

## Chapter 1

# The Nature of Preemption

This volume builds upon my 2005 book titled *Congressional Preemption: Regulatory Federalism*, which presents a broad overview of congressional use of preemption powers since 1790 to remove completely or partially state regulatory powers in various fields such as bankruptcy, civil rights, gun control, occupational safety, and water quality.<sup>1</sup> The book notes Congress, commencing in 1965, enacted the first of a new type of preemption statute that I label an innovative preemption statute. The book also briefly reviews this new preemption type in contrast to this book that is devoted primarily to various types of innovative preemption statutes and their relative success in achieving congressionally established goals. A review of constitutional developments will facilitate an understanding of the importance of innovative preemption statutes.

The U.S. Constitution established the world's first federal system in 1789, an *Imperium in Imperio* (an empire within an empire), by dividing exercisable powers between the newly established general government and the thirteen state governments. The fundamental law delegates specific powers to Congress and other specific powers to the president, reserves all other powers with the exceptions of prohibited ones to the states, and allows states to exercise other specified powers with the consent of Congress. The powers delegated to Congress by the U.S. Constitution are latent ones that may be employed at will. The drafters of the fundamental law recognized the undesirability of a static distribution of political powers between the national government and the states, and included provisions for the amendment of the fundamental law and other provisions authorizing Congress to enact statutes removing

completely or partially or contingently specific regulatory powers from the state governments.

The reserved powers include the English common law and equity that states continue to employ subsequent to the issuance of the Declaration of Independence in 1776. A most important component of the common law is the police power that is definable only in the broadest terms as the power of states to regulate persons and properties in order to protect and promote public health, safety, welfare, morals, and convenience. State and local governments were the principal regulators until well into the twentieth century, when Congress became a most important regulator and employed more frequently its constitutionally granted broad powers to remove completely or partially or contingently regulatory powers from states and by extension from local governments. The reader should note that not all preemption statutes contain an explicit preemption clause, and courts are called upon to determine whether a statute is preemptive.

Congress possessed the power to preempt completely certain concurrent state powers since 1789, but the power was not exercised after the enactment in 1790 of the Copyright Act and the Patent Act until 1946 when the Atomic Energy Act was enacted.<sup>2</sup> Several complete preemption statutes—atomic energy, grain standards, and railroad safety are examples—have been amended by Congress to allow states to play a role in the administration of these statutes.<sup>3</sup>

Congressional exercise of its preemption powers in an innovative manner since 1965 produced major changes in the nature of the federal system without a constitutional amendment.

Congress, commencing with the Voting Rights Act of 1965, enacted innovative preemption statutes differing significantly from the earlier preemption statutes.<sup>4</sup> We classify these statutes as minimum national standards preemption, contingent preemption, maximum national standards preemption, regulatory authority turn-backs, and state-friendly preemption statutes.

Two theories explaining the federal system in the United States are well known. The theory of dual federalism, a legalistic one, posits there is a constitutional division of exercisable powers between the national government and the state governments.<sup>5</sup> James Madison in effect was the author of theory of cooperative federalism that gained prominence after World War II, and emphasizes the cooperation between the three planes of government: national, state, and local.<sup>6</sup>

A brief review of the events leading to the drafting and ratification of the U.S. Constitution, and a listing of its key provisions will facilitate an understanding of the congressional development of con-

gressional minimum standards and other innovative preemption statutes pertaining to water quality, air quality, drinking-water quality, surface mining, insecticides, fungicides, and rodenticides. These relatively new innovative statutes supplement the complete preemption acts, removing all regulatory powers from states in a given field since 1790. Each state is authorized to continue regulating in each of the above five fields, provided the state has standards at least as stringent as the federal standards, qualified personnel, and the necessary equipment.

## CONSTITUTIONAL DEVELOPMENTS

The Declaration of Independence in 1776 officially dissolved the ties of each of the thirteen former colonies to the United Kingdom, and established them as nation-states that entered into a loose military alliance. The superintendence of the prosecution of the successful Revolutionary War was the responsibility of the Second Continental Congress, a unicameral body composed of an equal number of members from each state. The thirteen states and the United Kingdom signed the Treaty of Paris of 1783, granting independence to the states.

