 102 such statutes were enacted during the 1970s, 93 during the 1980s, 83 during the 1990s, and 41 between 2000 and 2004. The bulk of these statutes involve commerce, finance, and health, but banking has emerged as an important preemption area. The reasons for the sharply increased use of congressional preemption powers were the growing awareness of the interstate nature of many public problems, general failure of states 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 in solving major problems as part of their strategy of winning the presidency in a future election, and success of public and private interest groups lobbying Congress to enact preemption statutes. It should be noted a number of the post-1965 preemption statutes amend earlier preemption statutes as illustrated by the *Bankruptcy Reform Act of 1994, Federal Trademark Dilution Act of 1995, Riegle-Neal Amendments Act of 1997*, and *Internet Tax Nondiscrimination Act of 2001*.[22]

Mandates and restraints increasingly were included in the new preemption statutes. A mandate requires subnational governments to initiate a specific course of action, such as removal of listed pollutants from public drinking water supplies. A restraint prevents these governmental units from initiating an action; dumping sewage sludge in the ocean is an example.[23]

The pace of enactment of preemption statutes slowed somewhat after the Republican Party assumed control of Congress in 1995. Seventy-five such laws, including several important ones, were enacted in the period 1995-2004. They 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* establishing new mandatory congressional procedures for the enactment of mandates.[24] The following year, Congress enacted the *Safe Drinking Water Act Amendments of 1996*, providing relief from expensive directives contained in the *Safe Drinking Water Act Amendments of 1986*. These directives had left numerous small local governments with the choice of either bankruptcy or abandonment of their drinking water supply systems and also placed major financial burdens on larger local governments.[25]

The *Telecommunications Act of 1996* 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.[26] The act also stipulates local governments cannot require or prohibit the provision of telecommunications services by a cable operator.[27] And the *Internet Tax Nondiscrimination Act of 2001* forbids subnational governments to tax sales made via the Internet.[28]

The reader should be aware that state government officers are not always opposed to preemption statutes. The *Commercial Motor Vehicle*

Safety Act of 1986, for example, was enacted by Congress at the request of several states. These states were unable to solve cooperatively the problem created by commercial vehicle drivers who, holding operator licenses issued by a number of states, continue to drive with a license issued by one state after the suspension or revocation by another state of their respective license for a serious violation of that state's motor vehicle law or regulation.[29]

No one can deny that state legislatures are weaker today in terms of their unrestrained freedom to exercise all powers originally reserved to them at the time of the ratification of the U.S. Constitution. State legislatures today, however, are exercising powers they generally did not exercise prior to 1965. In other words, the universe of their exercised powers has been expanded tremendously by congressional minimum standards preemption statutes. This has resulted in state legislatures exercising what had been latent powers simultaneously with the loss of their freedom to exercise other specified regulatory powers because of congressional enactment of preemption statutes that remove all or specified regulatory powers in a given field from states. As explained in subsequent chapters, Congress increasingly relies upon the states to conduct regulatory programs meeting or exceeding minimum national standards, and the states typically possess considerable discretionary authority in administering these programs.

Changing Roles

Congress has drawn upon its latent delegated powers to expand its influence over the provision of services by subnational governments by means of conditional grants-in-aid, crossover sanctions, and tax credits (see chapter 3), and similarly to expand its regulatory policy sphere by enactment of preemption statutes. The latter have resulted in significant role changes for Congress, the president, federal bureaucrats, national and state courts, state governors, state legislatures, state bureaucrats, local government chief executives and governing bodies, local government bureaucrats, interest groups, and citizens.

Congress no longer confines its attention almost exclusively to foreign affairs, national defense, and major public works projects such as the Boulder Dam; it has become involved deeply in designing programs to solve rural, urban, metropolitan, and interstate problems that traditionally were the responsibilities of state and local governments. The enlargement of congressional responsibilities is attributable in part to lobbying by special interest groups and activism by certain members of Congress who have sought to establish a leadership record. Congressional

activism in one regulatory field has generated interest group pressures in other fields.

As chief executive, the president is responsible for preparing and transmitting an annual executive budget to Congress and directing myriad federal departments and agencies. The president increasingly has been subject to intense pressure by interest groups and citizens as partial congressional preemption statutes have become more common.

