A COMMISSION REPORT

Federal Statutory Preemption of State and Local Authority:

History, Inventory, and Issues

U.S. Advisory Commission on
Intergovernmental Relations

A-121
September 1992

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(September 1992)

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EXECUTIVE SUMMARY

Preemption refers to the authority of the Congress under the supremacy clause of the **U.S.** Constitution to enact statutes that displace or replace state and/or local laws and powers. The Congress' power to preempt, however, is limited to the fields of authority delegated to it (e.g., bankruptcy) by the people of the states through the **U.S.** Constitution.

Preemption may entail (1) federal displacement of state and/or local law so as to prohibit state or local governments from exercising particular powers (e.g., a prohibition of state or local regulation of an economic activity deregulated by the Congress), (2) federal replacement of a state and/or local law or regulation by a federal law or regulation, or (3) federal enactment of a requirement that state and/or local governments comply with a federal standard.

Preemption is sometimes stated explicitly in a federal statute. Often, however, there is no explicit statement of preemption; consequently, the federal courts and administrative agencies infer preemption based on their own interpretations of congressional intent.

This report finds that:

- The pace and breadth of federal preemptions of state and local authority have increased significantly since the late 1960s. Of the approximately 439 significant preemption statutes enacted by the Congress since 1789, more than 53 percent (233) have been enacted only since 1969.
- Many public officials are unaware of the extent of federal preemption.
- The state officials surveyed acknowledged the need for federal preemptions, but objected to or expressed concern about some of their features.
- The U.S. Supreme Court has given the Congress broad discretion to exercise its preemption powers.
- The federal courts often imply federal preemption where there is no explicit statutory statement.
- Some federal preemptions provide substantial latitude to state and local governments in the means of compliance.

There are three broad categories of federal preemption statutes—dual sovereignty, partial federal preemption, and total federal preemption.

Dual Sovereignty. There are three types of dual sovereignty:

(1) State powers not subject to preemption—including the power of states to levy taxes and to enter into nonpolitical interstate compacts;

(2) Direct and positive conflict between state and federal laws—a state law is valid unless there is a conflict with a federal law on the same subject (e.g., Civil Rights Act of *1964);* and

(3) Administrative *or* judicial rulings precluding preemption—for example, the Voting Rights Act of 1965 and its amendments provide for either an administrative ruling by the U.S. Attorney General or a declaratory judgement by the **U.S.** District Court for the District of Columbia that any proposed change in the election system of a covered state or local government will not abridge the voting rights of citizens protected by the act.

Partial Preemption. Under partial federal preemption, the Congress or federal administrative agencies may establish minimum national standards for a function or service and authorize the states to exercise primary regulatory responsibility, provided that state standards are at least as high and are enforced. Partial preemption permits a state to tailor regulatory programs to meet special needs and conditions. Partial preemption has become more commonplace since 1965 and has had a greater impact on federal-state relations than total federal preemption. There are three types of partial federal preemption:

(I) Standard—a state law supersedes a corresponding federal law if standards are equal to or higher than the national standards (e.g., Water Qualify Act of 1985 and Clean Water Act of 1977);

(2) *Combined*—the Occupational Safety and Health *Act* of *1970* combines partial federal preemption with traditional dual sovereignty regulation authority; and

(3) State transfer of regulatory *authority*—the Wholesome Meat Act grants the Secretary of Agriculture authority to transfer responsibility to a state that has enacted an inspection law consistent with federal standards.

Total Preemption. Under total preemption, the federal government assumes complete regulatory authority. Ten types of total preemption were found:

(1) *No* need for state *and/or* local *assistance*—bankruptcy;

(2) *No* state economic regulation *allowed*—deregulation of the airline and bus industries;

(3) State and local assistance needed—state and local assistance to the Nuclear Regulatory Commission in protecting public health and safety in the event of an accident at a nuclear generating plant, and state enforcement of the federal ban on the use of products containing lead in public water systems;

(4) State activities exception—the National Traffic and Motor *Vehicle Safety* Act of *1966* allows a state or local government to establish safety requirements for equipment for its own use;

(5) Limited regulatory turnbacks—several statutes authorize turnback of responsibility to the states (e.g., Hazardous and Solid Waste Act Amendments of *1984* and Atomic Energy Act *of 1946);*

(6) Federal mandating of state law *enactment*—the Equal Employment *Opportunity* Act of *1972* and similar acts mandate that states comply with federal laws by enacting state laws under threat of civil or criminal penalties;

(7) Federal promotion of interstate compacts—the Low-Level Radioactive Waste Policy Act of *1980* encourages formation of compacts to provide for availability of disposal capacity;

(8) Gubernatorial petition for preemption removal—the governor of New **York** may petition the Secretary of Transportation for removal of a limitation on the collection of bridge tolls on Staten Island;

(9) State veto of a federal administrative decision—a governor or state legislature may veto a site selected by the Secretary of Energy to construct a high-level radioactive waste facility (the Congress may override the veto);

(10) Contingent *total preemption*—the Voting Rights Act of *1965* and its amendments contain provisions that are not applied to a state or local government unless certain conditions are met.

To assess the impact of federal preemption and perceptions regarding the desirability of various approaches, ACIR surveyed state elected officials, agency heads, and the **26** state ACIRs. There was a consensus that there is too much federal preemption and that the Congress delegates too much authority to federal administrators. Nevertheless, many respondents acknowledge the need for federal preemption under certain circumstances.

In general, state officials rated highly **(1)** standard partial preemption, (2) a federal statutory provision stipulating that a state law is valid unless there is a direct and positive conflict with a federal law, and **(3)** congressional permission for states to act where no federal standard is in effect.

Federal preemption, according to state officials, does not often solve problems in their states originating in other states. Furthermore, preemption often prevents states from pursuing policies they prefer. The suggestion for a code of restrictions in each federal preemption statute received strong positive ratings. In addition, there was nearly unanimous agreement that each preemption statute should contain a sunset provision.

ACIR also included five questions about federal preemption in its 1992 national public opinion poll.

75 percent of the respondents favored federal preemption of the listing of health risks on the labels of food products.

50 percent of the respondents favored federal regulation of interstate banking.

37 percent of the public favored federal regulation of companies that sell life, fire, property, casualty, and automobile insurance.

20 percent of the respondents favored federal regulation of the location and building of low-income housing in local communities.

The report also examines factors that seem to be encouraging the rise of preemption, including: **(1)** the general trend of increased federal regulation; (2) the loosening of constitutional restraints on congressional power; **(3)** the Congress' constitutional obligations to protect rights nationwide; **(4)** the reduced fiscal capability of the federal government, resulting in a turn to regulation to accomplish objectives; (5) the opening of new fields of federal regulation in recent decades; *(6)* the proliferation of interest groups in Washington; **(7)** public concern about America's competitive position in the world economy; (8) small-state concerns about the adverse impacts of big-state regulation; **(9)** bipartisan support for preemptions of different types; and (10) the popularity of many preemptions, such **as** health, safety, and environmental protection.

The report concludes by examining salient issues of preemption, including; **(1)** the large scope of preemption today; (2) the clarity of statutory preemption language; **(3)** preemption by evolution through administrative and judicial interpretation; **(4)** congressional delegation of preemption authority to administrative agencies; *(5)* setting minimum versus maximum federal standards; *(6)* flexibility for state and local governments; **(7)** the extent to which the diverse forms of preemption are well matched to particular issues; **(8)** the lack of evaluation of preemption statutes; **(9)** the question of whether preemptions should be subject to sunset rules; and (10) the balance between the supremacy clause and the Tenth Amendment.

ACIR has recommended limitations on federal preemption. In **1984,** in Regulatory Federalism: Policy, Process, Impact and Reform, the Commission issued five principles to guide the Congress in the exercise of those powers. In **1987,** in "Federal Preemption of State and Local Authority'' (Intergovernmental Perspective, Winter 1988), the Commission **found** that "federal preemption, while a necessary feature in the design of a federal system, ought to be minimized and used only **as** necessary to secure the effective implementation of national policy adopted pursuant to the Constitution." The Commission also found that "preemption is properly a legislative decision, within appropriate constitutional constraints, and ought not to be exercised by administrative or judicial officers without prior legislative authorization and direction." With this report, the Commission reaffirms its earlier recommendations (see Findings and Recommendations, page **1).**

PREFACE

There has been a dramatic increase in federal statutory preemption of state and local authority during the last 20 years. The research for this report uncovered the startling fact that more than half of the **439** federal preemption statutes passed by the Congress in the 200-year history of the United States were enacted during only the last two decades. Preemption has become a central feature of our federal system. Although without preemption, under the supremacy clause of the U.S. Constitution, the federal government would be a crippled giant, like everything else, too much of a good thing can be bad.

It is difficult to get an accurate count of preemptions. Statutes preempting state and local authority are not always labeled as such. Moreover, preemptions are often buried in omnibus legislation. There also is the problem of implied preemption. The Congress does not say explicitly that it is preempting state and local authority, but courts and regulators infer preemption from the language and/or intent of the legislation. At the very least, we need truth-in-preemption packaging from the Congress.

This is the third report in which ACIR has recommended that the Congress explicitly state its intention to preempt and that regulators and courts not be allowed to infer preemption where there is no such statement. ACIR also has recommended that the Congress keep preemption to a minimum and in strict conformity with the Constitution, and that preemption be invoked only to:

(1) Protect basic political and civil rights guaranteed to **all** citizens by the Constitution;

(2) Ensure national defense and the proper conduct of foreign relations;

(3) Establish certain uniform and minimum standards in areas clearly affecting the flow of interstate commerce;

(4) Prevent state and local actions that substantially and adversely affect another state or its citizens; or

(5) Assure essential fiscal and programmatic integrity in the use of federal grants and contracts into which state and local governments may freely enter.

