Federal Preemption of State Law

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United States Constitution, Article VI

The Laws of the United States . . . shall be the supreme Law of the Land . . .

The U.S. Constitution creates a federal government with power to act on both states and individuals. Article I of the Constitution enumerates the powers of Congress and provides that Congress may enact laws "necessary and proper" for executing those powers.[1] Furthermore, the Tenth Amendment to the Constitution provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[2]

Although Congress is limited to powers enumerated in the Constitution, and to those necessary to exercise such powers, the federal government is supreme within areas of its delegated authority. The second clause of Article VI of the U.S. Constitution provides (emphasis added):

> This Constitution, and **the Laws of the United States** which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, **shall be the supreme Law of the Land**; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[3]

The supremacy clause, as this portion of Article VI is commonly known, provides the basis for federal preemption of state law.

1. U.S. Const. art. I, s. 8.
2. U.S. Const. amend X.
3. U.S. Const. art. VI, cl. 2.

Origins and intent

In the simplest terms, the supremacy clause means that, where federal and state laws conflict, federal law will supersede state law. Our system of government distributes responsibilities to both the federal government and the governments of the individual states, each with the ability to enact laws. Inherent to this design was inevitable conflict between duly enacted laws.

The framers of the Constitution sought to solve this problem by establishing that federal law would be supreme to all state laws. There is a self-evident logic to this approach; for a national government to work, laws enacted by that government ought to supersede conflicting state laws.[4] Though the inclusion of the supremacy clause was not without controversy,[5] it was the clear solution to the potential for conflict.[6] Without the supremacy clause, states would not be obligated to accept federal control over matters within the states. In effect, the federal government would have power only to the extent that states acknowledged such power, which would undermine the very purpose of a national government. The supremacy clause was an obvious solution; the language originally proposed at the Constitutional Convention was adopted without a single dissenting vote.[7]

Although the intent of the supremacy clause is plain, applying that intent to actual conflicts has yielded a large body of case law. It is the responsibility of the judicial branch to resolve disputes where federal

4. Joseph Story, *Commentaries on the Constitution of the United States* (Durham: Carolina Academic Press, 1987), 684.
5. James Madison, "Federalist No. 44." In *The Federalist* (Norwalk: The Easton Press, 1979), 304. ("The indiscreet zeal of the adversaries to the Constitution has betrayed them into an attack on this part of it also, without which it would have been evidently and radically defective.")
6. Story, *Commentaries*, 684.
7. Charles Warren, *The Making of the Constitution* (New York: Barnes & Noble, 1967), 319. The language of the clause was subsequently compressed and modified by the Committees on Detail and Style. Id., 321–322.

and state laws conflict and courts have developed a framework for evaluating preemption issues. In the simplest terms, the courts' preemption analysis considers whether, and to what extent, federal law has displaced state law. Over time, courts have consistently identified three types of preemption: express preemption, field preemption, and conflict preemption. We will consider each in turn.

Express preemption

The most straightforward type of preemption occurs when Congress, in enacting legislation, clearly expresses its intention to preempt state law. As the Supreme Court has noted, "when Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing the issue,"[8] then "there is no need to infer congressional intent to pre-empt state law."[9] Such expression does not, however, preclude judicial review. Even when express preemption clauses are included in legislation, courts may have to determine how to interpret such clauses.

In *Shaw v. Delta Air Lines, Inc.*, the Supreme Court was asked whether New York's Human Rights Law was preempted by the Employee Retirement Income Security Act of 1974 (ERISA).[10] The petitioners, Delta Air Lines and other companies, provided their employees with various benefits through plans subject to ERISA. These plans did not, however, provide benefits to pregnant employees as required by New York law.[11]

In its preemption analysis, the court noted that it is compelled to find that a state law is preempted by federal law when "Congress' command is explicitly stated in the statute's language."[12] Section 514 (a) of ERISA provides that the provisions of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.[13] The court found that New York's Human Rights Law was preempted by ERISA, holding that "the breadth of § 514 (a)'s pre-emptive reach is apparent."[14]

By contrast, Congress may express that it is not their intent to preempt state law. In *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, the Supreme Court was asked whether California's Warren Alquist Act was preempted by the Atomic Energy Act of 1954.[15] The California law prohibited construction of any nuclear power plant absent a finding by the State Energy Resources Conservation and Development Commission that there would be adequate storage for the plant's spent fuel rods.[16] The petitioners, two power companies, sought a declaration that the law was invalid.[17]

The court explained that "Congress may pre-empt state authority by so stating in express terms"[18] before noting that the Atomic Energy Act does not "prohibit the States from deciding, as an absolute or conditional matter, not to permit the construction of any further reactors."[19] Indeed, section 271 of the Act provides that "nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities."[20] The court, holding that the California law was not preempted by the Atomic Energy Act, found that this language removed any doubt "that ratemaking and plant-need questions were to remain in state hands."[21]

