

# *Constitutional Highlights*

*From the Legislative Reference Bureau*

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## **United States Constitution Article I, Sections 8 and 10; Article 6; and the 10th Amendment FEDERAL PREEMPTION OF STATE LAW**

### **History and purposes of these sections**

**A primary concern of the framers in drafting the U.S. Constitution was to balance power between the states and the federal government. One method of striking this balance was to give the states a measure of control over the selection of federal officers and, as a result, the operation of the federal government. Thus, article I, section 2 gives the states an active role in determining electoral qualifications for purposes of electing members of the U.S. House of Representatives; article I, section 3, as originally ratified, gave each state equal representation in the U.S. Senate and required each senator to be selected by the state legislature; and article II, section 1 gives the states an active role in selecting presidential electors.**

**Another method of striking the balance between state and federal power was to provide certain powers to the federal government, specifically divest states of certain powers, and reserve certain powers to the states. Thus, article I, section 8 lays out the specific powers, called the “enumerated powers,” of the U.S. Congress. Article 6, called the “Supremacy Clause,” provides that the U.S. Constitution, the laws of the United States, and all treaties made under the authority of the United States, are “the supreme law of the land.” In addition, article I, section 10 prohibits the states from engaging in numerous activities, including coining money, passing ex post facto laws or laws impairing the obligation of contracts, and, with certain exceptions, engaging in war. Finally, the 10th Amendment further 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.” These provisions establish the boundaries of federal preemption of state laws. Under the Supremacy Clause, if a state law is preempted by the U.S. Constitution or a federal law or treaty, the state law cannot be enforced.**

### **How the courts interpret these sections**

**The courts have recognized three types of preemption: conflict preemption, express preemption, and**

implied preemption. In determining whether any of these types of preemption exist, the courts are guided by a presumption against preemption if the federal law in question regulates an area traditionally regulated by the states. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716 (1985).

### *Conflict preemption*

Under the Supremacy Clause, any state law that conflicts with a federal law is preempted. *Gibbons v. Ogden*, 22 U.S. 1 (1824). A conflict exists if a party cannot comply with both state law and federal law (for example, if state law forbids something that federal law requires). *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). In addition, even in the absence of a direct conflict between state and federal law, a conflict exists if the state law is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

In determining whether a state law is a sufficient obstacle, the courts examine the federal statute as a whole and identify its purpose and intended effects and then determine the impact of the challenged law on congressional intent. An interesting conflict preemption case from Wisconsin illustrates this analysis. In *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), Mortier challenged an ordinance of the town of Casey (described by the U.S. Supreme Court as “a small rural community located in Washburn County, Wisconsin, several miles northwest of Spooner, on the road to Superior”) after the town denied him a permit to spray pesticides on his lands. Among other things, Mortier asserted that the ordinance was an obstacle to full implementation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which was ostensibly enacted to promote pesticide regulation that is coordinated solely at the federal and state levels. Mortier presented legislative history stating that FIFRA established a coordinated federal-state administrative system and, as described by the court, “raising the specter of gypsy moth hordes safely navigating through thousands of contradictory and ineffective municipal regulations.” But the court was more interested in the language of FIFRA itself. In upholding the town’s ordinance, the court found that FIFRA itself implied a regulatory partnership among federal, state, and local authorities.

### *Express preemption*

Express preemption exists if a federal statute explicitly states that it preempts state law (and if Congress, in passing the statute, was exercising authority granted to it under the U.S. Constitution). Although express preemption can be unambiguous, often federal statutes expressing an intent to preempt are quite complicated and difficult to apply. In addition, like any statute, a federal statute expressing an intent to preempt is subject to interpretation by administrative agencies and the courts. For example:

The federal Employee Retirement Income Security Act of 1974 (ERISA) preempts all state laws “insofar as they may now or hereafter relate to any employee benefit plan,” except that state “laws . . . which regulate insurance, banking, or securities” are saved from preemption. 29 U.S.C. 1144 (a) and (b) (2) (A). These statutes have spawned numerous ERISA preemption cases under which the courts determined which state laws “relate to” an employee benefit plan, which state laws “regulate” insurance, banking, or

securities, and what activities qualify as insurance, banking, or securities.

The Interstate Commerce Commission Termination Act preempts state laws concerning price, routes, or services of motor carriers, except that “the safety regulatory authority of a state” with respect to motor vehicles is saved from preemption. A case originating in Columbus, Wisconsin, is among the cases interpreting this provision. In *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424 (2002), the U.S. Supreme Court held that “safety regulatory authority of a state” includes the regulatory authority of municipalities, so that municipalities are allowed to regulate tow truck safety.

### *Implied preemption*

Even without a conflict between federal and state law or an express provision for preemption, the courts will infer an intention to preempt state law if the federal regulatory scheme is so pervasive as to “occupy the field” in that area of the law. For example, the courts have held that the National Labor Relations Act (NLRA) preempts state laws directed at conduct actually or arguably prohibited or protected by the NLRA or conduct Congress intended to leave unregulated. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959); *Machinists v. Wisconsin Emp. Rel. Commission*, 427 U.S. 132, 140-48 (1976).

## Strategies for reconciling legislation with these sections

### *Be consistent with federal law*

A state law has a greater chance of avoiding a claim of conflict preemption if the state law complements the federal law. A legislative attorney should understand how federal law operates in the area a bill proposes to regulate. The requester may want to consider structuring the bill in a way that avoids frustrating the intended purpose of the federal law. If the legislature obviously is unaware of or disregards federal law, a court, in turn, may more easily disregard the actions of the legislature.

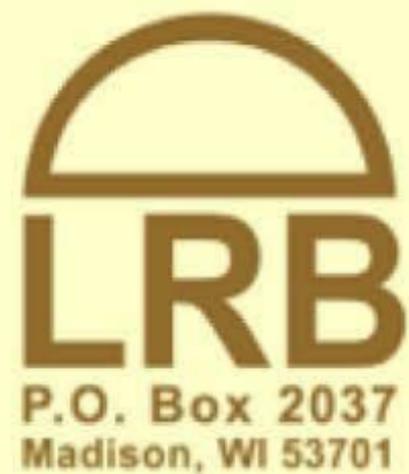
### *Tailor the state law to avoid express preemption*

Avoid express preemption by taking advantage of exceptions provided in the federal statute. If the federal statute reserves certain subjects for state regulation, draft the bill to fit within those subjects. Also, even if the federal statutes do not specifically reserve subjects for state regulation, attempt to draft the bill so that it falls outside of the category of state laws that are expressly preempted. If the bill deals with an area of traditional state authority, the courts may be less inclined to find preemption.

### *Use a statement of legislative purpose*

If a federal statute expressly preempts state laws that are enacted for a specific purpose, include a statement of legislative purpose in a bill to demonstrate that the bill is enacted for a different purpose. Of course, the stated purpose must be rational, given the proposed legal effect of the bill.

*The Legislative Reference Bureau attorneys would be happy to help you determine how federal law impacts upon your proposal and help you draft your proposal so as to avoid preemption.*



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