### ARTICLES OF CONFEDERATION

The Congress that prosecuted the Revolutionary War recognized the need for a more permanent structure of government, and in 1777 proposed the Articles of Confederation and Perpetual Union providing for a league of amity. Boundary disputes, however, delayed ratification until 1781, when the thirteenth state, Maryland, ratified the articles.

The most important provision was Article II, which declared, "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the united States in Congress assembled." The drafters employed a lowercase *u* in united to emphasize a national government had not been established, and the articles were a treaty uniting the states for only expressed purposes.

Article III explained the new government was "a firm league of friendship," and described its purposes as "common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or by any of them, on account of religion, sovereignty, trade, or other pretense whatever."

Three important provisions promoting harmonious interstate relations were incorporated in Article IV: Citizens of a state as sojourners in sister states were entitled to the privileges and immunities of citizens in each state visited; the governor of the asylum state must return fugitives from justice to the requesting state; and each state must give full faith and credit to the legislative acts, records, and final judicial proceedings of courts in the other states. These provisions are incorporated in Article IV of the U.S. Constitution, as they are essential for the health of a confederacy or a federal union.

Each state legislature was authorized by Article V to appoint two to seven delegates to the unicameral Congress subject to recall. A three-year term limit over a six-year period was established for delegates appointed annually in a manner determined by each state legislature. A state's delegates collectively possessed a single vote. The reader should note the articles importantly did not establish an executive branch or a judicial branch.

The Congress was granted few powers: borrow and coin money, declare war, establish a postal system and standards of weights and measures, negotiate treaties with foreign nations, regulate relations with Indian tribes, and set a quota for each state to furnish men and funds for the army. The limited powers of the Congress and the lack of authority to levy taxes predestined the confederacy to failure.

## DEFECTS

The defects of the articles and the weakness of the Congress quickly were revealed by experience. Specific defects included Congress's reliance upon voluntary state contributions of funds, lack of authority to regulate interstate commerce and enforce its laws, difficulty in obtaining funds from foreign lenders, and inability to suppress disorders within states.

The printing of paper money was authorized by Congress, but such money almost immediately became worthless because of the lack of authority to levy taxes to raise revenue. This problem was not the only serious one. Article VI forbade states to "lay any imposts or duties which may interfere with stipulations in treaties" entered into by Congress with foreign nations, but Article IX stipulated commerce treaties may not prevent a state "from prohibiting the exportation or importation of any species of goods or commodities whatsoever . . ." Furthermore, the articles did not prohibit state-erected interstate trade barriers that soon brought interstate commerce to a near standstill.<sup>7</sup>

The end of the confederation was hastened by Captain Daniel Shays who served in the army during the Revolutionary War, and subse-

quently lead a rebellion of disgruntled farmers in western Massachusetts in 1786, which spread to within forty-five miles of Boston. They sought a lowering of real property taxes, cheap money, and suspension of mortgage foreclosures. The Commonwealth of Massachusetts was powerless to suppress the rebellion, and it was suppressed only when wealthy Boston residents raised funds for an army led by General Benjamin Lincoln.<sup>8</sup>

The articles' serious defects persuaded the Maryland and the Virginia boundary commissioners in 1785 to recommend the sending of delegates by each state to a meeting in Annapolis in 1786 to develop remedies. Only five states sent delegates who memorialized Congress to call a convention to consider drafting amendments to the articles. Congress responded by calling a convention to meet in Philadelphia in 1787.

### THE CONSTITUTIONAL CONVENTION

Only Rhode Island failed to send delegates to the convention that met from March 25 to September 17, 1787. States appointed seventy-four delegates, but nineteen refused to accept appointments or did not attend the convention. The convention was divided by philosophical and sectional differences with delegates representing the former expressing the fear a stronger national government would be a threat to individual liberties. The sectional differences were based on the nature of the economy in each region. Five days of negotiations led to a six-to-one decision to replace the Articles of Confederation and Perpetual Union with a new constitution. Delegates from five states had not arrived by the time of the vote.

Delegates debated whether the proposed Congress should be granted authority to review and invalidate state laws before they would become effective, but decided the constitution should not delegate this power. A major controversy concerned state representation in the proposed unicameral Congress with states with small populations pressing for equal representation for each state as under the Articles of Confederation. The Connecticut compromise resolved this controversy by providing for a bicameral national legislature with a Senate representing each state equally and a House representing each state in accordance with its population, with the proviso that each state would have a minimum of one representative.

