



Preemption

The people of Wisconsin elect their legislators to enact laws, which cover a broad range of topics. But can legislators make laws on any topic? No, because the U.S. Constitution precludes enforcement of state laws when Congress has preempted state law.

WHY IS THERE PREEMPTION?

The United States operates under a dual government system comprised of the federal government and state governments. The federal government has the president, Congress, and the federal court system. State governments, such as Wisconsin's, have a governor, a state legislature, and a court system. The U.S. Constitution gives Congress powers to make laws on certain subjects. The states retain the rest of the powers to make laws. The Tenth Amendment to the Constitution reads, "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." In some situations, both Congress and state legislatures may make laws on the same subject, such as what actions constitute a crime.

If both Congress and a state legislature enact laws on the same subject, how do we know which law to follow? The founding fathers sought to clarify this dilemma with the supremacy clause in Article VI, Section 2, of the U.S. Constitution, which reads, in part, "This Constitution, and the Laws of the United States...shall be the supreme Law

of the Land; and the Judges in every State shall be bound thereby." This means that if the federal government has the power to make a law or regulation, then the federal law will override the state law. The action of the supremacy clause, when federal law overrides state law, is known as preemption. Preemption falls into two main categories: express preemption and implied preemption.

EXPRESS PREEMPTION

Congress may preempt state authority by stating so explicitly in the law itself. For example, the Federal Insecticide, Fungicide, and Rodenticide Act states, "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." This means that the Wisconsin Legislature cannot make a law that requires different information to be included on a pesticide label from that required by the federal government.

Even though express preemption is stated clearly in federal law, it can still be tricky to figure out when federal law preempts state law. For example, Joseph Blunt sued Medtronic, a manufacturer of implantable defibrillators, in a Wisconsin court over the safety of a medical device. Blunt had an implanted defibrillator but had surgery to replace it after learning

that the defibrillator's battery could short circuit. The Wisconsin Supreme Court faced the question of whether Blunt's lawsuit must be dismissed because the federal law pertaining to medical devices preempts state law. The federal Medical Devices Amendment to the Food, Drug, and Cosmetics Act contains the following statement [with emphasis added]:

No State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any *requirement* —

- (1) which is different from, or in addition to, any requirement applicable under this chapter 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 this chapter.

Was Blunt's lawsuit over the safety of a device a *requirement* the state created that federal law prohibits? The court debated the nature of the approval protocol to which the device was subjected by the U.S. Food and Drug Administration. Ultimately, the Wisconsin Supreme Court ruled that by allowing a court to decide the safety of the device the state was creating a requirement; that the federal law preempted the state law tort claim; and that Blunt could not sue Medtronic over the safety of the device.

IMPLIED PREEMPTION

Implied preemption occurs when federal law overrides state law but without directly saying so. This form of preemption is not discussed in the federal statute but derives from the interaction or, more appropriately, the lack of interaction of the federal and state laws. Implied preemption comes in two forms: conflict preemption and field preemption.

Conflict preemption. When someone cannot comply simultaneously with state law and federal law, conflict preemption occurs. Courts faced with a question of conflict preemption have articulated the problem in two ways: (1) compliance with both federal and state regulations is a physical impossibility; and (2) state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

For example, Alexis Geier sued Honda in her state's court for injuries she suffered in an accident despite that she was wearing a seat belt. Geier wanted Honda to be held responsible because her vehicle did not have installed air bags. At the time, federal regulations required just 10 percent of cars to have a passive restraint system, and this passive restraint system could be automatic seat belts, another form of safety technology, or air bags. The U.S. Supreme Court determined that the federal Department of Transportation wanted to phase in the restraint requirement and allow for alternative safety technologies. If Geier prevailed, her lawsuit would mean that all automobiles in her state were defectively designed if they did not contain air bags; an automobile manufacturer complying with federal regulations would still

be making an automobile considered defective in that state. A state's requirement that all cars contain air bags is an obstacle to the federal government's regulatory goals of phasing in the requirement and of allowing development of safety devices other than air bags. The Supreme Court ruled that the suit in state court and the federal regulation conflicted and, therefore, the federal regulation preempted the state court suit under the theory of implied preemption.

Field preemption. The other form of implied preemption is field preemption. If Congress and the federal agencies create a pervasive scheme of regulation and it appears that the federal government intends to regulate every aspect of the subject, then a state is preempted from regulating that subject under field preemption. Field preemption occurs in subject areas where the federal interest is so dominant that state laws on the subject are assumed preempted.

One example of a subject area dominated by federal regulations is airline travel. The Federal Aviation Act and regulations by the Federal Aviation Administration govern airline travel and have preempted state laws regarding airspace management and pilot qualifications. The Federal Aviation Act preempts all state law on the subject of air safety, or as Justice Jackson of the U.S. Supreme Court stated, "[P]lanes do not wander about in the sky like vagrant clouds. They move only by federal permission...under an intricate system of federal commands."

With airplanes flying through the airspace of different states and the nationwide desire for safe air travel, the need for dominant

federal oversight over the field of airline travel is evident. Where does the field of airline travel end? The answer is not immediately clear. In one case, the Federal Aviation Act and the federal Noise Control Act preempted a local ordinance that attempted to minimize noise pollution by restricting airplane takeoff times. In another case, the Federal Aviation Act did not preempt a state court lawsuit resulting from a passenger's fall from an airplane's stairs. Even though the federal government's regulation of airline travel is pervasive, there is a point where federal oversight over the field of airline travel ends.

CONCLUSION

The concept of preemption clarifies which law—federal law or state law—to follow. Preemption also allows for consistent regulation of a subject, such as airline travel, that affects multiple states across the country or the country as a whole. The question of when preemption occurs, however, is a difficult one to answer. As long as the state and federal governments continue to enact laws and make regulations, the courts will continue to consider the question of preemption.

Governing Wisconsin: "Preemption"

Study Questions

1	What is "express preemption" of state law? Who does the preempting?	
2	When a state passes a law that conflicts with federal law, who decides which law applies?	
3	Why do courts have authority to hold that some federal laws preempt state laws?	
4	How does conflict preemption differ from field preemption?	
5	Can you think of subjects that states cannot regulate because the Federal Aviation Act has preempted them?	
6	Why might it be a good idea for federal law to preempt state law?	

Governing Wisconsin: "Preemption"

Study Questions in the Cognitive Domain

1	What is "express preemption" of state law? Who does the preempting?	When the U.S. Congress passes a law that clearly states that Congress intends to preempt state law, conflicting state statutes have no legal effect.	Cognition
2	When a state passes a law that conflicts with federal law, who decides which law applies?	Both state and federal courts can decide whether federal law has preempted state law, with the U.S. Supreme Court having the last word.	Comprehension
3	Why do courts have authority to hold that some federal laws preempt state laws?	The supremacy clause of the U.S. Constitution provides that the Constitution and U.S. laws "shall be the supreme law of the land" and shall be binding upon state judges.	Application
4	How does conflict preemption differ from field preemption?	Both are implied, rather than express, but conflict preemption results if compliance with both federal and state law is impossible or if state law blocks the purpose of federal law. Field preemption results when Congress has clearly intended to be the sole regulator in a field.	Analysis
5	Can you think of subjects that states cannot regulate because the Federal Aviation Act has preempted them?	Subjects the Federal Aviation Act preempts include antenna tower height restrictions, employee whistleblower protections, jet fuel tanker truck design, noise abatement ordinances, pilot licensing, and wetlands preservation.	Synthesis
6	Why might it be a good idea for federal law to preempt state law?	Some subjects affect the whole nation and cannot be efficiently or effectively regulated by state and local governments.	Evaluation