Congress's Authority to Correct the Courts' Preemption Decisions

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Introduction

The Supremacy Clause of the United States Constitution makes clear that where federal laws conflict with state laws, federal law supersedes. The doctrine of preemption that flows from the Supremacy Clause – that federal laws preempt conflicting state laws – has touched on many areas of the law. For example, it has been an important part of the effort to guarantee civil rights protections in the face of resistance from some states.

It has also played a key role in safeguarding Americans from various environmental and public health hazards. Congress's constitutional authority to craft federal legislation that preempts state law enables it to establish minimum protections for all American citizens, regardless of what individual state laws might allow. For instance, Congress has given the Food and Drug Administration (FDA), the National Highway Traffic Safety Administration (NHTSA), and the Consumer Product Safety Commission (CPSC) the power to craft protective standards that set minimum safety requirements for many of the products we use on a daily basis. Similarly, Congress has given the Environmental Protection Agency (EPA) the power to set minimum regulatory requirements to ensure that all Americans have minimum levels of clean air and water. Without these federal "regulatory floors," public health and safety might vary widely from state to state.

Congress's constitutional authority to craft federal legislation that preempts state law enables it to establish minimum protections for all citizens.

Over the past several years, product manufacturers have argued for an expansion of the preemption doctrine, not to enhance safety protections for Americans, but rather to shield themselves from legal liability for health and safety hazards their products create. With the support of the Bush Administration, they argued that federal regulatory actions not only set regulatory "floors" or minimum standards, as Congress clearly intended, but also regulatory ceilings, by preempting lawsuits filed by injured consumers. Often courts have accepted those arguments. In addition, even before the Bush Administration, the Supreme Court had rendered decisions interpreting federal statutes to preempt state tort law.

Whether or not the Court's decisions were correct, Congress might wish to change the results of those decisions. Yet, some have claimed that Congress cannot legislatively overrule the federal courts' preemption decisions. This paper analyzes Congress's power to change the substantive law so as to effectively overrule judicial decisions regarding preemption and concludes that the law is clear that Congress has full constitutional authority to make such changes.

Congress's Power to Set Federal Regulatory Preemption Policy

The Supremacy Clause of the Constitution states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof…shall be the supreme Law of the Land."[1] Thus, the Supreme Court has said: "the purpose of Congress is the ultimate touchstone in every preemption case."[2]

Congress has broad legislative power under the Commerce Clause and can use that power to set preemption policy across a broad spectrum. It might wish to preempt only subminimal requirements (a model known as "floor" preemption); it might wish to totally preempt state law (adopting both "floor" and "ceiling" preemption); it might wish to preempt state positive law but not common law (i.e., invalidating only state statutes and regulations); or it might wish not to preempt any state law at all. Indeed, Congress may wish to adopt state law as federal law.[3] Any of these options would be a legitimate exercise of Congress's legislative power. When Congress makes an explicit decision about the preemptive effect of a statute and writes its intent into the law, it is known as "express preemption."

However, Congress does not – or cannot – always explicitly address the issue of preemption in a statute. Over the years, the Supreme Court has established a framework for determining the preemptive effect of these statutes. It is called the doctrine of "implied preemption." Courts begin their analysis with a "presumption against preemption," whereby they assume that state law is not preempted unless it is the "clear and manifest purpose of Congress."[4] From there, the purpose of Congress remains the touchstone for the courts' preemption analysis, but that analysis focuses more on the practical implementation of the law than on interpretation of statutory language. The Court has identified three different subsets of implied preemption: field preemption, physical impossibility preemption, and obstacle preemption.

Field preemption occurs where the federal statute creates a comprehensive regulatory scheme that the courts determine was obviously designed to oust the states' rights to regulate in that field. A good example is federal regulation of ocean fishing, which is a "paradigm of multiple statutes and regulations, and varying governmental institutions, pervasive in depth, breadth and detail, in a regulatory system that Congress intends to be national in character."[5] Courts look for a federal regulatory system that is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."[6]

Physical impossibility preemption arises in situations where a person cannot possibly comply with both federal and state law. A classic example is a case where a state law required a product to be labeled with a particular label and none other, while federal law required the same product to be labeled with a different label.[7] Here, it is a "physical impossibility" to comply with both the state and federal laws, so the state law is preempted.

