

Chapter 1

THE BASICS ON PREEMPTION

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1.1 WHAT IS PREEMPTION?

Preemption is a doctrine of American constitutional law under which states and local governments are deprived of their power to act in a given area, whether or not the state or local law, rule or action is in direct conflict with federal law.¹ The preemption doctrine is a subset of the field of “federalism,”² the broader term for the structured allocation of power among federal and state governments under our constitutional system. The analysis of a preemption dispute focuses upon statutory construction (the federal statute’s words and its drafters’ intention) in the context of a constitutional framework of sovereignty, commerce regulation, or other predicate for federal powers.

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- 1. Stephen Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 771 (1994).
 - 2. For a useful review of federalism concepts, see Robert Bork & Daniel Troy, *Locating the Boundaries: The Scope of Congress’s Power to Regulate Commerce*, 25 HARV. J. L. & PUB. POL’Y 849 (2001).

1.2 THE BOOM IN PREEMPTION STATUTES AND JURISPRUDENCE

Approximately 350 federal statutes specifically preempt state and local regulatory authority, and half were enacted in the period 1980–2000.³ Hundreds more have been interpreted by courts in the absence of express preemptive statutory language: “When Congress is unclear about its intent to preempt, the courts must then decide whether or not preemption was intended and, if so, to what extent.”⁴ The explicit terms rarely resolve the issue; the context of the federal statute and the context of the particular set of facts being addressed by the court will have the greatest impacts on how a preemption issue will be resolved.

Legal scholars examining federal preemption have noted a sharp increase in the preemption cases decided by the U.S. Supreme Court in the past two decades compared to prior decades, reflecting the scope and intensity of expanded federal powers.⁵ At the same time, relatively few political science scholars have devoted research efforts to preemption, “because preemption issues are routinely addressed by courts, whose numerous decisions on the subject turn on fine points of law that only a lawyer could love.”⁶ The academic scholarship of preemption has been supplanted by the conflicts among tort litigators and the advocates of central federal regulation, for whom preemption debate has become a boiling cauldron of contentious rivalry.

The phenomenal growth of preemption statutes and court decisions presents a series of dramatic threats to the historic power of the states, though the public at large rarely considers preemption law, and few journalists devote attention to covering the accretions of federal authority that preemption fosters. States regard the increasing force of preemption laws and rules as a major challenge; “states now often face broad preemptions that restrict access to our own funds, laws, and procedures for meeting the people’s needs.”⁷

3. Sen. Carl Levin, Introductory Remarks on S. 1214 (1999), available on Senate Government Affairs Com. Web site, www.senate.gov.

4. Levin, *id.*

5. S. Candace Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829 (1992).

6. Address by Prof. Martha Derthick, University of Virginia, to the American Political Science Association (2001).

7. Testimony of Gov. Michael Leavitt for National Governors Assn., May 5, 1999, available at www.nga.org.

1.3 THE BOOM IN TORT PREEMPTION CONFLICTS

Much of the recent attention upon preemption law has arisen from the large economic stakes of success or failure in products liability litigation.⁸ Plaintiffs' trial lawyers have a major economic stake in restraining the reach of federal preemption of tort remedies. Their views against preemption of remedies have been extraordinarily clear, much more so than the detached ambivalence about preemption that scholars occasionally project in the fields of political science and constitutional law. Preemption has become a "dollars-and-cents" issue for every lawyer whose livelihood depends on contingent fee portions of large jury verdicts awarded to injured persons. If the investment of attorney time and expenses is not recouped, because the individual injury damages claims are dismissed on preemption grounds, a direct financial loss is immediately felt by the advocate for the injured litigant. So it is that the torts area has become such a hotbed of preemption debate.

Preemption will increase in importance to the plaintiffs' bar, as the intrusion of federal agency rules into design and label choices becomes deeper and more pervasive, and state norms become more impacted by federal agency requirements and preferences.⁹ The defense bar has a lot to lose as well; a pro-defense trend among the Supreme Court's decisions would aid the makers of regulated products who sell their designs across many boundaries.

The social policy repercussions of the tort debate are significant: What is the proper balance for our society? Is the redistributive justice model an appropriate limitation on the exclusivity of federal standards? Should we substitute a nationwide minimum safe design rule in place of a deterrent remedial sanction that punishes sloppy and unsafe design choices? Is the current wave of advocacy favoring preemption just a subset of "tort reform," being done comprehensively by industry advocates without much resistance from the isolated members of the plaintiff's bar? Should there be a due process right of the injured person to have his or her "day in court" for a defect that caused an injury, or should the desired efficiencies of national uniformity justify rejection of the potential for multiple damage award stimuli for product redesigns?