Unfortunately, Congress does not always make its intent so clear. Acting within the limits of its enumerated powers, Congress can effectively choose how much state power to allow, if any. Furthermore, the Constitution allows for state and federal regulatory overlap. Absent an explicit expression of the intent of Congress, it can be challenging to determine

8. Cipollone v. Liggett Group, 505 U.S. 504, 517 (1992).
9. California Federal Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 282 (1987).
10. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 88 (1983).
11. Id., 92.
12. Id., 95.
13. 29 U.S.C. s. 1144 (a).
14. *Shaw,* 463 U.S. at 96.
15. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 194–95 (1983).
16. Id., 197.
17. Id., 198.
18. Id., 203.
19. Id., 205.
20. 42 U.S.C. s. 2018.
21. *Pac. Gas,* 461 U.S. at 208.

where the federal government's authority should end and where a state's authority should begin. In such cases, courts must look to what is implied by federal law.

Implied preemption: field preemption

Even when Congress has not expressly declared its intent to preempt state law, courts have found such intent where Congress has acted to legislatively occupy an entire field. Field preemption is most common in areas in which federal law is the more appropriate regulatory approach; this frequently involves issues that cross state lines, such as immigration,[22] labor rights,[23] environmental protection,[24] and transportation.[25]

In *Southern R. Co. v. Reid*, the Supreme Court was asked whether a North Carolina law relating to the receipt of freight conflicted with congressional power to regulate interstate commerce.[26] North Carolina law required the agents and officers of railroads to receive freight whenever tendered at a station.[27] The petitioner railroad company, which had been penalized for failing to receive certain goods, argued that they were permitted to delay acceptance of the goods because the Interstate Commerce Commission had not established rates for shipping to the destination.[28]

The court noted that the Interstate Commerce Act was "designed to regulate interstate commerce"[29] and, especially relevant to this case, to grant Congress control of establishing rates for shipping by rail.[30] The court held that the North Carolina law was preempted by federal law, finding that "Congress has taken possession of the field of regulation."[31]

Contrast that decision with *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, in which the court was asked whether a regulation adopted by the State Corporation Commission of Kansas was preempted by the Natural Gas Act.[32] To combat reduced purchases from the Kansas-Hugoton gas field, the commission regulation provided that producers' rights to extract assigned amounts of gas would be permanently canceled unless designated amounts of gas were purchased.[33] The petitioner pipeline company argued this regulation was preempted by federal law, because the requirement to increase purchases of gas affected would affect pipeline companies' costs.[34]

The Natural Gas Act of 1938 does provide broadly for the federal regulation of transporting and selling natural gas in interstate commerce.[35] The court acknowledged that, absent a clear intent by Congress to preempt state law, it may infer such intent "where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law."[36] But the court refused to draw such an inference about the field of natural gas production "merely because purchasers' costs and hence rates might be affected."[37] As the court noted, "there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers."[38]

As federal law grows increasingly broad and complex, courts could rely more on field preemption to assert the supremacy of federal law. Given that the analysis requires only a finding that Congress intends to occupy a field, Congress could set national policy on a wide variety of subjects. However, courts have grown

22. Hines v. Davidowitz, 312 U.S. 52 (1941), finding that Pennsylvania's Alien Registration Act of 1939 was preempted by the Federal Alien Registration Act of 1940.
23. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), finding that California had no jurisdiction over a labor practice covered by the National Labor Relations Act.
24. Bates v. Dow Agrosciences L.L.C., 544 U.S. 431 (2005), finding that the Federal Insecticide, Fungicide, and Rodenticide Act did not preempt claims under Texas law alleging that mislabeled products had damaged crops.
25. Geier v. Am. Honda Motor Co., 529 U.S. 861, 864 (2000), finding that a Federal Motor Vehicle Safety Standard preempted a lawsuit under District of Columbia tort law.
26. Southern R. Co. v. Reid, 222 U.S. 424, 431 (1912).
27. Id.
28. Id., 432.
29. Id., 437.
30. Id., 438.
31. Id., 442.
32. Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 496 (1989).
33. Id., 497.
34. Id.
35. 15 U.S.C. s. 717 (a).
36. *Northwest Cent. Pipeline,* 489 U.S. at 509.
37. Id., 514.
38. Id.

increasingly reluctant to rely on field preemption.[39] Instead, courts are relying more on an examination of the specific conflict between federal and state laws.