The third controversy involved slavery, with the northern states generally advocating the immediate termination of the importation of slaves. Delegates approved a compromise clause providing slaves could be imported for twenty years and Congress could levy a tax of up to ten dollars on each imported slave.

The fourth controversy involved whether Congress should be authorized to impose import duties and export duties. The northern states favored both duties as sources of national revenue, and the southern states opposed the duties because they would be paying most of the duties in view of the facts they exported the bulk of their products, which were chiefly agricultural, and imported most of their needed manufactured products. The compromise provided that Congress could tax imports but not exports.

There was no serious opposition to fifteen of the eighteen powers proposed to be delegated to Congress. Furthermore, there was near unanimous agreement regarding the various prohibitions placed upon Congress and the requirement states must obtain congressional permission to initiate specified proposed actions, including entrance into interstate compacts or agreements, or levying of imposts on imports and exports.

The proposed constitution in Section 10 of Article I contains preemption provisions removing powers from the states. “No state shall enter in any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.”

The Constitution authorizes two types of concurrent powers. The first type includes the power of states to levy taxes immune from formal congressional preemption or court invalidation, unless they impose a burden on interstate commerce or violate the privileges and immunities clause or equal protection of the law clause of the Constitution. The second type includes powers expressly delegated to Congress and not prohibited to states, as illustrated by regulation of interstate commerce. The existence of concurrent powers can result in clashes between a congressional statute and a state statute. The drafters of the Constitution were aware such potential conflicts would occur and incorporated the supremacy of the law clause in Article VI, providing for the prevalence of the congressional statute wherever there is a conflict. This type of concurrent power exercised by a state legislature is subject to complete or partial preemption by a congressional statute.

Section 10 of Article I also permits state legislatures to exercise certain otherwise prohibited powers with the consent of Congress—levying of import and tonnage duties, keeping troops in time of peace, and entering into compacts or agreements with sister states. The reader should note the U.S. Supreme Court has not always opined these powers can be exercised only with congressional consent. In 1893, the court in

*Virginia v. Tennessee* noted such approval is required only if two or more states desire to enter into “political compacts” affecting the balance of powers between the general government and the states.<sup>9</sup> The court in 1975 opined the prohibition of levying “imposts or duties on imports” without the consent of Congress does not prevent imposition of an *ad valorem* property tax on imported tires.<sup>10</sup> The court issued a generally similar ruling in 1986, upholding the authority of Durham County, North Carolina, to impose an *ad valorem* property tax on imported tobacco stored in customs-bonded storehouses for future incorporation in domestic manufacturing on the grounds the tax did not violate the import-export clause of the U.S. Constitution, and was not preempted by an act of Congress.<sup>11</sup>

The reader should note citizens residing within states receive all of their public services, except the postal service, from state governments and/or local governments. Congress, of course, influences the provision of many of these services by offering conditional grants-in-aid to sub-national governments. Acceptance by a state government or a local government of one of these grants binds the recipient unit to abide by the attached conditions. Congress may authorize the provision of many services on federal properties located within states, such as education for children of military personnel.

The proposed constitution would establish a strong president, a Supreme Court, and a Congress possessing specific delegated powers (see below). Fear of a centralized government was reduced by inclusion of “checks and balances” designed to protect the semi-sovereignty of the states and individual liberties from abuse.

#### RATIFICATION CAMPAIGN

The proposed constitution, which was not a popular document, was sent by the convention to the thirteen state legislatures with the proviso each should arrange for the election of delegates to a special convention with the power to ratify or to reject the document. Several objections immediately were raised: the convention was called to revise the Articles of Confederation and Perpetual Union and not to discard them, the articles could be amended only with the unanimous consent of the states, the proposed Congress either would be too strong or too weak, and the new government either would be too independent of the states or too dependent upon them. The strongest opposition was in the interior of the nation and regions with a small population. Farmers and imprisoned debtors not surprisingly favored cheap paper money issued by states.

The proposed constitution forbade Congress to suspend the writ of habeas corpus unless a rebellion or an invasion threatens public safety. Congress and the states were forbidden to enact a bill of attainder or an ex post facto law, and to impair the obligation of contracts. Many of the opponents' criticisms centered on the lack of a bill of rights, similar to the rights in state constitutions guaranteeing freedom of assembly, petition, press, religion, and speech. Proponents of the draft constitution argued a bill of rights would be superfluous in view of the fact the proposed fundamental law does not grant powers to Congress to abridge the liberties of citizens.