8. Stacey Carroll, *Federal Preemption of State Products Liability Claims: Adding Clarity and Respect for State Sovereignty to the Analysis of Federal Preemption Defenses*, 36 GA. L. REV. 797 (2002).

9. Brian Wolfman & Douglas Stevick, *Preempting the Preemption Defense*, 29 TRIAL LAW. QTLY. 43, 50 (1999).

1.4 THE CENTRAL ROLE OF CONGRESSIONAL INTENT TO PREEMPT

Constitutional power to preempt state and local governments has been given to Congress. The courts do not themselves preempt; they adjudicate disputes in which a litigant asserts that Congress has preempted by express words or by implication. In determining whether state actions are preempted, the courts' "sole task is to ascertain the intent of Congress."¹⁰ Intent to preempt should be the "clear and manifest purpose of Congress."¹¹

Once the congressional intent is found, the attention shifts to the coverage of the preemptive law: "[A]ny understanding of the scope of a preemption statute must rest primarily on a 'fair understanding of congressional purpose.'"¹² The Court will look at indicia of congressional purposes concerning preemption, will consider what the pre-preemption context or case law had been, and what the Congress had said concerning that prior context, as of the time the Congress adopted the preemption language.¹³

Some members of Congress admit they are aware of its shortcomings: "If we in Congress want Federal law to prevail, we should be clear about that. If we want the States to have discretion to go beyond Federal requirements, we should be clear about that."¹⁴ Unfortunately, most preemption clauses have been "a last minute compromise in a massive piece of new legislation."¹⁵

1.5 A BRIEF HISTORY OF PREEMPTION

Our constitutional design mixes elements of a unitary system with the preservation of a confederate system in the "dual federalism" model.¹⁶ The authors of the *Federalist Papers* debated about the relative powers of federal and state governments.¹⁷ During the ratification campaigns for the new Con-

10. *California Fed. Savings & Loan Assn. v. Guerra*, 479 U.S. 272 (1978).

11. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

12. *Medtronic Inc. v. Lohr*, 116 S. Ct. 2240, 2250 (1994).

13. *AGG Enterprises v. Washington County*, 281 F.3d 1324, 1329 (9th Cir. 2002).

14. Sen. Carl Levin, Introductory Remarks on S. 1214 (1999), *available at* www.senate.gov.

15. Catherine Fisk, *The Last Article About the Language of ERISA Preemption?*, 33 HARV. J. LEGIS. 35, 102 (1996).

16. Joseph F. Zimmerman, *Preemption in the U.S. Federal System*, 23 PUBLIUS 1 (Fall 1993).

17. An excellent review of the debated issues is found in Joseph F. Zimmerman, *Federal Preemption* 25 (Iowa State Univ. Press, 1991).

stitution, Alexander Hamilton was sadly incorrect when he predicted that “it will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities.”¹⁸ The authors of the *Federalist Papers*, Hamilton, James Madison, and John Jay, could not have pictured today’s federal powers when they predicted in 1788 that the balance of power was “much more likely to be disturbed by the preponderancy of the [states] than of the [federal government].”¹⁹ The states would have the greater support by the general public and would be more potent in “resisting and frustrating the measures of” the federal government.²⁰ The states had “numerous and indefinite” powers while the federal government had “few and defined” powers.²¹ And federal judges could not encroach on the rights of the states because they exercise merely judicial power and are kept in check by political mechanisms.²²

The first federal preemption cases arose early in the nation’s history as direct conflicts between individuals and state legislative powers.²³ The earliest federalism cases had dealt with the preemptive powers of legislation, including the power of citizens to sue other states, which was the basis for adoption of the Eleventh Amendment to limit suits against states.²⁴ State-federal conflicts of power continued to evolve with the 1824 landmark case of *Gibbons*²⁵ forecasting the modern allocation of powers.

The major historic milepost on the road to today’s federal preemption was Chief Justice John Marshall’s statement in *McCulloch v. Maryland* that “States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the Federal Government.”²⁶ This statement of preemptive power is the root from which perhaps 500 appellate decisions have discussed federal preemption.

Preemption of state laws by federal regulatory program statutes was not a significant part of our constitutional jurisprudence in the nineteenth cen-

18. Federalist No. 17.

19. Federalist No. 45.

20. Federalist No. 45.

21. Federalist No. 45.

22. GOTTFRIED DIETZE, *THE FEDERALIST* 217 (Johns Hopkins Press, 1960) (explicating the authors’ views of the balance of power and the judicial role); JOSEPH ZIMMERMAN, *FEDERAL PREEMPTION* 25-27 (Iowa State Univ. Press, 1991).

23. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

24. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

25. *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1 (1824).

26. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

tury, because there was so little federal legislation to assert preemptive force. The states' rights fervor of the Civil War era might be said to involve a resistance to the growing federal preemption of state authority, but not in the sense that "preemption" issues are addressed as regulatory conflicts in today's lexicon.

The federal regulatory apparatus grew slowly and haltingly at the end of the Victorian era and only gradually encroached upon the traditional exercise of police powers of the states.²⁷ The United States was growing into a complex multistate, multimarket economy with expanding overseas commercial interests during that time. The initial cases establishing preemption norms arose in the decade after 1912.²⁸

The history of preemption in categories of regulation is highly contextual. Only 29 statutes enacted prior to 1900 contained preemption clauses.²⁹ Generalizing about preemption is difficult because the contexts differed so much. The particular regulatory situation is important; where states have historically exercised responsibility for an area, courts are more reluctant to find the states are preempted. For example, aviation is a more recent and more closely federally regulated mode of transport, so federal rules dominate; railroads had more state controls and less incentive to centralize all controls in a single federal entity.³⁰ Regulation and preemption language grew dramatically in the 1970s and later decades.³¹

As the Supreme Court majority in *Geier* observed in 2000, when declining the dissent's proposal of a test of preemption as a special burden, the federal courts in preemption cases use "well-established preemption principles that already are difficult to apply."³² Any scholar who attempts to read hundreds of preemption cases will concur in the "difficult to apply," but will fault the Court for calling them "well established."

27. Stephen Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 787–88 (1994).

28. *Id.* at 801.

29. Joseph F. Zimmerman, *Preemption in the U.S. Federal System*, 23 PUBLIUS 1 (Fall 1993).

30. *Frank v. Delta Air Lines*, 314 F.3d 195 (5th Cir. 2002), citing *French v. Pan Am Express, Inc.*, 869 F.2d 1, 5 (1st Cir. 1989).

31. Joseph F. Zimmerman, *Preemption in the U.S. Federal System*, 23 PUBLIUS 1, 2 (Fall 1993).

32. *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913, 1921 (2000).

1.6 IS THERE A PRESUMPTION AGAINST PREEMPTION?

The search for congressional intent about preemption has long been said to begin “with the basic assumption that Congress did not intend to displace state law.”³³ There has been a presumption that the “historic” state police powers are not preempted by the federal government³⁴ unless it is “the clear and manifest purpose of Congress”³⁵ to “supplant state law”³⁶—that is, that express or implied preemption criteria have been satisfied for a particular federal statute or rule, and the statute or rule applies to the particular set of facts.³⁷ The basis for the desire to avoid preemption is the preservation of the federalism bargain, under which exercise of federal supremacy “is not lightly to be presumed.”³⁸ Courts should not unnecessarily disturb the “federal-state balance.”³⁹ Courts were again reminded in 2005 not to “cavalierly” preempt the exercise of state powers.⁴⁰

The presumption is stronger in some categories and weaker in others. If the subject matter was “traditionally regarded as properly within the scope of state superintendence,”⁴¹ or a matter of public health or safety,⁴² then the courts rely more heavily on the presumption that states will continue to have an important role. Advocates for preemption must show more than an “obscure grant of authority [in order] to regulate areas traditionally supervised by the states’ police power.”⁴³

The presumption against preemption also operates in tort cases with traditional state-law remedies, where the plaintiff benefits from the historic role of the states in compensating injured victims.⁴⁴ If the context is one in which

33. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

34. *Hillsborough County v. Automated Medical Labs. Inc.*, 471 U.S. 707, 715 (1985).

35. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

36. *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

37. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

38. *N.Y. State Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973).

39. *United States v. Bass*, 404 U.S. 336, 349 (1971).

40. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005).

41. *Fla. Lime & Avocado Growers Inc. v. Pauli*, 372 U.S. 132, 144 (1963).

42. *Automated Medical Labs. v. Hillsborough County*, 471 U.S. 707 (1985).

43. *Merrill Lynch Pierce Fenner & Smith Inc. v. Dabit*, 126 S. Ct. 1503, 1515 (2006).

44. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

no federal remedies exist and the preemption decision would leave a vacuum by precluding recovery, courts tend to pay closer attention to the presumption against preemption.⁴⁵

Courts often declare the presumption, paying lip service to it; but Professor Kenneth Davis, who intensely scrutinized what is actually happening in court decisions, disagreed and argued from the outcomes of court decisions that there really is no longer an operative presumption.⁴⁶ Professor Lawrence Tribe asserted that the presumption against preemption remains relevant in today's climate of federalism jurisprudence because it serves to protect the interests of states by a procedural mechanism, the duty of Congress to explicitly declare an intent to preempt the states.⁴⁷ Doing so requires congressional action that balances the competing centralization and devolution interests, and thus the procedural step of requiring expressions of intent to preempt will protect the states.⁴⁸

The presumption is "not triggered when the State regulates in an area where there has been a history of significant federal presence," such as maritime commerce.⁴⁹ And the Supreme Court has ignored the presumption in some recent cases, weaving a quilt rather than a fine garment of seamless jurisprudence.⁵⁰

1.7 DELEGATION OF PREEMPTIVE POWERS

Congress can delegate to a federal agency the power to preempt state requirements when Congress adopts enabling legislation in a particular field.⁵¹ When it delegates that power, courts tend to give respect to the federal agency view that the state standards have been preempted.

In some statutes, Congress has laid out for the federal agency a multi-variable assessment similar to what courts must weigh when considering implied preemption. This preemption analysis is a task that can be delegated to administrative bodies. The Congress delegated to the Consumer

45. *Abbot v. Abbot*, 844 F.2d 1108, 1112 (4th Cir. 1988).

46. Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C.L. REV. 967 (2002).

47. LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, at 500 (2d ed., 1988).

48. *Id.* and see Richard Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 SYRACUSE L. REV. 897 (1988).

49. *United States v. Locke*, 529 U.S. 89, 108 (2000); *Franklin Natl. Bank v. New York*, 347 U.S. 373, 375–76 (1954).

50. *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88 (1992).

Product Safety Commission the power to assess whether a state standard remained in effect and was not held to be preempted, by making specific findings after the commission weighed several specific factors concerning the state rules.⁵² Commentators have ascribed to these types of federal statutes a purpose “recognizing that a rational balancing of state and federal interests on a given issue can take place only after the federal agency has promulgated its own rules on the issue.”⁵³

Agencies asserting that their statutes provide them with preemptive powers sometimes invoke the *Chevron*⁵⁴ doctrine, allowing the agency’s interpretation of an ambiguous statute to be adopted by the court if it was a reasonable interpretation of the ambiguous statute.⁵⁵ The 5–4 majority in *Geier* said “[T]he agency’s own views should make a difference” in whether preemption is implied, even though the text of the agency rule and its preamble did not address preemption explicitly.⁵⁶ Similarly, the Supreme Court in the 2005 *Bates* decision looked at environmental regulations to discern the boundaries of pesticide statutory preemption.⁵⁷ Here we distinguish, as the Supreme Court case law of deference does, between final rulemaking in which comments were evaluated and to which Chevron deference is given,⁵⁸ and the hortatory expressions in *Federal Register* advisory preambles that the current managers of the administrative body wish to assert preemption but have opted not to do so through Chevron-backed rulemaking.⁵⁹ The latter does not warrant federal

51. See, e.g., 47 U.S.C. § 253 (FCC preemption expressly delegated).

52. This is discussed at length in Chapter 12, *infra*.

53. Susan Bartlett Foote, *Administrative Preemption*, 70 VA. L. REV. 1429, 1437 (1984).

54. *Chevron Oil USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

55. *Bank of America v. City and County of San Francisco*, 2002 Westlaw 31399026 (9th Cir., 2002), *citing* *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 403 (1987).

56. *Geier v. American Honda Motor Co.*, 120 S.Ct. 1913, 1926 (2000).

57. *Bates v. Dow Agrosiences LLC*, 544 U.S. 431 (2005).

58. *Chevron Oil USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

59. Food & Drug Administration, Drug Labeling Rules preamble, 71 Fed. Reg. 3936 (Jan. 24, 2006). This was criticized as an added segment of the preamble that was not exposed to public comment and appeared contrary to earlier agency statements in the same rulemaking.

preemption⁶⁰ just as it does not warrant Chevron deference.⁶¹

But it is not clear whether the classic administrative law studies of general agency decisions under Chevron will also include deference on questions of agency interpretation of constitutional law issues like preemption. Questions of law are for de novo judicial review in most instances. A more explicit Supreme Court decision will be needed in another future case to give agencies the power to have both deference and preemptive force.

60. Alison Zieve & Brian Wolfman, *The FDA Argument for Eradicating State Tort Law*, 34 BNA Prod. Safety & Liab. Rep. 308 (Mar. 27, 2006).

61. *United States v. Mead Corp.*, 533 U.S. 218 (2001) (substantially less deference to agency decisions not made in notice and comment rulemaking under delegated powers), and *see* JAMES T. O'REILLY, *ADMINISTRATIVE RULEMAKING*, ch. 16 (2006 Supp.).