The role of many federal bureaucrats, whose numbers have remained nearly constant since 1946, has been enhanced dramatically as a product of congressional enactment of "skeleton" preemption statutes outlining new programs or policies and authorizing departments and agencies to draft and promulgate implementing rules and regulations. As explained in subsequent chapters, their responsibilities include reviewing and accepting or rejecting state and local government applications for federal grants-in-aid and analyzing state regulatory standards for conformance with national minimum standards statutes and regulations prior to delegating regulatory primacy in a given field to applicant states.

The national judicial system continues to play its customary referee role, but also has become deeply involved in policymaking in areas such as public schools and the environment, even to the point of establishing a judicial receivership of several public school systems, as described in chapter 6. State courts have been deprived of jurisdiction over specified types of lawsuits by preemption statutes.

The traditional balance of power between a governor and the state legislature has been altered by partial congressional preemption statutes and their implementing rules and regulations which grant to governors powers not delegated by his/her state constitution and/or statutes. The new roles of governors are examined in chapter 5.

Minimum standard preemption acts have forced state legislatures to amend their statutes to bring them into conformity with national standards or lose responsibility for the preempted functions and possibly national grants-in-aid.

The importance of state bureaucrats who administer programs covered by minimum national standards has increased because they draft and promulgate implementing regulations. In drafting regulations, bureaucrats typically work closely with their federal counterparts who are required by law to review state rules and regulations for conformity with national minimum standards. Development of acceptable state rules and regulations often necessitates extensive negotiations between bureaucrats on the two planes of government.

Chief executives of general purpose local governments are not responsible for administering federal minimum standards preemption

acts, but are subject to their provisions and implementing rules and regulations. They may have to seek clarification or waivers of the standards or extensions of time for their governments to meet newly established standards.

Minimum standards preemption statutes can also impact local government bodies. If their facilities fail to meet minimum air, water, and drinking water national standards, these governing bodies will have to appropriate funds for necessary improvements to existing facilities and/or construction of new facilities. Federal mandates imposed on state and local governments are examined in chapter 7, which also addresses the question whether subnational governments should be reimbursed in full or in part for the costs incurred in complying with the mandates.

A positive correlation exists between the expansion of national governmental programs 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 the national bureaucrats with varying degrees of success.

Do business firms prefer national or state regulation? Congressional preemption has changed the political landscape in terms of interest group politics and the extent of state regulatory authority. Many economic interest groups historically lobbied against national government regulation in the belief they would be more successful in influencing state legislatures not to enact stringent regulatory statutes and state administrators whose promulgated regulations might not be as strict or vigorously enforced compared with national regulations and their enforcement. The motor vehicle industry in the mid-1960s was a major exception as it lobbied for complete congressional preemption of motor vehicle safety standards and regulation of new motor vehicles emissions. Motor vehicle companies were fearful that absent such preemption they might have to manufacture vehicles with specific safety features and emission control systems for sale in each state with nonharmonious standards. The trucking industry and the teamsters union similarly lobbied Congress to remove state authority to establish maximum truck sizes and weights (see chapter 4).

Preemption Criteria

When and under what conditions should Congress preempt the regulatory authority of states and their political subdivisions? The importance of

this question increased with the acceleration in the pace of congressional enactment of preemption statutes. President Dwight D. Eisenhower, reflecting the concern of many citizens that the national government had become too powerful, appointed in 1953 the Commission on Intergovernmental Relations. The commission was charged with conducting an in-depth study of power distribution in the federal system.

The commission addressed the controversy over congressional removal of state regulatory authority and identified the following conditions as justifying Congress exercising its preemption powers:

> (a) When the National Government is the only agency that can summon the resources needed for an activity. For this reason, the Constitution entrusts defense to the National Government. Similarly, primary responsibility for governmental action in maintaining economic stability is given to the National Government because it alone can command the main resources for the task.
> (b) When the activity cannot be handled within the geographic and jurisdictional limits of smaller units, including those that could be created by compact. Regulation of radio and television is an extreme example.
> (c) When the activity requires a nationwide uniformity of policy that cannot be achieved by interstate action. Sometimes there must be an undeviating standard and hence an exclusively national policy, as in immigration and naturalization, the currency, and foreign relations.
> (d) When a State through action or inaction does injury to the people of other States. One of the main purposes of the commerce clause was to eliminate State practices that hindered the flow of goods across State lines. On this ground also, national action is justified to prevent unrestrained exploitation of an essential nature resource.
> (e) When States fail to respect or protect basic political and civil rights that apply throughout the United States.[30]

The above criteria may be viewed as common sense ones restating the powers delegated to Congress by Section 8 of Article I of the U.S. Constitution and Section 5 of the Fourteenth amendment.