Article VII of the proposed constitution provided it would become effective upon ratification by nine states. The proposed fundamental law was ratified quickly by the Delaware, New Jersey, and Pennsylvania conventions, and their approvals were followed by the approval of conventions in Connecticut and Georgia. Strong opposition continued in Massachusetts, New York, and Virginia, and their rejection would doom the proposed constitution.

#### THE FEDERALIST AND ANTIFEDERALIST PAPERS

Alexander Hamilton, John Jay, and James Madison wrote a series of eighty-five letters to editors of New York City newspapers during the winter and spring of 1787 to 1788 to convince delegates to the state convention to ratify the proposed constitution. Thirty-six letters were published as a book in late March 1788, the remaining letters were published as a second book in late May, and the two books subsequently were consolidated into one.<sup>12</sup> The excellent expositions contained in the book merit reading today.

Each letter writer explained and defended a provision of the proposed constitution and ended with the name *Publius*. Hamilton in the Federalist No. 17 argued "it will always be far more easy for state governments to encroach upon the national authorities than for the national government to encroach upon the State authorities. The proof of this proposition turns upon the greater degree of influence which the state governments, if they administer their affairs with uprightness and prudence, will generally possess over the people."<sup>13</sup>

Opponents were fearful the supremacy of the laws clause would permit Congress to convert the proposed federal system into a unitary one. Hamilton, in the Federalist No. 33, sought to allay this fear: "If a number of political societies enter into a larger political society, the laws which the latter must enact, pursuant to the powers entrusted to it



by its constitution, must necessarily be supreme over those societies and individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for political power and supremacy.”<sup>14</sup>

Madison, in the Federalist No. 39, explained the fundamental law would establish a governance system that would be “neither wholly national nor wholly federal.”<sup>15</sup> The reader should recall the words *confederation* and *federation* in the eighteenth century were used interchangeably. The Constitution’s supporters termed themselves federalists in an attempt to appeal to persons opposing a strong national government.

The necessary and proper clause also was justified in the Federalist No. 44 by Madison, who supported the clause by explaining employment of the first alternative—assignment of specific powers to each plane of government—would have produced “a complex digest of laws on every subject to which the Constitution relates”; and the second alternative would involve enumeration of “the particular powers of means not necessary or proper for carrying the general powers into execution,” and the “task would have been no less chimerical . . .”<sup>16</sup>

Madison in the Federalist No. 45 assured citizens fearful of the creation of a national leviathan by stressing “the powers delegated by the proposed constitution to the federal government are few and defined,” and added in the Federalist No. 46 that “a local spirit will infallibly prevail much more in the members of Congress than a national spirit will prevail in the legislatures of the particular states.”<sup>17</sup>

*The Federalist Papers* generally were influential in swaying public opinion and particularly influenced the views of delegates to the New York convention, as a number of members lacked a complete understanding of the reasons why each provision was included in the proposed fundamental law. Sixteen letters, signed *Brutus*, were published in the *New York Journal* between October 1787 and April 1788 to rebut the proponents’ arguments. Available evidence suggests the letters were written by Robert Yates, a delegate to the Philadelphia constitutional convention and an associate of Governor George Clinton of New York. These papers were not published in book form as *The Antifederalist Papers and the Constitutional Convention Debates* until 1986.<sup>18</sup>

Brutus, in an October 18, 1787, letter attacked the necessary and proper clause and the supremacy of the laws clause, and concluded:

It is true the government is limited to certain objects, or to speak more properly, some small degree of power is still left to the States, but a little attention to the powers vested in

the general government, will convince every candid man, that if it is capable of being executed, all that is reserved for the individual States must very soon be annihilated, except so far as they are barely necessary to the organization of the government. The powers of the general legislature extend to every case that is of the least importance—there is nothing valuable to human nature, nothing dear to free men, but what is within its power. It has authority to make laws which will affect the lives, the liberty, and property of every man in the United States; nor can the constitution or laws of any State, in any way prevent or impede the full and complete execution of every power given.<sup>19</sup>

The influential *Federalist Papers* did not allay the fear of many citizens the proposed fundamental law would create a strong national government. Thomas Jefferson wrote a letter to Madison, and implied the Virginia convention would not ratify the proposed document until a bill of rights was incorporated.<sup>20</sup> Proponents sought to convince the conventions in the larger states to ratify the document by promising the first action taken by Congress under the constitution would be the proposal of a bill of rights. The conventions in Massachusetts, New York, and Virginia ratified the proposed constitution with the proviso that a bill of rights be added as soon as the constitution became effective.