Clearly, the pace of preemption has outstripped these criteria. A major reason for being concerned about the unprecedented rise in preemption is the subordination of the Tenth Amendment not only to the supremacy clause today but also to the powers of the Congress. This subordination—some would say destruction—of the Tenth Amendment was made crystal clear by the **U.S.** Supreme Court in ***Garcia*** v. ***San Antonio Metropolitan Transit Authority*** (1985) and ***South Carolina*** v. ***Baker*** (1988). The supremacy clause says that federal laws are supreme and valid only when they conform to the **U.S.** Constitution. A federal law is not supreme simply because it has been enacted by the Congress and signed by the President. In the past, the **U.S.** Supreme Court served as a check on the Congress' interpretation of its constitutional powers. Now, the court has given the Congress substantial freedom to interpret its own constitutional powers, checked only by the voters and the political muscle of state and **local** governments in the national political process.

Robert B. Hawkins, Jr.
Chairman

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Of course, the Commission and its staff retain final responsibility for the contents of the report.

John Kincaid
Executive Director

Bruce D. McDowell
Director, Government Policy Research

CONTENTS

Figures and Tables

FINDINGS AND RECOMMENDATIONS

Findings

1. The pace and breadth of federal preemptions of state and local authority have increased significantly since the late 1960s.

Federal preemptions span an ever widening range of commercial, monetary, civil rights, environmental, health, and safety fields. The number of explicit federal preemption statutes alone—not counting implied preemptions found by the courts or promulgated by administrative rulemaking—has increased to the point that over half of all such preemptions in the nation's constitutional history have been enacted by the Congress only since 1969. These preemptions include prohibitions of economic regulation and other activity by the state and local governments, as well as requirements that states enforce federal laws, conform their own laws to federal standards, and take on new responsibilities. Federal preemptions also may override state and local decisions and *prevent states and local governments from pursuing policies* preferred by their citizens.

2. Many public officials are unaware of the extent of federal preemption.

Inventories of federal preemptions have been few and incomplete. Even the inventory in this report is only a beginning; it catalogs only statutory preemptions explicitly enacted by the Congress. As far as is known, there is no catalog of implied preemptions found by the courts or promulgated by administrative rulemaking. Consequently, no one knows how many federal preemptions there are or how much they cost the state and local governments or whether they unduly constrain the policy creativity and vitality of state and local governments. In addition, the nature of federal preemptions is such that many of them are transmitted to implementing officials through state laws that obscure their federal origins.

3. The state officials surveyed acknowledged the need for federal preemptions, but objected to or expressed concern about some of their features.

Leading the list of objections was the excessive amount of federal preemption, the tendency of the Congress to delegate too much preemption authority to federal administrators, prohibitions on state regulation of certain industries, and federal requirements for states to enact legislation to comply with provisions of federal laws. Surveyed state officials indicated that federal preemptions seldom solve problems in their states that originated in other states; instead, these federal actions are seen as more likely to prevent states from pursuing policies they prefer. Many state respondents favored greater detail in federal preemption statutes concerning prohibited actions to help avoid long periods of litigation. Many respondents also strongly favored "sunset" reviews of preemption statutes to help ensure that troublesome provisions do not go unchallenged forever.

4. The U.S. Supreme Court has given the Congress broad discretion to exercise its preemption powers.

In *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985) and in *South Carolina* v. *Baker* (1988), the Court ruled that federal power is limited only by voters and by the ability of state and local governments to persuade the Congress to exercise restraint. By this interpretation, the Tenth Amendment is not an independent, judicially enforceable restraint on federal preemption. Although the U.S. Supreme Court has recently given renewed attention to the Tenth Amendment, as well as the republican guarantee clause, in *Gregory* v. *Ashcroft* (1991) and *New York* v. *United States et al.* (1992), the Court has not significantly restrained the reach of federal power on constitutional grounds.

5. The federal courts have often implied federal preemption where there is no explicit statutory statement of preemption.

The supremacy clause of the U.S. Constitution requires that when a state law conflicts with a law of the United States enacted pursuant to the Constitution, the state law must yield to the U.S. law. However, judicial interpretations have ranged from requiring the minimum amount of state yielding to complete yielding. At times, the courts also seem to broaden the reach of federal preemptions beyond any expressed intent of Congress. The courts, therefore, do not follow a consistent and predictable doctrine in deciding preemption cases. They have not always held the Congress to a strict test of accountability by requiring a clear statement of intent to preempt. Similarly, the courts have not consistently required that extensions of preemption by administrative rulemaking or court findings be based on clear delegation of such authority by the Congress. In recent years, however, the U.S. Supreme Court has made greater efforts to limit preemption to plain statements of legislative intent.

6. Some federal preemptions provide substantial degrees of latitude to state and local governments in choosing the means of compliance.

In various cases, the states may regulate at or above the established federal standards, administer their own laws in the preempted field except to the extent that there is a direct conflict with individual provisions of **U.S.** law, act where no federal standard is in effect, accept a federal turnback of regulatory authority, or receive certain **ex**emptions from federal preemption. In addition, states may transfer certain preempted responsibilities to the federal government or be reimbursed for carrying them out.

Recommendations

Recommendation 1:

Reaffirmation of Requirements for Explicit Intent to Preempt and Principles for Limiting Federal Preemption

The Commission finds that the pace of federal preemption of state and local authority has accelerated dramatically since the Kestnbaum Commission (1953-55) first offered recommendations to moderate this tendency, and that the pace of preemption continues despite the Commission's own recommendations of 1984 and 1987. The Commission reaffirms its earlier findings that federal preemption, while a necessary feature in the design of the federal system, ought to be used only as necessary to secure the effective implementation of federal policy adopted pursuant to the U.S. Constitution, and that preemption is properly a legislative decision, within appropriate constitutional constraints, and ought not be exercised by administrative or judicial officers without clearly stated legislative authorization and direction.

The Commission, therefore, reaffirms its earlier recommendations to the effect that (1) the Congress not preempt state and local authority without clearly expressing its intent to do so; (2) the Congress limit its use of the preemption power to protecting basic political and civil rights, managing national defense and foreign relations, ensuring the free flow of interstate commerce, preventing state and local actions that would harm other states or their citizens, and protecting the fiscal and programmatic integrity of federal-aid programs into which state and local governments freely enter; (3) the Executive Branch not preempt by administrative rulemaking unless the Congress has expressly authorized such action and established clear guidelines for doing so, and unless the administrative agency taking such action clearly expresses its intent to preempt; and (4) the federal courts not confirm the validity of statutory and administrative preemptions unless accompanied by a clear statement of intent to preempt and unless the extent of preemption is no greater than necessary to give effect to that intent within the limits of constitutional authority

Recommendation 2:

Congressional Preemption Notes and Executive Agency Notifications

The Commission finds that federal preemptions often affect vital interests of the states and their local governments. As such, preemptions should not be enacted by the Congress without thorough consideration of their likely impacts and without provisions for periodic review after enactment. It also should be recognized that the great diversity among the states and their local governments may affect substantially the impact and effectiveness of federal preemptions from place to place.

The Commission recommends, therefore, that the Congress provide by legislation for the preparation and consideration, in both committee and floor debate in both houses of the Congress, of preemption notes concerning any bill affecting the powers of state or local governments. Such notes should express, in clear language, any intent of the legislation to preempt or not to preempt state or local government powers, justify the preemption in accordance with the United States Constitution, stipulate and justify the scope of such preemption, present options for minimizing the extent of federal preemption and for providing flexibility to state and local govemments in complying with any proposed preemption, and provide either for a sunset provision or for periodic review of the preemption.

The Commission recommends, furthermore, that the Congress amend the Administrative Procedure Act *to provide that any administrative rulemaking proposed by the Executive Branch that would affect the powers of state or local govemments be required to be published in the* Federal Register *with a preemption note stating, in clear language, the extent of any federal preemption intended and citing the explicit statutory provision on which any preemptive rules would be based.*

Recommendation 3:

Preemption Notes in the Executive Branch

The Commission finds that many legislative and regulatory proposals originate in the executive branch of the federal government. Systematically evaluating these executive branch proposals against principles similar to those recommended for the legislative and judicial branches will increase the likelihood that federal agencies will avoid unnecessary preemption. The Commission applauds the principles established in the Federalism **Ex**ecutive Order (No. 12612), but finds that this order is not being used to its full potential.

The Commission recommends, therefore, that the executive branch of the federal government prepare a preemption note for any legislative or regulatory proposal affecting the powers of the states or their local govemments and attach the preemption note to the proposal for consideration within the originating department or agency and any reviews by the Office of Management and Budget, the White House, the Congress, and formal rulemaking processes. The preemption note should be guided by the principles set forth in the Federalism Executive Order (No. 12612) and should be incorporated into any federalism assessment prepared thereunder. The preemption note should express, in clear language, any intent of the proposal to preempt or not to preempt state or local government powers, justify the preemption in accordance with the United States Constitution, stipulate and justify the scope of such preemption, present options for minimizing the extent of federal preemption and for providing flexibility to state and local governments in complying with any proposed preemption, and provide either for a sunset provision or for periodic review of the preemption.

Recommendation 4:
State and Local Vigilance on Federal Preemptions

The Commission finds that the state and local governments have the greatest stake in limiting the use of federal preemption powers and in ensuring that those powers are used in a manner that reinforces both federalism and genuine national interests.

The Commission recommends, therefore, that the national associations representing state and local governments, acting individually and jointly, (1) monitor the introduction and consideration of preemption legislation, as well as the development of preemptive administrative regulations, (2) seek to influence them in accordance with the principles set forth above, and (3) join litigation to limit the use of the federal preemption power to necessary and proper cases.