The commission also formulated the following principles to guide congressional regulation to ensure states retain essential reserved powers:

> First, the fact the National Government has not legislated on a given matter in a field of concurrent power should not bar State action.
>
> Second, national laws should be framed that they will not be construed to preempt any field against State action unless this intent is stated.
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> Third, exercise of national power on any subject should not bar State action on the same subject unless there is a positive inconsistency.
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> Fourth, when a national minimum standard is imposed in a field where uniformity is not imperative, the right of States to set more rigorous standards should be carefully preserved.

> Fifth, statutes should provide flexible scope for administrative cession of jurisdiction where the objectives of the laws at the two levels are substantially in accord. States legislation need not be identical with the national legislation.[31]

The first principle is simply recognition of the well-established principle of constitutional law that either or both planes of government may exercise concurrent powers. The second principle is easy to state but difficult to implement, and questions may be raised whether the principle is workable in all situations. The third principle is nothing more than a restatement of the supremacy of the law clause of the U.S. Constitution. The fourth principle underlies the type of minimum standards preemption employed by Congress since 1965, which is examined in chapter 5. The fifth principle was implemented by the *Atomic Energy Act of 1959*, which authorizes the Nuclear Regulatory Commission to turn over certain regulatory powers to states signing an agreement with the commission provided the state statutes and administrative regulations are consistent with the federal statutes and administrative regulations, a subject explored in chapter 4.[32]

The commission in effect urged Congress to be more careful in the future when enacting statutes not to preempt the regulatory powers of the states unnecessarily, but it did not attack U.S. courts for their decisions.

The U.S. Advisory Commission on Intergovernmental Relations, established by Congress in 1959, issued a report in 1984 recommending that Congress enact a preemption bill into law only to achieve one of the following goals:

1) to protect basic political and civil rights guaranteed to all American citizens under the Constitution;
2) to ensure national defense and proper conduct of foreign relations;
3) to establish certain uniform and minimum standards in areas affecting the flow of interstate commerce;
4) to prevent state and local actions which substantially and adversely affect another State or its citizens; or
5) to assure essential fiscal and programmatic integrity in the use of federal grants and contracts into which state and local governments freely enter.[33]

These principles do not differ significantly from the conditions identified by the Commission on Intergovernmental Relations nearly two decades earlier.

A much different answer to when and under what conditions Congress should preempt the regulatory authority of the states was

provided by President Ronald Reagan, who in 1987 listed the following as "Fundamental Federalism Principles":

(a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.
(b) The people of the States created the national government when they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.
(c) The constitutional relationship among sovereign governments, State and national, is formalized in and protected by the Tenth Amendment to the Constitution.
(d) The people of the States are free, subject only to the restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their lives.
(e) In most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administrations for our domestic concerns and the surest bulwarks against anti-republican tendencies."
(f) The nature of our constitutional system encourages a healthy diversity in the public policies by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.
(g) Acts of the national government—whether legislative, executive, or judicial in nature—that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.
(h) Policies of the national government should recognize the responsibility of—and should encourage opportunities for—individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.
(i) In the absence of clear constitutional or statutory authority, the presumption to sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.[34]

Reagan's principles essentially reflected the position of individuals and organizations favoring states' rights, emphasized the vital role played by individual states as laboratories of democracy, and advised Congress to exercise restraint in exercising its delegated powers. Richard S. Williamson, President Reagan's first assistant for intergovernmental relations, explained in 1982 the president was seeking "to change the

presumptions which have been directing Americans and led them in recent years to turn first to the federal government for answers. He is seeking a 'quiet revolution,' a new federalism which is a meaningful American partnership."[35] Nevertheless, President Reagan signed more preemption bills into law than any other president to date.[36]

The Changing Nature of National-State Relations

The U.S. Constitution to a large extent assigns responsibility for the restructuring of the federal system to Congress by delegating to it sweeping powers in broad terms without guidelines or restrictions governing their use. When pressures build for action to solve a major problem Congress generally responds by developing a solution *de novo*. No comprehensive study has been conducted by Congress or any other organization to identify and assess (1) the effectiveness of the various structural approaches employed by Congress to remove regulatory powers completely or partially from subnational governments or (2) the impact of preemption statutes on the viability and fiscal capacity of these governments.