The Constitution was ratified when the New Hampshire ratification convention, the ninth one, approved the fundamental document in June 1788, and also recommended the addition of a bill of rights. Elections were held for presidential and vice presidential electors and members of the U.S. House of Representatives in 1788, each state legislature appointed two U.S. senators, and the new national government became effective in 1789. A bill of rights containing twelve amendments was proposed by Congress, and ten amendments were ratified by the states and became effective on December 15, 1791.

## THE FUNDAMENTAL LAW

Elements of the unitary and confederate systems of governance are incorporated in the U.S. Constitution to form simultaneously a compound republic and a unitary government by granting Congress complete control over the District of Columbia and U.S. territories. The fundamental document delegates to Congress specific regulatory powers, including

exclusive and concurrent ones, and one service provision power, the postal service. The 1791 ratification of the Tenth Amendment reserves all other powers not delegated or prohibited to the states and the people.

## DELEGATED POWERS

Section 8 of Article I delegates the following powers to Congress:

To lay and collect taxes, duties, imposts and excises, to pay the debts and to provide for the common defense and general welfare of the United States, but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of sciences and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;—and

To make all laws which shall be 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 or officer thereof.

**Implied Powers.** An argument erupted between individuals supporting a loose interpretation of the delegated powers and those favoring a strict interpretation. Hamilton, for example, maintained Congress was empowered to charter a national government bank, and Jefferson countered Congress lacked such a power since chartering a bank was not a delegated power. Congressional enactment of the Alien and Sedition Acts disturbed Jefferson and Madison. The latter in particular expressed his strong opposition to the acts: “The sedition act presents a scene which was never expected by the early friends of the Constitution. It was then admitted that the State sovereignties were only diminished by powers specifically enumerated, or necessary to carry the specified powers into effect. Now, Federal authority is deduced from implication;

and from the existence of State law, it is inferred that Congress possesses a similar power of legislation; whence Congress will be endowed with a power of legislation in all cases whatsoever; and the States will be stripped of every right reserved, by the concurrent claims of a paramount legislature.”<sup>21</sup>

Implied powers are essential for implementation of expressly delegated powers. The necessary and proper clause, also known as the elastic clause, is the basis of the doctrine of implied powers enunciated by the U.S. Supreme Court in *McCullough v. Maryland* in 1819: “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate which are plainly adapted to the end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.”<sup>22</sup>

## RESULTANT POWERS

Congress can utilize two or more expressly delegated powers to infer it possesses a resultant power. The national legislature, for example, expressly is authorized “to establish a uniform rule of naturalization,” but it is not specifically delegated the power to regulate immigration. Congress also is granted constitutional authority to regulate commerce with foreign nations. This power, the power to regulate the naturalization of aliens, and the power of the Senate to confirm treaties with foreign nations negotiated by the president serve as the constitutional basis for regulation of immigration.

A second example is congressional use of its delegated powers to borrow funds and to coin money as constitutional authority to issue paper money.

## THE SUPREMACY OF THE LAW CLAUSE

The reader should note that this clause, in common with the necessary and proper clause, does not delegate a power to Congress. A compound republic with a national legislature and state legislatures with each possessing concurrent powers is faced with the problem of conflicts of laws. To solve the problem, Article VI of the Constitution stipulates: “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, anything in the Constitution or Laws of Any State to the contrary notwithstanding.”

The lower U.S. courts and the U.S. Supreme Court do not always invalidate a state constitutional provision or statute facially conflicting with an act of Congress by opining the conflict is not the type conferring jurisdiction upon these courts. Furthermore, courts often negate only one or two sections of a state statute conflicting with a congressional statute and the remainder of the state statute remains in effect, unless it contains a provision for invalidation of the entire law in the event a section is found to be unconstitutional.