Recommendation 5:
Evaluation of Federal Preemptions

The Commission finds that too little is known about the effectiveness of most federal preemptions and their effects on state and local governments. No one has sought to evaluate the cumulative impact of all federal preemptions on the states and their local governments, or whether the benefits are commensurate with the costs. Even the evaluations of individual preemptions are often sketchy, leaving us to guess about the relative burdens and benefits to the federal, state, and local governments.

The Commission recommends, therefore, that greater effort be devoted to evaluating federal preemptions, including efforts by the executive and legislative branches of the federal government, and by the national associations representing state and local governments.

Note: Pursuant to the Commission's recommendations, Senators Carl Levin and David Durenberger introduced into the U.S. Senate S. 2080, entitled "Preemption Clarification and Information Act of 1991," and Representative Craig Thomas introduced into the U.S. House of Representatives HR 4613, entitled "States and Local Legislative Prerogatives Preservations Act of 1992."

Chapter 1. INTRODUCTION

Intergovernmental regulation has become one of the most prominent features of American federalism during the past quarter-century. One facet of intergovernmental regulation is federal preemption of state and/or local authority by acts of Congress and by judicial and administrative interpretations of federal statutes.

Preemption refers, generally, to an appropriation or seizure for oneself to the exclusion of others. Often it means taking possession of something before others do so. In the feudal past, for example, preemption referred to royal prerogatives to purchase goods at certain prices in preference to other buyers. For about the first 150 years of U.S. history, preemption was most commonly known as a first option or right to purchase public land, usually a portion not exceeding 160 acres.

Preemption – Displacement of State law

In the field of intergovernmental relations, preemption refers to the authority of federal law to displace or replace state (and local) law under the supremacy clause of the U.S. Constitution (Art. VI). The clause states: "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."

The supremacy clause does not mean that the federal government is supreme in all things; it means only that federal law is supreme within the realms of power delegated to it by the people of the states through the U.S. Constitution. As Alexander Hamilton wrote in *The Federalist*, the supremacy clause does not mean "that acts of the [federal government] which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the [states], will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such."[1]

Consequently, the scope of federal preemption of state and local powers depends very greatly on interpretations of the scope of the powers of Congress enumerated in the U.S. Constitution. Over the years, as congressional powers (e.g., the commerce clause) have been interpreted more broadly, the scope of federal preemption of state and local authority has broadened as well because conflicting state law or administrative policy must yield to federal law enacted pursuant to the delegated powers of the Congress.

Interpreting Federal Preemption Powers

Interpretation, therefore, lies at the heart of preemption: the Congress's interpretation of its delegated powers; the judiciary's interpretation of the authority of the Congress to enact a particular statute pursuant to its delegated powers; judicial and administrative interpretations of the explicitly or implicitly preemptive effects of federal statutes; and judicial and administrative judgments of whether a state law and a federal law can both be enforced in a particular field. Once it is determined that a federal statute accords with the U.S. Constitution, then: "The constitutional principles of preemption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter."[2]

This judgment, however, is often more of an art than a science. As Justice Hugo Black wrote in 1941:

> There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[3]

The question of interpretation is important because, unlike the general definition of preemption as "prior appropriation," federal preemption rarely involves a prior appropriation of powers. That is, federal preemption usually displaces state or local laws that already occupy a field—laws that reflect the preferences of the citizens of

states and localities as expressed through their elected legislators. Consequently, most federal preemptions alter the balance of power in the federal system by shifting powers to the federal government through the enactment of laws that reflect the preferences of citizens nationwide through their elected members of Congress. Given that federal preemptions ordinarily displace state or local laws that reflect the diverse preferences of the citizens of states and communities, it is especially important that the Congress be clear about its intent to preempt state or local powers. Such clarity is needed in order to ensure that preemptions genuinely reflect uniform voter preferences nationwide, in accordance with the **U.S.** Constitution, and that unelected judicial and executive officials do not overreach their statutory authority to displace state and local laws duly enacted by elected state and local officials.

Unlike the general definition of preemption as "exclusivity," however, federal preemption of state or local power does not necessarily displace state or local law entirely. Generally, the **U.S.** Supreme Court has advanced three views on the question of exclusivity.[4] One view is that in a direct collision between state law and federal law, state law is simply invalidated under the supremacy clause of the **U.S.** Constitution. **A** second view, sometimes referred to as a nationalist view, is that when the Congress preempts part of **a** field or **a** phase of commerce, it effectively occupies the entire field, leaving no room for supplementary state or local legislation. **As** Justice Joseph Story argued in his dissent in *New York* v. *Miln:*

> Full power to regulate a particular subject implies the whole power, and leaves no residuum; and a grant of the whole to one is incompatible with a grant to another of a part. When a state proceeds to regulate commerce with foreign nations, or among the states, it is doing the very thing which congress is authorized to do.[5]

A third view is that state or local law may continue in force as a supplement to federal law so long as there is no direct conflict between the federal and state laws. In 1963, for example, the **U.S.** Supreme Court upheld, 5-4, a Florida law that set standards for avocados sold in Florida, standards that were higher than those set by federal law.[6] Although the Florida law was applied to avocados grown out of state as well as in-state, the Court sustained the law on the ground that growers could comply with both the state and federal standards because compliance with the higher state standard automatically meant compliance with the lower federal standard.

Preemption, therefore, is **a** complex field of federal law, but given the prominence of preemption in American federalism today, it is important to understand preemption because it has profound effects on intergovernmental relations and the balance of power in the federal system. Outside of the literature of law, however, relatively little attention has been given to preemption.

Historical Background

When the ratification of the United States Constitution was being debated in 1787-88, many Americans were concerned that the broad, general language of the document, combined with its supremacy clause, would allow the federal government to centralize power to a greater extent than anticipated by its limited enumeration of delegated powers. Hamilton's argument about the limited scope of the supremacy clause was not entirely persuasive. Consequently, the Tenth Amendment was added soon after the Constitution was adopted to reinforce the intent that the powers not explicitly given to the federal government are reserved to the states or to the people.

Despite early decisions by the U.S. Supreme Court, such as *Gibbons* **v.** *Ogden* (1824)' and *Brown* v. *Maryland* (1827),[8] which strongly asserted federal preemption powers, the intent of the Tenth Amendment was largely acceded to by the Congress until this century. **As** Table 1-1 shows, only about 30 statutes were enacted in the 110 years from 1789 to 1899 to preempt powers of the states by substituting federal policy for state or local policies. Even with respect to clearly enumerated powers, such as bankruptcy, preemption followed a checkered path. The first federal bankruptcy law preempting state powers was enacted in 1800 but then repealed in 1803. **A** second bankruptcy act was passed in 1841, only to be repealed in 1843. **A** third act, passed in 1867, was repealed in 1878. Not until 1898 did the Congress enact a bankruptcy statute with staying power.

After the turn of the century, as Table 1-1 also documents, the amount and scope of preemption began to grow significantly. This growth was modest at first, centering around interstate and foreign commerce, but also beginning to preempt (or substitute for) state roles in banking and finance and in health and safety. Today, health, safety, and environmental protection generate more federal preemption statutes than **do** any other categories except commerce. (See also Figures 1 and **2.)**

The increase in federal statutory preemption of state and local powers also has been reflected on the U.S. Supreme Court's docket. According to one study, ten preemption cases, or 2 percent of the Court's docket, were heard during the Supreme Court's 1962, 1963, and 1964 terms. During its 1985, 1986, and 1987 terms, however, the Court heard 39 preemption cases, which represented 9 percent of its docket?

As federal preemptions have increased in number, they have attracted greater attention from state and local officials. Federal preemptions limit the discretion of state and local voters and sometimes impose additional costs on state and local governments. When those costs were offset significantly by federal grants, the fiscal impacts of preemptions were softened, but since federal aid to state and local governments declined from **26.5** percent of state-local outlays in **FY** 1978 to about 20.5 percent in FY 1991, concerns about federal preemption have intensified among state and local officials and citizen organizations. Statutory relief from some burdensome federal preemptions has been provided by the Congress, especially where state and local governments have been turned away by the courts in their requests for relief; however, relief measures are still far outweighed by preemption measures.