A federal system is described aptly as an *imperium in imperio*, an empire within an empire, with legislative bodies on the national and state planes of government exercising relatively autonomous political power in their respective area of competence as well as concurrent powers (see chapter 5). The U.S. Constitution delegates specific powers to Congress and reserves all other powers unless prohibited to the states and the people. Congress, however, is authorized to employ its delegated powers, including the necessary and proper clause reinforced by the supremacy of the law's clause (art. VI), to preempt certain concurrent powers exercised by state legislatures. In other words, certain concurrent powers are coordinate ones and other powers are subordinate ones subject to complete or partial preemption by Congress. A power fundamental to semi-sovereign states, such as the power to levy taxes, is not subject to preemption unless its exercise places an undue burden on interstate commerce or denies a citizen equal protection of the laws.

Although Congress has possessed the power to preempt completely certain concurrent powers since 1789, the power was not employed between 1790, when the *Copyright Act* and the *Patent Act* were enacted, and 1946 when the *Atomic Energy Act* was enacted.[37]

Several of the original complete preemption statutes—atomic energy, grain standards, and railroad safety are examples—have been amended by Congress in recognition of the significant roles states can play in the administration of these statutes. These amendments authorize

the responsible federal administrator to make limited regulatory authority turn-backs to states meeting stipulated conditions. Congress also has authorized the governor of one state to petition the secretary of transportation for removal of a decision made by a complete preemption statute and the governor or state legislature to veto a federal administrative decision based upon a complete preemption statute—*Nuclear Waste Policy Act of 1982*—subject to a subsequent veto override by Congress (see chapter 4).

Congress incorporated contingent preemption provisions in the *Voting Rights Act of 1965*, described in chapter 4, by stipulating the act will apply to a state only if two conditions prevail within the state.[38] In 1999, Congress enacted the *Gramm-Leach-Bliley Financial Modernization Act*, which contains a contingent preemption provision providing a federal insurance agent licensing system would be implemented if twenty-six states failed to adopt a uniform licensing system for agents by November 12, 2002.[39] This provision was effective: thirty-five states on September 10, 2002, were certified as having a uniform licensing system.[40]

Congressional mandates requiring state and local governments to initiate a particular course of action currently are the major irritants in national-state relations. Subnational governments described as galling the 1985 decision of the U.S. Supreme Court that validated congressional extension of the provisions of the *Fair Labor Standards Act* to their employees.[41]

A revolution, albeit a relatively silent one, in intergovernmental relations has been worked since 1965 by limited congressional preemption of traditional state and local responsibilities. Chapter 5 examines the various types of limited preemption statutes enacted by Congress, including ones creating an *imperium in imperio*, adopting a state standard, authorizing additional uses of a federally regulated product as determined by a state standard, combining partial preemption and *imperium in imperio*, and providing for voluntary state transfer of regulatory responsibility to the national government.

In effect, a regulatory *imperium in imperio* under partial preemption exists at the sufferance of Congress, which in its wisdom at any time may assume complete responsibility for a regulatory function. The principal distinction between a genuine *imperium in imperio* and one created by minimum standards partial preemption statutes is that the latter's establishment is dependent upon a state voluntarily submitting a plan, containing state standards at least as stringent as national ones and an enforcement program, to the appropriate federal department or agency and accepting the regulatory primacy delegated to it by the department

or agency if the plan is approved. Under regulatory primacy, only the state exercises regulatory authority and the role of the concerned national body is to monitor state exercise of the authority.

The Accountability-Responsibility Problem

Congress in enacting limited preemption statutes has produced a complex national-state intertwining of powers that makes it difficult for government officers, and particularly for citizens, to determine which plane is responsibility for solving major governmental problems. A genuine system of "dual" federalism with no shared powers would facilitate citizen determination of the plane of government responsible for a function or a functional component. The reluctance of Congress to enact limited preemption acts on a regular basis until 1965 preserved in general a governance system in which accountability and responsibility could be fixed with relative ease. It, of course, must be recognized that federal conditional grants-in-aid allow subnational government officers to blame Congress for certain unpopular actions by maintaining they were "mandated" to take the actions. In fact, the so-called mandates could have been avoided by failing to apply for or accept grants-in-aid from the national government.