A significant number of congressional statutes do not contain an expressed preemption provision removing regulatory powers from sub-national governments. In consequence, state courts and U.S. courts are called upon to rule whether these statutes are preemptive and whether each statute supersedes all state authority in the regulatory field or only part of it. Congress possesses the authority to reverse U.S. Supreme Court preemption decisions, but the number reversed by Congress is small.<sup>23</sup>

Justice Hugo Black of the U.S. Supreme Court in 1941 commented on the Court's difficult role in interpreting congressional statutes.

There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the follow expressions: conflicting, contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.<sup>24</sup>

#### THE GENERAL WELFARE CLAUSE

This clause is misinterpreted by a number of observers as authorizing congressional enactment of any law promoting the general welfare of the United States. This clause does not delegate a power to Congress. The misinterpretation, if accurate, would mean the governance system

of the United States is a unitary one in view of the supremacy of the laws clause that provides for the supersession of any provision in a state constitution or a state statute in direct conflict with a congressional act.

Congress is authorized by the Constitution to provide only one service, the postal service, on other than federal property within states; state and local governments provide all other services. It is important to note the Constitution does not delegate authority to Congress to exercise the common law police power, as it is the exclusive reserved power of states to regulate individuals and property in order to promote and protect public health, safety, welfare, morals, and convenience. However, Congress encourages provision of services by subnational governments and influences their nature by means of conditional grants-in-aid, and employs its interstate commerce regulatory power to protect public health, safety, welfare, and morals of citizens.

### CONGRESSIONAL PREEMPTION

Delegated powers can be exercised by Congress at its discretion to enact statutes removing partially or completely and prospectively and/or retroactively the regulatory powers of subnational governments in a given field.<sup>25</sup> The reader should note a preemption provision not based upon an expressly delegated power, such as one regulating migratory birds, can become effective by the president negotiating a treaty with a foreign nation and approval of the treaty by the Senate in accordance with Section 2 of Article II of the U.S. Constitution. Bills implementing free trade concordats with other nations in recent years have been termed *agreements*, such as the North American Free Trade Agreement, rather than *treaties*, as the former requires only an affirmative majority vote of each house for enactment, compared to a two-thirds affirmative vote in the Senate required for approval of a treaty.<sup>26</sup> Congress occasionally includes a savings clause in a statute preserving part of the regulatory authority of states in what otherwise would be a complete preemption act, or authorizes a state to regulate provided its regulations are equal to or stricter than the corresponding federal ones (minimum standards preemption).<sup>27</sup> In 2015, there were twenty-eight minimum standards preemption acts.

Critics object to the costs imposed upon states and local governments by preemption statutes containing mandates requiring subnational governments to initiate specified actions, and restraints prohibiting these units to initiate specified actions. Some critics are convinced subnational

governments are becoming little more than administrative subdivisions of the national government. Many complaints about federal mandates and federal restraints in fact do not involve preemption and are the result of subnational governments applying for and accepting federal conditional financial grants-in-aid.

Politically powerful special interest groups are responsible for a number of important preemption statutes. The environmental movement in particular became strong in the 1960s, and helped to persuade President Lyndon B. Johnson to send a message to Congress in 1967, recommending enactment of an air-quality statute removing all air pollution regulatory powers from the states. Governor Nelson A. Rockefeller of New York led a campaign to forestall enactment of such a law, and proposed as an alternative a series of interstate compacts, including the Mid-Atlantic-States Air Pollution Control Compact that was enacted by the Connecticut, New Jersey, and New York state legislatures, but did not receive congressional consent. Congress decided not to enact a complete preemption act, and instead enacted the Air Quality Act of 1967 allowing states to continue to regulate air pollution abatement, except emissions from motor vehicles, provided state standards are at least as stringent as the national standards and are enforced by qualified personnel who possess the necessary equipment.<sup>28</sup>

The motor vehicle manufacturers in the mid-1960s were facing the spread of non harmonious state emissions standards, feared they might have to develop as many as fifty emission control systems, and lobbied Congress to enact the proposed Air Quality Act of 1967. California had stricter motor vehicle air-quality emission standards than the proposed national standards, and the California standards would have been superseded if the proposal law was enacted. California lobbied Congress for an exemption that was incorporated in the act.