Finally, under the theory of ***obstacle preemption***, federal law will displace state laws that create an obstacle to the full achievement of federal objectives. In their analyses in these cases, courts must determine what federal objectives are at issue and then determine whether state law creates such a significant obstacle to the achievement of those goals that it must be preempted.

In recent years, the doctrines of express and obstacle preemption have been at the heart of the legal disputes where preemption theory intersects with public health policy. Statutes that entrust federal agencies with power to implement Congress's public health goals expand the number of ways Congress can affect federal preemption policies. First, Congress may expressly provide authority to an agency to make preemption determinations.[8] When it delegates such power to an agency, Congress sometimes puts limitations on the agencies' preemption choices. For example, Congress might only delegate to an agency the power to determine whether federal regulations preempt state regulations, without also giving the agency the power to determine whether its regulations preempt state common law. Agency preemption determinations made under expressly delegated power are judged under traditional administrative law principles.

Second, more commonly, Congress does not expressly provide authority to an agency to make preemption determinations but does provide it authority to make substantive regulations. Those substantive regulations, in turn, can have preemptive effect, just like a statute,[9] but whether they do depends on congressional intent – sometimes provided expressly and sometimes not. In these cases, courts apply the doctrines of Express Preemption or Implied Preemption, described above, to the regulations. Often, in these cases, the agency has expressed a view with regard to preemption, either in a preamble to a regulation or in a brief to a court. Most recently, the Supreme Court has said that courts should consider those views in light of the thoroughness, consistency, and persuasiveness of the agency's explanation.[10]

Congress's Power to 'Correct' Courts' Preemption Decisions

Federal courts' preemption decisions crystallize the difficult policy implications of Congress's preemption choices and provide an opportunity to focus Congress's attention on clarifying its true preemptive intent. Like its power to create preemption policies in the first instance, Congress's power to amend statutes to supersede courts' preemption decisions is broad.

Courts' decisions in these cases are, in essence, statutory interpretation decisions since their goal is to discern what Congress's intent was or would have been had Congress considered the issue before the court. Unlike constitutional interpretation decisions, which can only be overturned by means of a constitutional amendment, statutory interpretation decisions invite congressional critique. As with any judicial interpretation of a statute with which Congress disagrees, Congress may amend the statute to make its intent clearer. Even if

Congress does not disagree with the court's interpretation of the original statute's preemptive effect, it may decide that it wishes to change the law's preemptive effect.

To put these general ideas in a more specific context, consider three regulatory preemption cases: *Riegel v. Medtronic,*[11] *Geier v. American Honda,*[12] and *Wyeth v. Levine.*[13]

Riegel is an example of a case in which the court attempts to divine congressional preemptive intent from the plain language of a statute. Charles Riegel sued a medical device manufacturer after a balloon catheter exploded in his coronary artery during heart surgery. The manufacturer argued that Riegel's state common law claims were preempted by the express language of the Medical Device Amendments of 1976. The statute expressly preempts "any requirement – (1) which is different from, or in addition to, any requirement applicable under [the statute] to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under [the statute.]"[14] The Supreme Court agreed with the manufacturer, holding that Riegel's state common law claims, if successful, would impose "requirements" on the defendant product manufacturer and, therefore, were preempted by the express terms of the federal statute.

Riegel is the most recent in a line of cases in which the Supreme Court has interpreted express preemption of state law "requirements" to mean that Congress intended to preempt state common law actions.[15] The Court has always been careful to recognize that Congress has the power to simply change the language of the statute and thereby supersede the Court's decision. In *Riegel*, the Supreme Court noted:

> Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments. *Absent other indication*, reference to a State's "requirements" includes its common-law duties.[16]

The Medical Device Safety Act, introduced in both the 110th and 111th Congresses, would effectively overrule *Riegel*, and is an example of Congress exercising its broad power to "correct" judicial decisions by clarifying the express preemptive language in a statute.

Geier differs from *Riegel* in that the Supreme Court ruled in favor of the product manufacturer's preemption argument not because of the express preemption clause in the statute, but rather based on the notion that the injured consumer's lawsuit would have conflicted with a *regulation* specifically tailored to uphold the primary federal objective established by Congress in the National Traffic and Motor Vehicle Safety Act of 1966. Alexis Geier was injured in a collision and sued Honda on a "defective design" theory because her car was equipped only with manual shoulder and lap belts, not airbags or other passive restraints. The car's equipment complied with a NHTSA regulation that allowed automobile manufacturers to phase in airbags over an extended period of time. NHTSA conceived of the "phase-in" requirement as a technique to ensure that manufacturers would install a variety of protection systems in their car after determining that alternative protection systems would best promote the Vehicle Safety Act's primary purpose – improving passenger safety. The Supreme Court cited that finding in support of its holding that Geier's lawsuit, which

would require airbags in all cars, was preempted because it conflicted with the achievement of federal objectives.