Although limited congressional preemption statutes subject states to national controls, the extent and variety of these controls vary considerably from one statute to another, as outlined in chapter 5. While the argument can be advanced that the system may function more effectively if preemption statutes are tailored to address each problem in the most effective manner, one product of this approach is citizen confusion.

Citizen control of governments is reduced by complete and limited preemption as the decision-making forum is shifted from subnational legislative bodies to the more remote Congress. This disadvantage may be offset in the eyes of many citizens by advantages that can flow from congressional preemption statutes. Recommendations are presented in chapter 7 to clarify the responsibility of the national and state planes of government under partial preemption statutes.

Congressional Preemption and Goal Achievement

Congressional exercise of its preemption powers is justified primarily on the ground that it is the most effective and efficient manner in which to solve major nationwide problems. Unfortunately, as noted earlier, there have been few studies of the effectiveness and efficiency of the various types of complete and limited preemption statutes enacted by Congress.

Studies of a complete preemption program with a provision for the turnback of limited regulatory authority—the agreement states program in the nuclear area—reached the positive conclusion the program is effective and popular with the states. Citizens generally are aware that the air quality and water quality partial preemption statutes have failed to achieve their goals because Congress has been forced to grant extensions of time for achievement of mandated standards by the states and their political subdivisions.

A 2002 U.S. General Accounting Office limited study focused on federal and state responsibilities for standard setting and implementation in regulatory programs and noted: "...[there are a] rich variety of ways in which the federal government and the states can work toward achieving shared regulatory objectives. Each variation reflects circumstances and sensitive issues specific to the program concerned, and each program is unique in some way. But comparative analysis reveals both underlying features of program design and trade-offs between the various options available. Explicitly considering these features and trade-offs could help guide decisions about how to structure future federal-state regulatory programs."[42] This study is examined in more detail in chapter 7, which also examines the question whether Congress, in mandating the achievement of statutory goals by specific dates, was realistic in view of the fact no consideration was given to the technical feasibility of achieving certain statutory goals or the financial and political capacity of subnational governments to comply with the standards by the dates specified.

Field preemption by Congress may have undesirable consequences as illustrated by a 1992 decision of the U.S. Supreme Court opining the *Airline Deregulation Act of 1978* strips states of all regulatory authority in the field, thereby making it impossible for state attorneys general individually or cooperatively to enforce state deceptive practices suits against airlines.[43]

Experience also reveals a federal preemption statute is not always successful in achieving its proclaimed goals. Congress has preempted to a substantial degree the authority of states to regulate the financial securities industry. New York State Attorney General Eliot Spitzer in 2002 demonstrated the regulatory inadequacy of the U.S. Securities and Exchange Commission's supervision of financial markets by his investigation of Merrill Lynch & Company. His findings revealed some of its analysts pretended to be providing impartial recommendations to clients to purchase shares of dot-com companies whose business the company's investment bankers were seeking while aware the stocks were not sound investments.[44] The company negotiated a settlement with the attorney

general involving the payment of $100 million in fines and issuance of an apology to investors.

Congressional Responsiveness

The unamended U.S. Constitution contained a built-in safeguard ensuring Congress would not intrude upon the reserved powers of the states by enacting unwanted preemption statutes. The constitutional provision (art. I, §3) authorizing the election of senators by state legislatures was an effective mechanism to allow them indirectly to veto preemption bills approved by the popularly elected House of Representatives. The Constitution of the Federal Republic of Germany currently contains a similar provision providing members of the *Bundesrat* are members of the *Kabinett* (cabinet) of each *Land* (state). The *Bundesrat* may disallow bills enacted by the *Bundestag* (parliament) if they encroach upon the powers of the *Länder* (states).

Allowing the drafters of the Constitution to speak for him, Jackson Pemberton in 1976 attributed the fundamental changes in federal-state relations to the adoption of the Seventeenth Amendment:

> We noted with concern that the universal nature of legislatures is to legislate too much, and that unless some opposing force were supplied, the United States Congress would eventually infringe every State prerogative until the rights of the people vested in the States were consumed. We talked much of the need for Senators to preserve the sovereignty of their States because they were the best defenders of the rights of the people had already lost to their States' governments. Hence, Senators were elected by the State legislature, were to answer to the State, and were to represent the interests of the State in the Congress. Amendment XVII destroyed that balance and the Senate became another house.[45]

Ratification of this amendment in 1913 removed a safeguard against congressional encroachment on state regulatory powers, yet Congress did not enact preemption statutes on a regular basis until the 1960s. Chapters 4 and 5 explain the reasons for the sharp increase in such statutes.