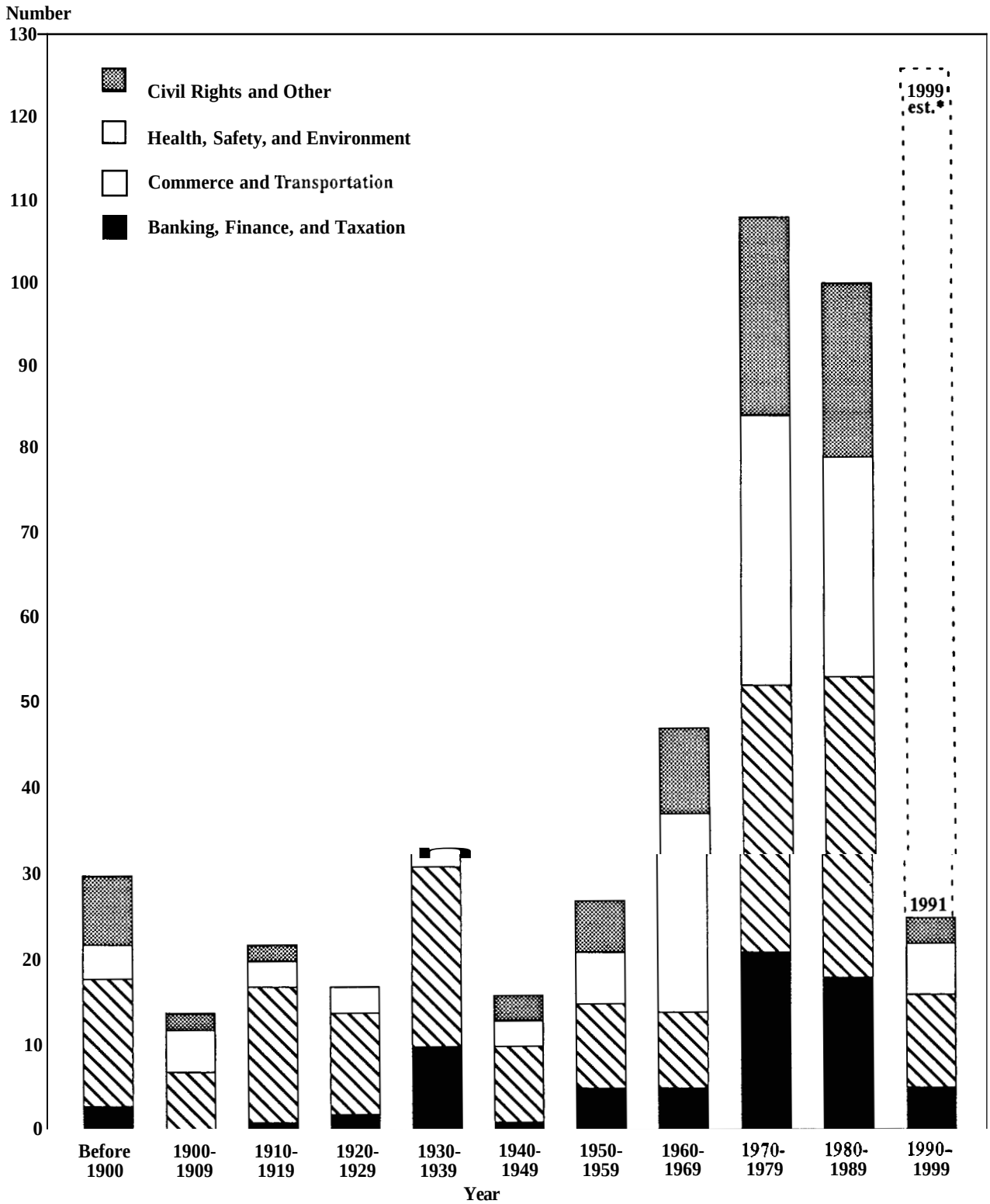
Constitutional Balance and Fiscal Impact

Thus, federal preemption presents issues of constitutional balance and fiscal impact. These are not simple issues. Even the definition of preemption is not simple. In fact, there are several different types **of** federal preemp-

Figure 1

Number of Federal Preemption Statutes Enacted Per Decade: 1790-1991

(by date of enactment and purpose)

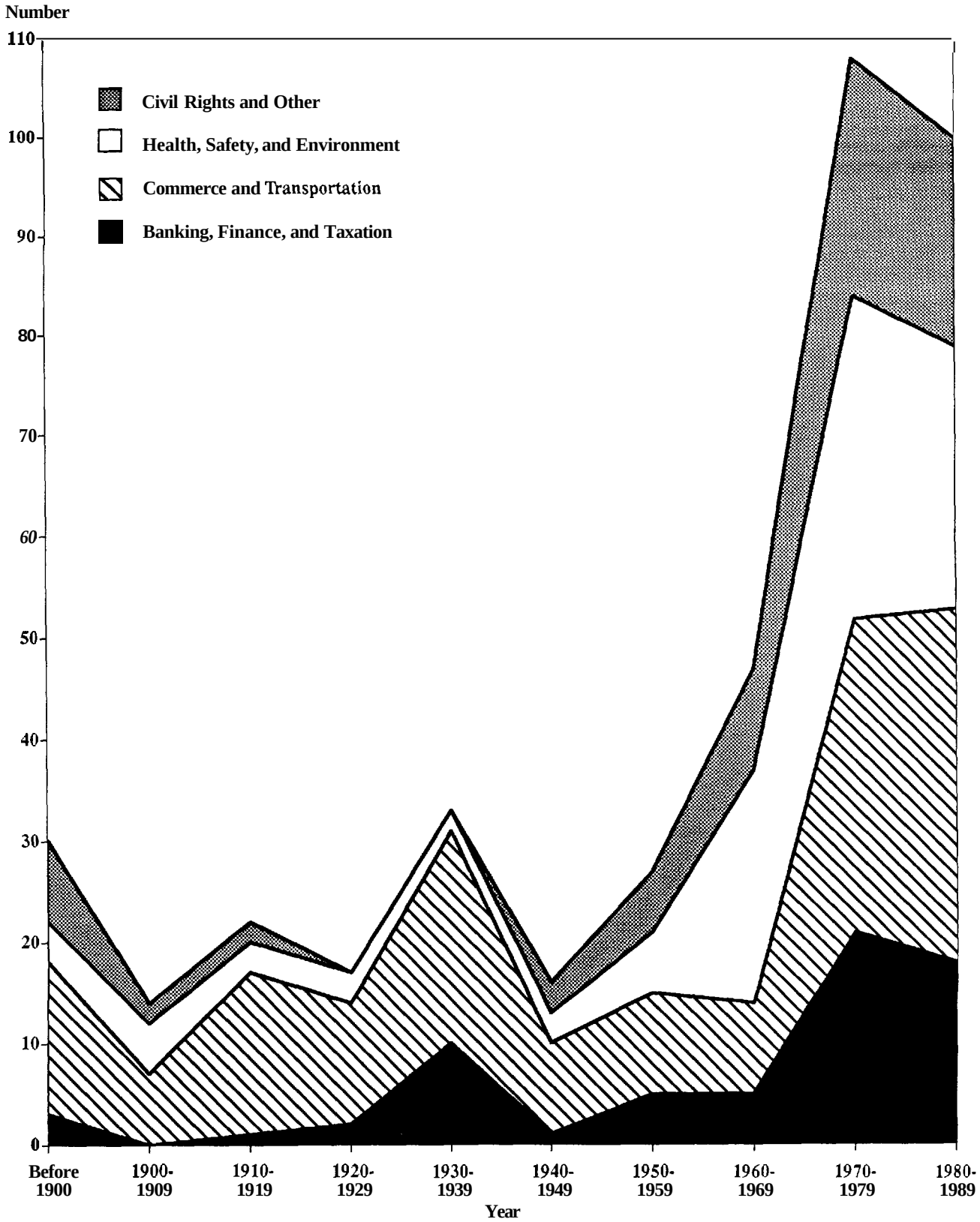


*The 1990-1991 rate was multiplied by 5 to estimate how many preemptions might be enacted during 1990-1999.

Source: Appendix A, p. 45.

Figure 2

Number of Federal Preemption Statutes Enacted Per Decade: 1790-1989
(by date of enactment and purpose)



Source: **Appendix A, p. 45.**

Table 1-1
Federal Preemption and Preemption Relief Statutes: 1790-1991
(by date of enactment and purposes)

	Banking & Finance	Civil Rights	Commerce	Health & Safety	Natural Resources	Tax	Other	Total	Preemption Relief Statutes'
Before1900	0	7	15	4	1	3	0	30	3
1900-1909	0	0	7	5	2	0	0	14	1
1910-1919	1	0	16	3	1	0	1	22	1
1920-1929	2	0	12	3	0	0	0	17	3
1930-1939	8	0	21	2	0	2	0	33	4
1940-1949	1	0	9	3	2	0	1	16	3
1950-1959	3	1	10	6	3	2	2	27	4
1960-1969	5	7	9	23	3	0	0	47	2
1970-1979	15	10	31	32	9	6	5	108	5
1980-1989	13	6	35	26	6	5	9	100	7
1990-1991	2	2	11	6	0	3	1	25	1
Totals	50	33	176	113	27	21	19	439	34

'These statutes modify federal preemptions that caused sufficient intergovernmental tensions to attract the attention of Congress. An example is the ***Fair Labor Standards Amendments of 1985*** enacted to help soften the impact of the U.S. Supreme Court's ***Garcia*** v. ***San Antonio Metropolitan Transit Authority*** decision mandating state and local employment conditions.

Source: Appendix A, page 45.

tion, and diverse ways to implement preemptions. Furthermore, many federal mandates are a subset of federal preemption, although preemptions and mandates are often not clearly distinguished in discussions of federal action.

This rapidly emerging and highly charged topic has been addressed before. The temporary Commission on Intergovernmental Relations (the Kestnbaum Commission) in 1955 and the Advisory Commission on Intergovernmental Relations (ACIR) in 1984 and 1987 issued reports recommending limitations on federal preemption.[10] Considerable attention also has been given to federal mandates." Federal preemptions and mandates proceed apace, however, amid confusion about the differences between the two, with no adequate inventory of federal preemptions and with little understanding of how the various types of preemption work.

Scope of Report

The purpose of this report is to (1) define federal preemption, (2) present an inventory of federal preemption statutes, (3) classify the types of federal preemptions and the mechanisms used to implement them, **(4)** record the views of several types of state officials concerning this topic, ***(5)*** draw conclusions about the appropriate scope of federal preemption and uses of implementation mechanisms, and ***(6)*** offer new recommendations for limiting and clarifying federal preemptions.

Notes

[1] ***The Federalist,*** No. 33.

[2] 'Amalgamated Assn. of Street, Electric Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 285-286 (1971).

[3] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[4] See Congressional Research Service, ***The Constitution*** of ***the United States of America: Analysis and Inteipretation*** (Washington, DC, 1987), p. 281.