Geier is a prime example of the notion that even in implied preemption cases, where the express language of the statute does not determine whether a case is preempted, Congress has broad power to make statutory amendments to clarify its preemption choices. The Vehicle Safety Act has an express preemption clause that only preempts state positive law (regulations and statutes), and a savings clause that says compliance with federal regulations "does not exempt any person from any liability under common law." Since the combined effect of these two provisions was not enough to preserve a product liability case, if Congress were to amend the statute to ensure the viability of similar claims in the future, it would have to explicitly state that the law saves claims for damages in the face of obstacle preemption arguments.

In *Wyeth*, the Supreme Court again addressed a manufacturer's claim that federal regulation preempted state common law claims under a theory of implied-conflicts preemption. Diana Levine, a professional guitarist, sued a pharmaceutical manufacturer after having an arm amputated because the manufacturer's drug caused severe infections and gangrene. The drug's label warned against – but did not preclude – administering the drug through intravenous injection, even though the manufacturer knew that improper intravenous injection could lead to gangrene. (Administration by IV drip was known to be a much safer method.) The manufacturer argued that Levine's lawsuit conflicted with congressional objectives, claiming that state common law would upset the balance of risks and benefits that FDA undertakes when approving pharmaceutical labels. The majority in *Wyeth* disagreed.

In responding to the defendant's implied-obstacle preemption arguments, the Court's opinion highlighted two points that have important implications for Congress as it considers how to respond to Supreme Court preemption decisions. First, the Court indicated that congressional inaction is a powerful indicator of its intent. The majority wrote:

> If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express preemption provision at some point during the FDCA's 70-year history. … As Justice O'Connor explained in her opinion for a unanimous Court: "The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them."[17]

This passage might be read as nothing more than a strong statement that courts should begin their implied preemption analyses with a presumption against preemption. Or, it might serve as a warning that Congress's failure to respond to preemption decisions in other contexts (e.g., the debate about "requirements") might allow courts to further expand preemption doctrine in a way that Congress had not intended.

Congress's inaction can be a powerful indicator of its intent.

Second, the Supreme Court made it clear that judges should limit their deference to agency preemption determinations if Congress has not explicitly delegated to the agency the authority to make those determinations. In *Geier*, the Court gave "some weight" to an agency interpretation of the preemptive effect of its regulation. In *Wyeth,* the Court clarified that the weight given to an agency determination made without specific congressional delegation of authority to do so should be limited, based on the "thoroughness, consistency, and persuasiveness" of the agency pronouncement. The concept of limited deference to agency determinations made without congressional authorization is a traditional aspect of administrative law that the Court had not before explicitly linked to its regulatory preemption analysis.

Any attempt by Congress to clarify its intent through properly enacted legislation is a legitimate exercise of power.

Limits on Congress's Power to 'Correct' the Courts

Some advocates and legislators have raised the false claim that legislative responses aimed at superseding judicial decisions would somehow usurp a judicial function. This idea is simply wrong. The Supreme Court itself has repeatedly said that Congress's intent is the touchstone of any preemption analysis, so any attempt by Congress to clarify its intent through properly enacted legislation is a legitimate exercise of power.

While it is wrong to claim that Congress usurps some judicial function simply by amending the preemption language in a statute, there is one general constitutional limitation on Congress's legislative power that might be implicated by an improperly drafted response to a particular case. The limitation is that Congress may not "undo" a final judgment by the judiciary. That is, once a judgment in a particular case has been entered and the appeals process has run its course, the Constitution's separation of powers principles prohibit Congress from enacting legislation that would require the courts to re-examine that particular judgment.[18] Consider, for example, how Congress might respond to *Riegel.* Congress could not change the Medical Device Amendments to allow Riegel's case to go forward now, since Riegel's time to appeal is over. However, Congress would be well within its constitutional powers to amend the law in a way that would enable future litigants to bring precisely the same suit that Riegel filed. So, generally speaking, substantive changes to the preemption language of a statute will only affect cases that have not been filed or have been filed but have not reached a final judgment.