Preemption statutes remove regulatory powers from states, yet the latter do not always oppose enactment of such statutes, and occasionally a number of governors request Congress to enact a specific preemption act. For example, the National Governors Association requested Congress to enact the Commercial Motor Vehicle Safety Act of 1986, because states could not solve the problem created by drivers of commercial vehicles holding operating licenses issued by more than one state and continuing to drive after state revocation of their license for dangerous driving by utilizing a license issued by a sister state.<sup>29</sup>

Preemption statutes most commonly are based upon the interstate commerce clause, but other preemption statutes are based upon constitutional authority granted to Congress to enact laws relating to bankruptcy,



copyrights, foreign commerce, naturalization, patents, and taxation. A preemption statute's coverage may be broadened by enactment of amendments as illustrated by the Clean Air Act Amendments of 1990.<sup>30</sup> Each of a small number of preemption laws contains a sunset clause providing for the expiration of the law on a specified date unless Congress extends the expiration date.<sup>31</sup> A preemption statute may be short—less than one page—or several hundred pages in length.

A recent trend is congressional inclusion of a preemption statute in another larger statute that otherwise is not preemptive, such as an appropriation act and an omnibus budget reconciliation act that are hundreds of pages in length. Examples include the Commodities Futures Modernization Act of 2000 in the Consolidated Appropriations Act for Fiscal year 2001, Satellite Home Viewer Extension and Reauthorization Act of 2004 in the Consolidated Appropriation Act of 2005, and the Improved Security for Drivers' Licenses and Personal Identification Cards Act of 2005 in the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act of 2005.

## TYPES

Preemption statutes have created a complex body of laws. Such statutes may be classified by type as complete, partial, and contingent. The first type removes all state regulatory authority in a given regulatory field, but may allow states to cooperate in the enforcement of the act. An examination of such statutes reveals there are eighteen subtypes, including ones depended upon state assistance for the achievement of their respective goal(s).<sup>32</sup>

Partial preemption statutes are of four types: Such a statute may (1) occupy part of a specified regulatory field; (2) establish minimum regulatory standards allowing a state-granted regulatory primacy by the U.S. Environmental Protection Agency (EPA) or the U.S. Department of the Interior to continue to regulate the field completely, provided its standards meet or exceed the national ones and are enforced; (3) authorize a state to establish a more stringent regulatory standard in a particular field without advanced approval of a U.S. department or an agency; or (4) permit a state to establish a more stringent procedural standard in a specified field without advanced federal approval. Fifteen more stringent state regulatory standards preemption acts and one more stringent state procedural standards act have been enacted to date. The latter act is the first of its type, and is contained in the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005.<sup>33</sup>

The year 1965 was turning point in the nature of the federal system when Congress employed in the Water Quality Act a new type of partial preemption termed *minimum standards preemption*, a state-federal partnership approach, encouraging states to employ their latent reserved regulatory powers in specified areas provided each state's standards are at least as stringent as the federal ones, and the state has qualified employees and necessary equipment.<sup>34</sup>

To obtain primacy with respect to water pollution abatement, for example, a state must enter into a memorandum of agreement with the U.S. Environmental Protection Agency. States granted regulatory primacy by a U.S. department or an agency are exclusively responsible for regulating, and the concerned national agency's roles are monitoring state performance and providing financial and technical support. This type also may be viewed as congressional devolution of power to the states. A number of congressional statutes, such as the Oil Pollution Act, do not contain authorization for the administering federal department or agency to delegate regulatory primacy to states.

#### ENACTMENT PACE

Congress enacted its first two preemption statutes in 1790: the Copyright Act and the Patent Act.<sup>35</sup> The enactment pace subsequently was slow, with only 29 acts enacted by the end of the nineteenth century. Such statutes continued to be enacted at a slow pace during the first five decades of the twentieth century: 14 (1900–09), 22 (1910–19), 17 (1920–29), 31 (1930–39), 16 (1940–49), and 24 (1950–59). The enactment pace increased sharply, commencing in 1965: 47 (1960–69), 102 (1970–79), 93 (1980–89), 84 (1990–99), and 160 (2000–09). By January 1, 2015, 711 preemption statutes had been enacted since 1790.