[5] New York v. Miln, 36 U.S. (11 Pet.) 102, 158 (1837).

[6] Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963).

[7] 22 U.S. (9 Wheat.) 1 (1824).

[8] 25 U.S. (12 Wheat.) 419 (1827).

[9] Kenneth Starr, et. al., ***The Law of Preemption, A Report*** of ***the Appellate Judges Conference*** (Chicago: American Bar Association, 1991), p. 1.

[10] The Commission on Intergovernmental Relations, ***A Report to rhe President for Transmittal to the Congress*** (Washington, DC, 1955), pp. 63-64; U.S. Advisory Commission on Intergovernmental Relations, ***Regulatory Federalism: Policy, Process, Impact, and Reform*** (Washington, DC, 1984), p. 259; and "Federal Preemption of State and Local Authority," ***Intergovernmental Perspective*** 14 (Winter 1988): 23-25.

"Studies of federal mandates are reviewed in Chapter 5 of ACIR, ***Regulatory Federalism.*** A recent inventory of federal "mandates" is found in Robert McCurley, Jr., "Federally Mandated State Legislation," ***State-Federal Issue Brief*** 3 (June 1990). See also Timothy J. Conlan, "And the Beat Goes On: Intergovernmental Mandates and Preemption in an Era of Deregulation," ***Publius: The Jounial*** of ***Federalism*** 21 (Summer 1991): 43-57; Martha A. Fabricius, "Mandate Stratagems," ***State Legislatures*** 17 (November 1991): 13, and "The 102nd's Multiplying Mandates," ***State Legislatures*** 18 (January 1992): 17-18; Michael Fix and Daphne A. Kenyon, eds., ***Coping with Mandates: What Are the Alternatives?*** (Washington, DC: The Urban Institute Press, 1989); Richard C. Hicks, "Environmental Legislation and the Costs of Compliance," ***Government Finance Review 8*** (April 1992): 7-10; Michael de Courcy Hinds, "U.S. Adds Programs with Little Review of Local Burdens," ***New York Times,*** March 24, 1992; John Kincaid, "From Cooperative to Coercive Federalism," ***Annals*** of ***the American Academy of Political and Social***

Science 509 (May 1990): 139-152; Sarah F. Liebschutz, "The National Minimum Drinking-Age Law," *Publius: The Journal of Federalism* 15 (Summer 1985): 39-51; Susan A. MacManus, " 'Mad' about Mandates: The Issue of Who Should Pay for What Resurfaces in the 1990s," *Publius: The Journal of Federalism* 21 (Summer 1991): 59-75; Ellen Perlman, "Special Report: Mandates," *City and State 7* (January 1, 1990): 16-18; Cathy Spain, "The Delicate Balance—Federal Preemption and Regulation of State and Local Governments," *Government Finance Review* 8 (June 1992): 40-42; Donald Stypula, "When It Rains, It Pours . . . Federal Mandates," *Michigan Municipal Review* 64 (July 1991): 160-162; U.S. General Accounting Office, *Legislative Mandates: State Experiences Offer Insights for Federal Action* (Washington, DC, 1988); Ray D. Whitman and Roger H. Bezdek, "Federal Reimbursement for Mandates on State and Local Governments," *Public Budgeting and Finance* 9 (April 1989): 47-62; and Joseph F. Zimmerman, "Regulating Intergovernmental Relations in the 1990s," *Annals of the American Academy of Political and Social Science* 509 (May 1990): 48-59.

Chapter 2. FEDERAL PREEMPTION: CRITERIA, INVENTORY, AND APPROACHES

The United States Constitution grants the Congress authority to preempt—or assume partial or total responsibility for—certain governmental functions (e.g., interstate commerce). Such preemption may be stipulated in a statute or inferred by the federal courts in the absence of an explicit statutory provision. Executive agencies also derive preemptions from federal statutes when they promulgate regulations. A federal preemption substitutes federal policy for state and local policies.

In enacting a preemption statute, the Congress may prohibit state and local governments from doing something or may mandate that they undertake a specific activity and/or provide a service meeting minimum or maximum federal standards.

Mandates are legal requirements—constitutional provisions, statutory provisions, or administrative regulations—requiring state and local governments to undertake a specific activity and/or provide a service meeting federal standards. Sometimes these standards are established as *minimum* national standards, such that state and/or local governments may enact more stringent standards. Mandates are based on the exercise of what has been called *partial* preemptive powers, as distinguished from restraints and conditions attached to federal grants-in-aid.' (The term *mandate* is used often without precise definition and is mistakenly applied to restraints and conditions of aid.)

A ***federal restraint*** restricts or prohibits specified state and local government actions. A restraint does not command action.

Conditions attached to federal grants-in-aid are considered as a matter of law to be accepted voluntarily by the grant recipient; they are not formally preemptions or mandates.[2]

Many federal preemption statutes impose costly mandates on state and local governments. The issue of reimbursement of costs incurred as the result of federal mandates is left for a future study. The remainder of this chapter describes briefly the formal allocation of power between the Congress and the states under the U.S. Constitution, the preemption criteria advanced by the Kestnbaum Commission and the *Advisory* Commission on Intergovernmental Relations, and the principal forms of preemption used by the Congress to structure federal-state relations.

Formal Power Allocation

The drafters of the U.S. Constitution delegated limited, enumerated powers to the Congress and reserved all remaining powers to the states and to the people. The delegated powers include exclusive ones—coinage of money, declaration of war, and the formal conduct of foreign affairs through treaties and alliances—which states are forbidden to exercise.[3] The Constitution forbids the Congress and the states to exercise certain other specified powers, such as issuing bills of attainder, enacting ex post facto laws, and granting titles of nobility.[4]

The U.S. Constitution also provides for two types of concurrent powers. The first type (e.g., the power to tax) is not subject to formal preemption unless the power is used to discriminate against a group or to place an undue burden on interstate commerce.[5] The second type includes powers granted to the Congress and not prohibited to the states (e.g., the regulation of commerce). In the event of a direct conflict between a state statute and a federal statute or treaty with another nation, the supremacy clause of the Constitution provides for the federal law or treaty to prevail by nullifying the conflicting state law.[6] Exercise of the second type of concurrent powers by the states is subject to total or partial preemption by congressional enactment of a statute.

States also are limited in the exercise of specified powers by the constitutional requirement that the Congress consent to the exercise of those powers. Examples of such powers include entering into interstate compacts, levying import and tonnage duties, and keeping troops in time of peace.' Although a literal reading of the Constitution makes clear that these powers are conditional, the U.S. Supreme Court, in reviewing a number of cases relating to these powers, has held in several instances that the consent of the Congress is not required for certain types of state exercises of these powers. For example, in 1893, the U.S. Supreme Court ruled that congressional consent is required for interstate compacts only if such compacts are "political," affecting the balance of power between the Union and the states? Similarly, the Court held in 1975 that the prohibition on levying "imposts or duties on imports and exports" without the consent of Congress does not prohibit the levying of a property tax on imported products?

Preemption Criteria

The U.S. Constitution has proved to be very flexible, due in part to the absence of explicit criteria limiting the ability of the Congress to preempt the statutes and regulations of the states and their political subdivisions. Opposition to the draft Constitution in 1787 centered largely on

fears that the Congress would employ its delegated powers aggressively to "produce. . .one consolidated government," according to minority members of the Pennsylvania constitutional convention.[10]

Fear of centralized political power continued to be a key theme in American politics during the nineteenth century. That fear was accentuated in the twentieth century by (1) the growth of the federal government during the Great Depression; (2) rapidly increasing use of federal conditional grants-in-aid during the 1950s, 1960s, and 1970s; and (3) following World War 11, occasional use of preemption to induce state and local governments to execute federal policies.

The fear of rising centralization prompted President Dwight D. Eisenhower in 1953 to appoint a temporary Commission on Intergovernmental Relations, chaired by Meyer Kestnbaum, to study the federal system. In its 1955 final report to the President and the Congress, the Kestnbaum Commission recommended that preemption powers be exercised by the Congress only under the following conditions:

> (a) When the federal government is the only agency that can summon the resources needed for an activity. For this reason the Constitution entrusts defense to the national government. Similarly, primary responsibility for governmental action in maintaining economic stability is given to the national government because it alone can command the main resources for the task.
>
> (b) When the activity cannot be handled within the geographical and jurisdictional limits of smaller units, including those that could be created by compact. Regulation of radio and television is an extreme example.
>
> (c) When the activity requires a nationwide uniformity of policy that cannot be achieved by interstate action. Sometimes there must be an undeviating standard and hence an exclusively national policy, as in immigration and naturalization, the currency, and foreign relations.
>
> (d) When a state through action or inaction does injury to the people of other states. One of the main purposes of the commerce clause was to eliminate state practices that hindered the flow of goods across state lines. On this ground also, national action is justified to prevent unrestrained exploitation of an essential natural resource.
>
> (e) When states fail to respect or protect basic political and civil rights that apply throughout the United States."

The above principles are essentially a restatement of the delegated or expressed powers of the Congress, including those embedded in the Fourteenth Amendment.

Continuing study by the **U.S.** Advisory Commission on Intergovernmental Relations **(ACIR)** of the issues relating to federal preemption led to the issuance in 1984 of a major report containing five principles to guide the Congress in exercising those powers:

> **(1)** To protect basic political and civil rights guaranteed to all American citizens under the Constitution;
>
> (2) To ensure national defense and the proper conduct of foreign relations;
>
> **(3)** To establish certain uniform and minimum standards in areas affecting the flow of interstate commerce;
>
> **(4)** To prevent state and local actions which substantially and adversely affect another State or its citizens; or
>
> (5) To assure essential fiscal and programmatic integrity in the use of federal grants and contracts into which state and local governments freely enter.'*

In a follow-up study, the Commission found in 1987 that "federal preemption, while a necessary feature in the design of a federal system, ought to be minimized and used only as necessary to secure the effective implementation of national policy adopted pursuant to the Constitution."[13] The Commission also found that "preemption is properly a legislative decision, within appropriate constitutional constraints, and ought not to be exercised by administrative or judicial officers without prior legislative authorization and direction."[14]

Building on these findings, the Commission adopted three recommendations:

Recommendation 1: Expression **of** Legislative Intent.