One focal point of this book is the extent to which Congress gives credence to the preemption concerns of state and local governments. In 1824, Chief Justice John Marshall of the U.S. Supreme Court referred to Congress's interstate commerce power by noting, "the wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied to secure them from its abuse."[46] One hundred and twenty-nine years later, Herbert Wechsler expanded Marshall's conclusion by developing the political safeguards theory of federalism,

explaining states can utilize the political process to fend off bills in Congress designed to preempt one or more of their reserved powers.[47]

Justice Harry A. Blackmun of the U.S. Supreme Court drew upon this theory in 1985 to uphold the constitutionality of a congressional preemption statute by opining, "the principal and basic limits on the federal commerce power is inherent in all state participation in federal government action."[48] The statute extended national minimum wage and overtime pay requirements to non-supervisory employees of state and local governments, thereby subjecting many of these governments to a new major fiscal burden.

States in the early 1960s also objected to many conditions attached by Congress to grant-in-aid programs and maintained they were burdensome and amounted to an indirect form of preemption. President Lyndon B. Johnson initiated several administrative actions in response to these criticisms and President Richard M. Nixon proclaimed his "New Federalism" policy was designed to shift political power to state and local governments (see chapter 3). President James E. Carter, a former Georgia governor, was sensitive to the criticisms of federal rules and regulations and an economic deregulation movement commenced during his administration.

President Ronald Reagan, who assumed office in 1981, has been the most successful president in terms of persuading Congress to reduce the number of conditions attached to grants-in-aid by replacing numerous categorical grants-in-aid with block grants and directing federal departments and agencies to expedite delegation of regulator primacy to states under minimum standards preemption statutes.

Fiscal Implications of Congressional Mandates

General purpose local governments complained for decades about state legislative mandates requiring the undertaking of specified activities and/or provision of services meeting minimum state standards on the ground these mandates impose substantial unreimbursed costs on local governments. Lobbying by local governments led to amendment of fifteen state constitutions and enactment of statutes in sixteen states providing mandate relief.[49] The various amendments and statutes either make it more difficult for state legislatures to impose mandates or require the state government to reimburse local governments in full or in part for costs incurred in implementing the mandates.

Congress uses its preemption powers to impose costly mandates and restraints on subnational governments. The restraints forbid them to initiate specific actions and the units may have to employ more

expensive alternatives. These governments lobbied Congress to reimburse them for mandated costs for three decades without success. In 1995, the Republican Party assumed control of Congress, which enacted the *Unfunded Mandates Reform Act of 1995*.[50] Chapter 7 contains a typology of congressional mandates and explores the impact of the *Unfunded Mandates Reform Act of 1995* in terms of achieving its stated goals.

Federalism Theory

Scholarly writings on the U.S. political system contain numerous references to theories of U.S. federalism, but the references tend to be little more than general phrases, most commonly "dual federalism" and "cooperative federalism." Dissatisfaction with the explanatory values of these descriptors, commencing in the 1960s, led to a myriad of new descriptors. William H. Stewart in 1984 identified 497 such figurative descriptions.[51]

The dual federalism theory is a simple one positing a complete separation of state and national powers. Similarly, the theory of cooperative federalism typically is defined as a governance system in which activities of the three planes of governments are carried out on a cooperative basis. Neither theory adequately explains the federal system more than two hundred ten years after its inauguration.

Chapter 2 explains in some detail congressional possession of certain exclusive powers which states are forbidden to exercise. Furthermore, state legislatures possess exclusive reserved powers—such as provision of services and control of local governments subject to state constitutional limitations—which generally are not subject to congressional control. These facts accord with the theory of dual federalism.

Cooperation between the national, state, and local planes of government in exercising powers is extensive. Examples of national government cooperation with subnational governments include the Internal Revenue Service and state tax departments exchanging computer tapes containing income tax returns, the Federal Bureau of Investigation operating a fingerprint service for state and local police forces, and Congress authorizing grants-in-aid to assist subnational units.