Implied preemption: conflict preemption

Federal and state laws can and do operate concurrently; indeed, many federal regulatory schemes explicitly provide for interconnected federal and state roles.[40] But not all regulatory schemes conceive of a shared authority and it is perhaps inevitable that the concurrent exercise of power leads to conflict. Where conflict arises, the supremacy clause is relied upon to provide a resolution.

In *Gade v. National Solid Wastes Management Ass'n*, the Supreme Court was asked whether Illinois laws relating to licensing of hazardous waste handlers were preempted by the Occupational Safety and Health Act of 1970 (OSH Act).[41] The Illinois laws and the OSH Act both imposed training requirements on workers at hazardous waste facilities. The respondent trade association argued its members were unfairly required to meet two different training requirements, with the Illinois requirements being more stringent.[42]

The court noted that conflict preemption may be found where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[43] The court found that the OSH Act was intended to "avoid subjecting workers and employers to duplicative regulation"[44] and held that "the OSH Act precludes any state regulation of an occupational safety or health issue with respect to which a federal standard has been established."[45]

Contrast that decision with the decision in *Florida Lime & Avocado Growers, Inc. v. Paul*, in which the Supreme Court was asked to consider whether a California law relating to the maturity of avocados was preempted by federal law.[46] California law prohibited the sale of immature avocados, as judged by their oil content.[47] The petitioners, avocado growers in Florida, argued that the California law was unconstitutionally excluding Florida avocados—deemed mature under federal law—from California markets.[48]

The court noted that a state law would be preempted "where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce"[49] but found no such impossibility in this case.[50] The court held that the California law was not preempted by federal law because compliance with both laws would be possible by, for example, "leaving the fruit on the trees beyond the earliest picking date permitted by the federal regulations."[51]

The conflict preemption analysis has become increasingly complicated, with more recent court decisions further dividing conflict preemption cases into cases of "physical impossibility" or "obstacle" conflict. The former is limited to cases where it is literally impossible to comply with two conflicting statutes, but those cases are few. The latter, where a statute poses an obstacle to compliance, is far more common.[52]

Judicial interpretation

The foregoing case studies serve to illustrate how courts apply the preemption doctrine and under what circumstances courts may find that state authority has been preempted by federal action. Although there are many examples of courts finding preemption, courts have historically operated with a presumption against preemption.

In *Rice v. Santa Fe Elevator Corp.*, the Supreme Court noted that Congress's purpose can be demonstrated in many ways, referencing the now familiar types of preemption: express, conflict, and field.[53]

39. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting.)
40. See, e.g., the Clean Water Act of 1972, 33 U.S.C. ss. 1342 and 1318 (c). Federal law requires permits for certain discharges of pollutants, but leaves monitoring and compliance regulations to the states.
41. Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 91 (1992).
42. Id., 93–94.
43. Id., 98.
44. Id., 100.
45. Id., 102.
46. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 133–34 (1963).
47. Id.
48. Id., 134–35.
49. Id., 142–43.
50. Id., 143.
51. Id.
52. United States v. Supreme Court of N.M., 824 F.3d 1263, 1291 (10th Cir. 2016).
53. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

However, regardless of the type of preemption at issue, the court always begins with the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[54] In other words, when determining whether state law is superseded by federal law, the question is what Congress intended.

Divining the purpose of Congress is often the crux of the problem. The *Rice* court itself conceded that "it is often a perplexing question whether Congress has precluded state action."[55] Competing bodies of law will forever present challenges to courts. As federal law continues to increase in scope and complexity, we can expect to see an increase in both express and implied preemption cases.

Furthermore, it is not always clear how the courts will decide a preemption case. The doctrine is well-established, with the Supreme Court relying on express, conflict, and field preemption in cases from the most recent term.[56] However, there is no single "preemption problem" and accordingly no universal solution.

Conclusion

Alexander Hamilton, writing in *The Federalist No. 33*, argued in defense of the supremacy clause:

> If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed.[57]

It is from this principle—that the laws of the larger political society must be supreme to the laws of the societies that compose it—that courts must proceed. The supremacy clause is clearly the law of the land. Though courts may vary in its application, they are ultimately guided by the obviousness of its necessity. The challenge for a state legislature is to operate within the context of that necessity.

54. *Rice*, 331 U.S. at 230.

55. Id.

56. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016). The court cited field and conflict preemption in holding that a Maryland program requiring load serving entities to enter into a pricing contract was preempted by the Federal Power Act; Gobeille v. Liberty Mut. Ins. Co., 136 S. Ct. 936 (2016). The court cited express preemption in holding that a Vermont law requiring disclosure of payments relating to health care claims was preempted by the Employee Retirement Income Security Act of 1974.

57. Alexander Hamilton, "Federalist No. 33." In *The Federalist* (Norwalk: The Easton Press, 1979), 207.