The Commission recommends that the Congress stipulate by law that no act of Congress shall be construed or interpreted as preempting related state and local authority unless the language of the statute explicitly expresses the intent of Congress to do so, and then only to the extent that state authority directly conflicts with the exercise of federal authority under the federal statute in question.

Recommendation 2: Legislative Authorization **of** Administrative Preemption.

(a) The Commission recommends that the Congress stipulate by law that no act of Congress authorizing the promulgation of rules and regulations by an administrative agency shall be construed or interpreted as authorizing the preemption of state and local authority unless the language of the statute in authorizing such rules and regulations explicitly authorizes preemption by administrative regulation.

(b) The Commission recommends further that the Congress amend the Administrative Procedure Act *in order to: (1) establish general criteria for the preemption of state and local authority by administrative regulation and (2) to direct that all such regulatory preemption of state and local authority be restricted to the minimum level necessary to achieve the objectives of the statute for which the rules and regulations are promulgated.*

(c) The Commission also recommends that any time the Congress authorizes the preemption of state and local authority by an administrative agency it enumerate specific criteria and standards in accordance with which the agency is directed to exercise its preemption authority.

(d) The Commission recommends, in conclusion, that the Congress also amend the Administrative Procedure Act *to require that no rules or regulations promulgated by an administrative agency of the United States Government be construed or interpreted to preempt state and local authority unless the regulation explicitly expresses an intent to preempt.*

Recommendation 3: Judicial Review of Preemption.

The Commission recommends that judicial review of preemption be conducted in such a manner as:

(a) to require as a matter of constitutional law that both the Congress and administrative agencies must have explicitly declared an intention to preempt state and local authority before the courts will construe as preemptive any act of the United States Government or rules and regulations promulgated under such an act;

(b) to require that the Congress, on the basis of the non-delegation doctrine, must have supplied statutory criteria to govern preemption of state and local authority by administrative action before the courts will judge such action constitutional;

(c) to scrutinize all acts of federal preemption, whether by statute or by administrative action, in order to determine that the extent of the preemption of state and local authority is no greater than necessary to give effect to the operation of the relevant statute enacted pursuant to the Constitution.[15]

Structuring Federal-State Relations

The Congress has employed its powers of preemption in innovative ways to structure the role of the states in the American federal system in general and federal-state relations in particular. Over time, though, the Congress has tended to develop new solutions for problems without examining the effectiveness of previous preemptions and their effects on state and local governments.

Experience with total preemption, however, convinced the Congress that the states can play important roles in administering certain statutes. For example, the Congress amended the atomic energy, grain standard, and railroad safety laws to authorize the federal government to turn back to the states limited regulatory authority for these functions. The Congress also has authorized the governor of New York to petition the Secretary of Transportation for removal of a particular preemption, and delegated authority to any governor or state legislature to veto a federal administrative decision based on a specified total preemption statute, subject to a veto ovemde by the Congress.

Partial federal preemption of the powers of states and their political subdivisions has become more commonplace since 1965 and has had a greater impact on federal-state relations than total federal preemption. For example, various congressional statutes provide for adoption of a state standard as a national standard, for state determination of additional uses for a federally regulated product, for state transfer of regulatory responsibility to a federal government agency, and for other innovative actions.

The extent of federal preemption has resulted in complex and changing federal-state relations that are confusing to many citizens, elected officials, and administrators.

Preemptive powers employed to date include:

(1) Total preemption, which denies a regulatory role to the states;

(2) Assigning a responsibility to the states; and

(3) Statutes that establish, through partial preemption, minimum national standards and authorize states to exercise primacy in regulating a specified activity, provided state standards are at least as high as federal standards and are enforced by the states.

It is important to note that federal regulatory policies typically were administered by federal departments and agencies until 1965 when, through partial preemption, states were enlisted to administer policies meeting minimum national standards. Today, the federal government relies heavily on state-administered programs.

It should also be noted that enactment of a total preemption statute by the Congress does not necessarily eliminate the need for state and local assistance to ensure the achievement of a federal policy objective. For example, the Nuclear Regulatory Commission has total responsibility for regulating nuclear power generating plants, but it lacks the resources to provide adequate protection to residents in the vicinity of the plants. Controversies involving emergency evacuation plans within a ten-mile radius of the Seabrook plant in New Hampshire and the Shoreham plant in New York illustrate the important public safety role of state and local governments if the goal of producing nuclear power is to be realized without undue hazards to residents.[16]

An Inventory of Federal Preemption Statutes

As the inventory in Appendix A indicates, the Congress was initially slow to employ its powers of preemption. The Congress began by establishing its authority with respect to such specifically delegated powers as patents, copyrights, and bankruptcy. Then it expanded the scope of preemption with respect to interstate and foreign commerce. The first congressional preemptions in the field of civil rights were enacted during the Civil War and Reconstruction. The Congress did not exercise its power of partial preemption, however, until 1965 (environmental protection).''

A new era in federalism was initiated after World War II, when the Congress began to enact total preemptions more frequently. The eventual use of partial preemption—statutory establishment of minimum national standards designed to protect civil rights and voting rights—led to more congressional and judicial mandates being applied to state and local governments.

Developing the Inventory

To develop this inventory, federal laws were reviewed in the U.S. Statutes at Large. A set of decision rules was applied to avoid the inclusion of statutes that contain insignificant or tangential preemptions. A statute was included in this inventory if:

- It contained language preempting state or local government authority;
- The courts had ruled that the law was preemptive; or
- Committee reports, where available, indicated an intent to preempt.

In cases where committee reports or court decisions were not available, statutes were included if they set forth federal standards or requirements of such detail or specificity that conflicts with state and local laws or ordinances would be unavoidable. Under those circumstances, preemption would result under general supremacy clause standards.

With a few exceptions, this list contains the initial enactment of a preemption. Subsequent recodifications of the law or minor amendments to it, although they reenact the preemption, are not listed. For example, the *Shipping Act of 1984* reenacted a preemptive provision that originated with *An Act Relating to Pilots and Pilot Regulation* in 1866.

Multiple preemptions within the same statute are listed only to the extent that they enact preemptions in different categories (e.g., the *Outer Continental Shelf Lands Act Amendments of 1978* contain provisions relating to liability limits and information disclosure). A few exceptions were made for different titles of a law because they are of such importance or are so well known that they merit standing alone (e.g., the *Fair Housing Act of 2968* and the *Civil Obedience Act of 1968* are two titles of the *Civil Rights Act of 1968).*

Care was taken to exclude federal actions which, at first, appeared to impinge on state and local authority (e.g., restrictions on allowable highway speed limits), but which, on closer examination, were grant-in-aid conditions. Although it might be unrealistic to do so (especially in the Medicaid program), theoretically, states and localities could avoid these infringements by declining federal funding. They are, therefore, excluded from this listing.

Cataloging these statutes is difficult because, frequently, preemptive language is adopted as a nongermane amendment to legislation. For example, the *Federal Energy Management Improvement Act of 1988* contains preemptive language relating to realistic looking toy guns. The increasing use of omnibus budget reconciliation legislation, often containing dozens of unrelated legislative initiatives, further complicates the cataloging effort. Resource constraints prevented a complete search of all relevant court decisions to determine the acts on which preemptions were found. As a result, some preemptive statutes may be missing from this inventory.

The extent of preemption activity is demonstrated by the inventory in Appendix A, which lists 439 federal preemptive statutes by category and date of enactment. State and local authority has been preempted, in whole or in part, in a wide variety of areas traditionally considered to be state and local government responsibilities.

A number of these acts, especially in the fields of banking, environmental protection, and transportation, contain multiple preemptive provisions. For example, the *Clean Air Act Amendments of 1990* preempt state and local authority regarding emissions from non-road vehicles (Section 222), solid-waste combustion units (Section 305), and appliance design (Section 614), among other things.

A full picture of the scope of federal intervention in state and local activities also must take account of the numerous federal statutes that have authorized general rulemaking by federal agencies, which, in turn, have adopted regulations that preempt state and local government authority as well (e.g., the *Department of Housing and Urban Development Act of 1965).* Resource constraints prevented a cataloging of these indirect preemption provisions.

Trends in Preemption

The earliest preemptions dealt with patents, bankruptcy, and other issues related to interstate commerce. Since the beginning of the twentieth century, a constant stream of interstate commerce preemptions has been enacted, involving labor, transportation, energy, and communications.

As Appendix B demonstrates, preemptions involving labor issues, weights and measures, and agriculture became common between 1900 and the onset of the Depression. Since World War II, the federal government's preemptive arm has stretched into consumer protection, energy security, communications, technology, and other fields.

In accordance with its obligations under a number of international treaties, the federal government also has superseded state authority regarding fish and wildlife conservation. Preemption of state and local taxing authority, particularly regarding the transportation and banking industries, also has been common.

Although the list of preemptive statutes is extensive, not all of the statutes fully preempt state and local authority. Many of the statutes, or provisions thereof, fall into the category of partial preemptions.