The number of preemption acts enacted during any given time period is not an accurate indicator of the amount and importance of regulatory authority removed from states and their political subdivisions. President George W. Bush, for example, approved 133 preemption acts in the period 2001 to 2008, yet relatively little exercised regulatory powers were removed from states, although each of the three Internet tax freedom acts prevent states from levying and collecting Internet access taxes.<sup>36</sup>

Congress responded to state and local government officers' criticisms of unfunded mandates by enacting the Unfunded Mandates Reform Act of 1995, establishing mandatory procedures Congress must follow to enact mandates, but not forbidding the enactment of such mandates.<sup>37</sup>

Congress also enacted the Safe Drinking Water Act Amendments of 1996, offering relief from the expensive filtering mandates that were forcing small local governments either to file for bankruptcy protection or to abandon their drinking water supply systems, and also were imposing major financial burdens on larger local governments.<sup>38</sup>

#### ADMINISTRATIVE AGENCY PREEMPTION

Many preemption statutes authorize the secretary of a department or the administrator of an administrative agency to promulgate regulations preempting related state and local government laws and administrative rules and regulations. This so-called administrative preemption tends to be resented by state and local government officers, and is controversial. The U.S. Supreme Court in 1961 sanctioned a deferential standard of review of federal agency administrative regulations and agency preemption of a state or local government law.<sup>39</sup> Nina A. Mendelson, in 2008, presented a strong case for a much more limited deference, noted the “lack of statutory guidance to agencies” relative to their preemption powers, and concluded that “a presumption against agency presumption is likely to result in more explicit congressional decisions on when agency preemption decisions are appropriate and what criteria should guide them. Asking Congress for that guidance may not only result in a more thoughtful focus on state regulatory autonomy, but may also help improve the administrative process.”<sup>40</sup>

State and local government officers’ resentment of federal preemption is directed in particular at what is termed *preemption by preamble*, which refers to a federal department or agency basing its preemptive regulations on the preamble to a statute declaring its goals. Congress, in 2008, specifically forbade the Consumer Product Safety Commission to preempt state or local government laws and administrative regulations on the basis of the preamble to a preemption statute.<sup>41</sup>

#### SIGNIFIANCE OF PREEMPTION

The drafters of the U.S. Constitution designed Congress with the expectation that it would employ its latent delegated regulatory powers and become the supreme regulator adjusting the nature of the federal union to meet existing and emerging challenges and problems. Extensive congressional enactment of preemption statutes since 1965 has produced without constitutional amendments a major governance revolution transforming the nature of the national economic union and the national

political union. Many important changes are attributable to post-1964 innovative preemption statutes examined in this volume. Noteworthy developments are congressional enactment since 1976 of preemption statutes economically deregulating the airline, bus, motor carrier, natural gas, railroad, and telecommunications industries. Other preemption statutes since 1978 regulate states as polities.

Preemption statutes, particularly environmental regulatory ones, often are outline or skeleton laws establishing broad policy goals and delegating broad authority to secretaries of departments and administrators of agencies to promulgate detailed implementing rules and regulations. The enhanced role of bureaucrats in determining public policy raises questions relative to the democratic legitimacy of the policy-making process, as citizens have limited opportunities to influence the rule-making process compared to interest groups.

The local government plane, with its relatively small geographical scale, provides citizens with the greatest opportunity to exert effective influence during the policy-making process. To the extent that congressional preemption, directly or indirectly through the states by means of minimum standards preemption statutes, limits the discretionary authority of general-purpose local governments, participatory democracy will suffer. This conclusion is reflected in public opinion polls consistently revealing citizens generally have the highest respect for their respective local government and the least respect for the national government.

Congress finances in part programs established by preemption statutes by including in them unreimbursed mandates that often are costly and must be implemented by subnational governments. Several statutes also include restraints forbidding these governments to initiate specified actions and necessitating the use of costly alternatives. The Ocean Dumping Ban Act of 1988, for example, prohibits dumping of sewage sludge in the ocean and thereby requires municipalities located near an ocean to utilize the expensive alternative of incinerating the sludge or placing it in a landfill.<sup>42</sup> The Unfunded Mandates Reform Act of 1995 has not provided relief to state and local government from such mandates and restraints.<sup>43</sup> On the other hand, the Safe Drinking Water Amendments of 1986 offer major relief to public suppliers of drinking water, particularly small suppliers.<sup>44</sup>

Regulatory decision-making has become more centralized in Congress, which has become a unitary government in fields it has completely preempted. States nevertheless retain a broad range of regulatory powers, and continue to enact innovative statutes that subsequently are enacted by Congress and sister states. The national government somewhat sur-