On a related note, a question might arise about whether a change to a statute's preemptive language can affect torts that occurred before the change was enacted. Again, so long as no final judgment has been reached, Congress can change the preemption regime as it applies to that case. A recent Eighth Circuit preemption case, *Lundeen v. Canadian Pacific Railway*,[19] is instructive.

On January 18, 2002, a freight train carrying liquefied anhydrous ammonia overturned near the town of Minot, North Dakota. Nearby residents who were injured or suffered property

damage sued the railroad alleging negligence in the construction, maintenance, and inspection of the tracks. In response, Canadian Pacific argued that the claims should be preempted under the express preemption clause of the Federal Railroad Safety Act (FRSA). The federal courts initially agreed,[20] but before there was a final judgment in the case, Congress rewrote FRSA's express preemption clause to specifically exclude state law claims like the plaintiffs filed in *Lundeen*. Congress even made the statutory changes retroactive to the date of the Minot derailment.

Canadian Pacific challenged the constitutionality of the statutory changes, alleging that Congress had violated the separation of powers doctrine and the railroad's rights to due process, mainly because of the statute's alleged retroactivity. Citing Supreme Court precedent, the Eighth Circuit held that Congress was well within its constitutional powers "to amend a statute that it believes [the courts] have misconstrued," even to "make such a change retroactive and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation of its work product."[21]

To summarize, when the courts find injured consumers' state tort lawsuits preempted by federal statutes, Congress has broad power to correct erroneous decisions through amendments to the statute. Although it may not be able to provide an avenue to the courts for a particular plaintiff whose case has been preempted, Congress certainly has the power to amend the statute so that similarly situated future plaintiffs will get their day in court.

Conclusion

Preemption is at its core a question of statutory interpretation. Did Congress intend the statute to preempt all, some, or no state laws? Courts must interpret express preemption provisions and make determinations as to Congress's intent with respect to statutes with no express preemption language. While courts have the last word on the interpretation of any statute, Congress has plenary power within its constitutional authorities to amend the statute to overrule any court's interpretation. Consequently, if Congress wishes to change the results of judicial interpretations of the preemptive effect of certain statutes, Congress may do so, even retroactively, so long as it does not attempt to overturn final judgments rendered by courts.

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End Notes

[1] U.S. CONST., Art. VI, § 1, cl. 2.

[2] *Wyeth v. Levine*, 555 U.S. ___, slip op. at 8 (2009), *quoting Medtronic, Inc. Lohr*, 518 U.S. 470, 485 (1996).

[3] *See, e.g.*, 18 U.S.C. § 13 (making state laws applicable to conduct occurring on federal property where Congress has exclusive legislative jurisdiction).

[4] *Wyeth v. Levine*, 555 U.S. ___, slip op. at 8 (2009), *quoting Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[5] *Southeastern Fisheries Ass'n., Inc. v. Chiles*, 979 F.2d 1504, 1509 (11th Cir. 1992), *quoted in* James T. O'Reilly, FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION, AND LITIGATION, 71 (2007).

[6] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

[7] *See, e.g., McDermott v. Wisconsin*, 228 U.S. 115 (1913).

[8] *See, e.g.*, 47 U.S.C. §§ 253(a), (d) (FCC may preempt state laws that prohibit the ability of any entity to provide interstate or intrastate telecommunications service).

[9] *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

[10] *See Wyeth v. Levine*, 555 U.S. ___, slip op. at 20 (2009)

[11] 552 U.S. ___ (2008).

[12] 529 U.S. 861 (2000).

[13] 555 U.S. ___ (2009).

[14] 21 U.S.C. § 360k(a).

[15] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005).

[16] *Riegel v. Medtronic*, 552 U.S. ___, slip op. at 11 (2008) (emphasis added).

[17] *Wyeth v. Levine*, 555 U.S. ___, slip op. at 18 (2009).

[18] *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

[19] 532 F.3d 682 (8th Cir. 2008).

[20] *See Lundeen I,* 447 F.3d 606 (8th Cir. 2006) and *Lundeen*, 507 F.Supp.2d 1006 (D.Minn. 2007) (holding that plaintiffs' claims were preempted by FRSA).

[21] *Lundeen*, 532 F.3d 682, 689 (8th Cir. 2008), *quoting Rivers v. Roadway Exp., Inc.*

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