One type of partial preemption, a minimum standard preemption, contains language that preserves state or local authority to the extent that their laws and ordinances require higher standards than the federal law. State and local authority is superseded only to the extent that those governments set lower standards or their laws are inconsistent with federal statutes or regulations. Such an approach was taken in the *Expedited Funds Availability Act of 1987,* which allows states to require that banks give cus-

tomers credit for deposits in less time than set by the federal law or by any regulation pursuant to that law.

Preemption Relief

In some instances, the Congress has acted to reduce the scope of preemption or provide some other measure of relief. Appendix A lists 34 statutes designed to reduce preexisting federal preemption of state and local governments or to clarify state and local authority in cases where preemption might otherwise result.

Amendments to the *Age Discrimination in Employment Act* adopted in 1986, for example, allowed state and local governments to apply different age guidelines to fire fighters and law enforcement officials than they could apply to other employees.

Federal preemptions not in these six main categories have been few. Examples include tort liability and election laws.

Approaches to Preemption

Several approaches to preemption are evident in the statutes, and the development of other approaches appears to be limited only by the innovative capacity of the members of Congress. The Congress has authorized the issuance of administrative and judicial rulings in cases where, short of total preemption, a specific statutory provision cannot clarify the degree of preemption.

There are three broad categories of federal preemption statutes—dual sovereignty, partial federal preemption, and total federal preemption. Each category is described below.

Dual Sovereignty

Without dual sovereignty, whereby the federal government has supremacy for certain purposes and the states remain independent for other purposes, there would be no federal system in the United States. The governmental system would be either unitary or confederate. In establishing a federal system, the drafters of the U.S. Constitution recognized that there could be a clash between congressional power and state power; therefore, they included the "supremacy of the laws" clause (*Art.* VI) to ensure the integrity of national laws in such cases.

Experience with the Articles of Confederation convinced the drafters of the Constitution of the need to delegate to the Congress the power to regulate interstate commerce. This power has proven to be the source of most, but not all, preemptive statutes. Its dormant nature and wide reach were described in 1949 by U.S. Supreme Court Justice Robert H. Jackson in the following terms:

> The commerce power is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the states. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this nation by the meaning it has given to these great silences of the Constitution.[18]

There are three types of dual sovereignty—state powers not subject to preemption, direct and positive conflict between state and federal laws, and administrative or judicial rulings precluding preemption. These types can be described as follows.

State Powers Not Subject to Preemption. The states' taxation power cannot be preempted formally by the Congress in the absence of evidence that a state tax imposes an inordinate burden on interstate commerce. For example, the U.S. Supreme Court in 1975 held that the constitutional prohibition of the levying of "imposts or duties on imports" by the states without the consent of the Congress does not prohibit the levying of a nondiscriminatory property tax on imported products.[19]

The Congress, however, may exercise the commerce power to nullify state taxation. For example, the U.S. District Court for the Northern District of California ruled in 1981 that "as a matter of federal supremacy, the power of the state to discriminate against rail transportation property for purposes of applying tax rates was preempted by the passage of the *Railroad Revitalization and Regulatory Reform Act* . . . in 1976."[20] The Court also has held that states cannot require out-of-state mail order firms to collect state use taxes unless such firms have a clear nexus with a state or unless the Congress permits such taxation.[21]

The U.S. Supreme Court has ruled that states have the power to enter into nonpolitical compacts with each other. Although the U.S. Constitution states that an interstate compact requires the consent of Congress, the Court in 1893 held that such consent is required only if the states desire to enter into "political" compacts affecting the balance of power between the states and the Union.[22]

Direct and Positive Conflict between State and Federal Laws. The Congress, in exercising its delegated powers, often includes a legislative provision stipulating that a state law on the same subject is valid unless there is a direct and positive conflict between the two, in which case the supremacy clause of the U.S. Constitution provides for the prevalence of the federal law. For example, in enacting the *Civil Rights Act of 1964*, the Congress stipulated that:

> Nothing in this *Act* shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of state laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of state law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.[23]

Similarly, the *Gun Control Act of 1968* stresses:

> No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any

state on the same matter, unless there is a direct and positive conflict between such provision and the law of the state so that the two cannot be reconciled or consistently stand together.[24]

The ***Drug Abuse Control Amendments of 1965*** contain an almost identical provision.[25]

The ***Federal Railroad Safety Act of 1970*** specifically authorizes the states to adopt laws, rules, regulations, orders, and standards that are more stringent than the counterpart federal ones "when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce."[26]

The ***Occupational Safety and Health Act*** of ***1970*** contains slightly different wording: "Nothing in this Act shall prevent any state agency or court from asserting jurisdiction under state law over any occupational safety or health issues with respect to which no [federal] standard is in effect. . . ."[27]

Administrative or Judicial Rulings Precluding Federal Preemption. The ***Voting Rights Act*** of ***1965*** is a total preemption statute only if two conditions are met in a state or its political subdivisions—(1) a voting device, such as a literacy test, was employed in 1964 and (2) less than 50 percent of the electorate cast ballots in the preceding presidential election.[28] The 1965 law was designed to prevent the abridgment of voting rights because of race or color.

The 1975 amendments to the act broadened the coverage to include language minorities, defined as "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage," and cited the Fourteenth and Fifteenth Amendments as authority for the act. The language minority "triggers" are pulled if either of the following conditions applies:

(1) More than 5 percent of the citizens of voting age in a state or political subdivision are members of one language group ***and*** less than 50 percent of all citizens of voting age voted in the 1972 presidential election.[29]

(2) More than 5 percent of the citizens of voting age in a jurisdiction are members of one language group ***and*** the illiteracy rate of the group exceeds the national illiteracy rate.

Any proposed change in the election system of a covered state or local government must be submitted to the U.S. Attorney General. No change may be made unless the Attorney General does not register an objection within 60 days or the U.S. District Court for the District of Columbia issues a declaratory judgment that the proposed change would not abridge the right to vote of citizens protected by the act.[30]

Whereas the ***Voting Rights Act*** provides for either an administrative or a judicial ruling precluding federal preemption, the ***Transportation Safety Act*** of ***1974*** provides for only an administrative ruling by the Materials Transportation Bureau of the U.S. Department of Transportation.[31] To avoid preemption, state requirements must afford an equal or greater level of protection than federal requirements and must not place an unreasonable burden on interstate commerce.

In introducing consistency rulings of the Materials Transportation Bureau, the Research and Special Programs Administration of the Department of Transportation in 1984 wrote that the Congress, in effect, intended to establish a type of dual authority to regulate in the field.

> Despite the dominant role that Congress contemplated for departmental standards, there are certain aspects of hazardous materials transportation that are not amenable to exclusive nationwide regulation. One example is traffic control. Although the Federal Government can regulate in order to establish certain national standards promoting the safe, smooth flow of highway traffic, maintaining this in the face of short-term disruption is necessarily a predominantly local responsibility. Another aspect of hazardous materials transportation that is not amenable to effective nationwide regulation is the problem of safety hazards which are peculiar to a local area. To the extent that nationwide regulations do not adequately address an identified safety hazard because of unique local conditions, state or local governments can regulate narrowly for the purpose of eliminating or reducing the hazard. The mere claim of uniqueness, however, is insufficient to insulate a non-federal requirement from the preemption provisions of the HMTA.[32]

An example of an administrative ruling is the request of the Nuclear Assurance Corporation for a determination about whether the prohibition of the transportation of radioactive materials on the facilities of the New York State Thruway Authority is inconsistent with and thereby preempted by the ***Hazardous Materials Transportation Safety Act of 1974.*** The key question was whether the corporation could comply with both the Thruway Authority rules and federal rules. The bureau held that the authority's "rule is not based on any finding that transportation of highway route controlled-quantity radioactive materials over the Thruway would present an unacceptable safety risk" and the "rule thus stands as a repudiation of the Department's rule of national applicability on highway routing of radioactive materials."[33]

Partial Federal Preemption

Under partial federal preemption, the Congress by statute, or federal administrative agencies by rules and regulations, may establish minimum national standards for a function or service and authorize the states to continue to exercise primary regulatory responsibility, provided that state standards are at least as high as the national minimum and are enforced by state authorities. This general type of preemption permits a state to tailor regulatory programs to meet special needs, conditions, and prefer-

ences, provided that the supervising federal agency certifies the state's programs.

Partial preemption permits dual regulation at the sufferance of the Congress, which at any time may preempt totally the responsibility for a regulatory function. In contrast to the type of dual sovereignty inherent in a federal system, the states under partial federal preemption may not continue to exercise primary regulatory responsibility unless each state voluntarily submits a plan to the appropriate federal agency and the agency certifies the plan as being in conformance with the congressional statute.

In this section, three types of partial federal preemption of state and local government authority are described—standard, combined, and state transfer of regulatory authority.

Standard Partial Preemption. Standard partial federal preemption can be described as "contingent" total preemption based on the "gun behind the door" theory that states have to be forced to initiate action to meet minimum national standards under the threat of losing primacy in regulating the partially preempted function. Under standard partial federal preemption, a state law supersedes the corresponding national law if state standards are equal to or higher than the national standards.

The *Water Quality Act of* 1965 was the first partial federal preemption statute. The law directed that each state adopt "water quality standards applicable to interstate waters or portions thereof within such state" as well as an implementation and enforcement plan.[34] The Secretary of the Interior (succeeded by the EPA Administrator) is authorized to promulgate interstate water quality standards, which become effective at the end of six months in the event that a state fails to establish adequate standards.