Neither theory, however, takes account of the sharply increased use of preemption powers by Congress since 1965. In effect, the national legislature has produced a quiet revolution in the U.S. federal system in the absence of constitutional amendments by employing its powers of complete and partial preemption to structure new regulatory relationships between the planes of government.

Daniel J. Elazar, who made important contributions to federalism theory, explained in 1987 "the center-periphery model of statehood is challenged by the champions of a new model, which views the polity as a matrix of overlapping, interlocking units, powers, and relationships. The efforts to come to grips intellectually with all of these phenomena have been slower than the movement in the real world. The accepted intellectual models have tended to lag behind actual developments."[52]

Elazar's comments are most pertinent. It is apparent a full appreciation of the complexities and dynamics associated with the ever-changing division and sharing of governmental powers cannot be gained from current federalism theories, which focus upon the paradigms of centralization and noncentralization of political power. This linear view of political powers is useful in positing the extremes, but is not helpful in promoting a full understanding of the nuances of a complex federal system composed of centralization, noncentralization, and decentralization elements.

Federalism is an abstract organizational principle; it does not determine precisely the boundary lines between national and state powers. A federal constitution can provide for a sharp and static distribution of powers between the two governmental planes or a dynamic changing distribution of powers. An examination of the U.S. Constitution reveals three broad spheres of power: a national controlling sphere, a state controlling sphere, and a shared national-state sphere. In practice, the shared sphere also includes general purpose local governments. The drafters of the Constitution sought to establish "a more perfect Union" and this goal has been achieved in the sense the planes of government have become more united through inter-linkages. The goal of "a more perfect Union" is depicted on the reverse side of the Great Seal of the United States: the shield with a horizontal bar represents Congress, linking the thirteen vertical bars (states) together, thereby suggesting Congress had been assigned the major responsibility for integrating states into the national polity.

The review of congressional complete and circumscribed preemption statutes in this volume reveals a new synthesis of elements to be incorporated into a more general theory of federalism which has greater explanatory value than the two current major theories. It will become apparent that more than a separation of all political powers between two planes of government and cooperative interplane relations must be embodied in a dynamic theory of federalism. The intertwining of regulatory programs, produced by fiscal incentives and prescriptions, and constantly changing relationships between the planes are key characteristics of a functioning federal system in the twenty-first century.

A comprehensive nonequilibrium theory of dynamic federalism must encompass elements of *imperium in imperio*, cooperative interplane

interactions, informal congressional preemption, total congressional preemption, and partial congressional preemption, a subject examined in chapter 7.

An Overview

An in-depth analysis of metamorphic federalism commences with chapter 2, which examines the strengths and weaknesses of the confederacy established in 1781 by the Articles of Confederation and Perpetual Union, the growing dissatisfaction with the articles, and the conversion of the confederacy into a federal system by the U.S. Constitution effective in 1789. This chapter explores the intent of the constitution's drafters and the expansion of the powers of the national government by statutory elaboration, judicial interpretation of constitutional grants of powers to Congress, and constitutional amendments.

Chapter 3 reviews congressional use of incentives—conditional grants-in-aid and tax credits—to persuade states and local governments to adopt and implement national policies. This chapter makes a clear distinction between incentives and genuine congressional mandates.

The subject of chapter 4 is complete congressional preemption of the regulatory authority of states in specified fields. Experience with several complete preemption statutes reveals states, if authorized, could play a role in implementation of the statutes, and Congress amended a number of these statutes by authorizing a limited turn-back of regulatory authority to the states.

Chapter 5 explores the nature of the *imperium in imperio* system established by the U.S. Constitution and congressional use of its delegated powers to remove regulatory powers partially from states.

Congressional preemption statutes have been challenged on numerous occasions on the ground they violate the Tenth Amendment to the constitution. Furthermore, Congress does not always include a provision in a statute stipulating whether the regulatory powers of states are preempted totally or partially. Chapter 6 focuses on major U.S. Supreme Court decisions relative to whether Congress exceeded its delegated powers in enacting a preemption statute or intended to preempt the powers of states without so stipulating.

Chapter 7 reviews the findings presented in the preceding chapters, draws conclusions with respect to the desirability and effectiveness of various types of complete and partial preemption statutes, and offers a more dynamic and general theory explaining the nature of the U.S. federal system in the first decade of the twenty-first century.