The federal role was strengthened by other congressional enactments, particularly the *Federal Water Pollution Control Act Amendments of 1972.*[35] The governors are directed to identify areas suffering water-quality control problems and to designate "a single representative organization, including elected officials from local government or their designees, capable of developing effective areawide waste treatment management plans" for each area. EPA issued regulations on September 14, 1973, giving governors until March 14, 1974, to designate or non-designate such areas and agencies.[36]

The 1972 law was amended by subsequent acts, including the *Clean Water Act of* 1977, which extended the coverage of the *Water Pollution Control Act* and stipulated *that "it is the* policy of *Congress that the states manage the* construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act."[37] In 1983, California returned its primacy for the construction grants program to EPA "because state officials believed the EPA required more of primacy states than it did of its own regional officials who served as implementors in states that did not accept primacy."[38]

The *Air Quality Act of 1967* completely preempted the right to establish motor vehicle exhaust-emission standards for 1968 and subsequent years for all states except California, which had tougher preexisting standards." The act also partially preempted other air pollution abatement activities of state and local governments by following the general procedure embodied in the *Water Quality Act of* 1965. States were encouraged to assume primary enforcement responsibility, but federal action was authorized in the event of state inaction or inadequate action was combat air pollution.

The *Clean Air Amendments of* 1970 represented a dramatic break with the earlier approach of relying on the states to provide the necessary leadership while taking into consideration the economic and technical feasibility of abatement controls.[40] Direct federal action to protect public health was made national policy, and dates were specified for state adoption of air quality standards and abatement plans. The amendments stipulated that 1975 model automobiles must achieve a 90 percent reduction of the 1970 standards for emissions of carbon monoxide, hydrocarbons, and nitrogen oxides.[41]

Idaho in 1981 "returned its air delegations to the EPA but reaccepted them in 1983 when EPA assured stringent enforcement within Idaho by contracting out supervision to a private firm. This incident illustrates that states will rescind their acceptance of primacy if it suits their political interests."[42]

The *Safe Drinking Water Act of* 1974 is another partial preemption statute. It stipulates that "a state has primary enforcement responsibility for public water systems" provided the EPA Administrator determines that the state "has adopted drinking water regulations which . . . are no less stringent" than national standards.[43] Should a state fail to adopt or enforce such standards, the agency applies national standards within that state. The act's 1986 amendments expanded coverage of contaminants and extended federal standards to underground sources of drinking water (this authority previously was scattered in various federal laws and regulations).[44]

The *Surface Mining Control and Reclamation Act of* 1977 also is a standard partial preemption statute. Each state with coal-mined land eligible for reclamation may submit to the Secretary of the Interior a state reclamation plan and annual projects to be carried out.[45] No federal funds are provided to a state for a reclamation program unless the state regulatory program has been approved.

Combined Partial Preemption and Dual Sovereignty. The *Occupational Safety and Health Act of* 1970 combines partial federal preemption with traditional dual regulatory authority.[46] The law specifically stipulates that "nothing in this Act shall prevent any state agency or court from *asserting jurisdiction under state law over any* occupational safety or health issue with respect to which no standard is in effect under section 6."[47]

The 1970 act also provides that a state agency may submit a plan to the Secretary of Labor to assume responsibility for the regulatory function, on the condition that state and local government employees be extended protection equivalent to that afforded private employees.[48] If the plan is approved by the Secretary, the Occupational Safety and Health Administration (OSHA) will pay up to half of the operating costs of the program.

As of 1992, 21 states, Puerto Rico, and the Virgin Islands operate programs covering public and private sector employees. Connecticut and New York cover only

public employees. An additional eight states had federal plan approval but withdrew from participation.[49]

In 1986, EPA made final a proposed rule to protect state and local government employees from the potential hazards of asbestos-abatement work under authority of the *Toxic Substances Control Act of 1976*.[50] OSHA normally is responsible for federal regulations protecting workers, but the agency's authority does not extend to state and local government employees. However, as noted above, 21 states have established employee protection standards as strict or stricter than OSHA's rules and regulations. OSHA also has determined that worker protection regulations in Idaho, Kansas, Oklahoma, and Wisconsin are comparable to or more stringent than federal standards. The EPA regulation applies to the remaining states.

There are three principal differences between the OSHA standard and the EPA regulations:

- EPA includes a provision not in the OSHA rule that generally requires persons to report to EPA at least ten days prior to beginning an asbestos-abatement project using public employees.
- EPA uses a different definition of asbestos, consistent with other EPA regulations. Specifically, EPA does not include non-asbestiform tremolite fibers while OSHA does.
- EPA does not include the OSHA preference for rotating employees in and out of the work place to meet exposure limits rather than using respirators.

State Transfer of Regulatory Responsibility. Another type of partial federal preemption is illustrated by the *Wholesome Meat Act of 1967*, which grants the Secretary of Agriculture the authority to inspect meat and to transfer that responsibility to a state that has enacted a law requiring meat inspection and reinspection consistent with federal standards.[51] This act also allows the states to transfer responsibility for meat inspection within intrastate commerce to the U.S. Department of Agriculture. To date, 18 states have initiated such a transfer. The *Poultry Products Inspection Act of 1968* contains similar provisions, and 26 states have shifted inspection responsibility to the U.S. Department of Agriculture.[52]

Total Federal Preemption

An examination of total preemption statutes enacted by the Congress since 1933 found ten distinctive types of complete assumption of regulatory authority:

(1) No need for state and/or local assistance,

(2) No state economic regulation allowed,

(3) State and local assistance needed,

(4) State activities exception,

(5) Limited regulatory turnbacks,

(6) Federal mandating of state law enactment,

(7) Federal promotion of interstate compact formation,

(8) Gubernatorial petition for preemption removal,

(9) State veto of a federal administrative decision, and

(10) Contingent total preemption.

Each of these types of preemption will be discussed briefly.

No Need for State and/or Local Assistance. The first type involves statutes that can be implemented solely by the federal government, with no state or local government role. For example:

- In 1898, the Congress decided to nullify the bankruptcy laws of the states and made the U.S. District Court and the Superior Court of the District of Columbia responsible for handling bankruptcy cases." By assigning total responsibility for this function to United States Courts, the Congress avoided the need to rely on states and/or their political subdivisions for assistance in carrying out the function.
- In 1967, responding to pressure from domestic motor vehicle manufacturers, who feared they might have to develop different specialized emission-control systems for each state, the Congress completely preempted the right to establish the standards for 1968 and subsequent years, except for California, which had tougher preexisting standards.[54] (State emission testing programs, however, are an essential part of many state implementation plans for the attainment of air quality goals. The *Clean Air Act Amendments of 1990* allows states to adopt the California standards.)

No State Economic Regulation Allowed. In enacting laws implementing deregulation of the airline and bus industries, the Congress took action to ensure that there would be no state economic regulation of those companies. The *Airline Deregulation Act of 1978* added the following section to the *Federal Aviation Act of 1958*:

> Sec. 105. (1) Except as provided in paragraph (2) of this subsection, no state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act to provide interstate air transportation.
>
> Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the board under section 401 of this Act, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the state of Alaska.[55]

The *Bus Regulatory Reform Act of 1982* deregulated that industry and stipulated that there could be no state economic regulation of bus companies.[56]

So-called fair trade laws offer another example. These laws, which were enacted in a number of states

during the Great Depression, typically provided that an agreement signed by a manufacturer with one retailer to maintain a fixed price for an article became binding on all retailers in the state. When state authority to enact such laws was questioned in view of the commerce clause, the Congress enacted the *Robinson-Patman Act* in 1936, validating such laws.[57] The authorization for state fair trade laws was repealed as part of the economic deregulation movement of the 1970s.

State and Local Assistance Needed. The *Atomic Energy Act of 1946*, as amended, assigned complete responsibility for the regulation of nuclear power plants to the Nuclear Regulatory Commission (formerly the Atomic Energy Commission). However, the lack of adequate resources makes the commission dependent on state and local governments for emergency personnel and equipment to protect public health and safety in the event of a radioactive discharge at a nuclear generating station. A major controversy swirled around attempts to repeal a commission regulation requiring emergency planning around new civilian nuclear power plants, including establishment of ten-mile evacuation zones, before the plants are allowed to operate at full power.[58] The state of Massachusetts and several towns in Massachusetts and New Hampshire refused to participate in federally sponsored evacuation exercises near the Seabrook nuclear power plant, and New York State and Suffolk County refused to participate in similar exercises near the Shoreham nuclear power plant.

A second example involves the ban imposed by the Congress in the *Safe Drinking Water Act Amendments of 1986* on the use of lead pipes, solder, and flux in any public water system.[59] The amendments direct states to enforce the prohibition "through state or local plumbing codes, or such other means of enforcement as the state may determine to be appropriate."[60] Failure of a state to enforce the lead ban may result in the loss of 5 percent of federal grants under the act.

State Activities Exception. In enacting the *National Traffic and Motor Vehicle Safety Act of 1966*, the Congress totally preempted responsibility for establishing safety standards. However, the act authorizes a state or local government to establish "a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable federal standard."[61]

Limited Regulatory Turnbacks. Several total preemption statutes authorize a federal official or agency to turn back limited regulatory responsibility to states. The *United States Grain Standard Act of 1968* is totally preemptory in that it stipulates that states and their political subdivisions may not "require the inspection or description in accordance with any standards of kind, class, quality, condition, or other characteristic of grain as a condition of shipment or sale of such grain in interstate or foreign commerce, or require any license for, or impose any other restrictions on, the performance of any official inspection function under this Act by official inspection personnel."[62]

The act also authorizes the administrator of the Federal Grain Inspection Service to delegate to state agencies authority to perform official inspection and weighing.[63] Currently, eight states are authorized to perform these functions at export locations, and 13 states do so at interior locations. Given that the states operate their programs on a fee-for-service basis, they incur no costs that must be reimbursed by the Federal Grain Inspection Service.

Similarly, the *Hazardous and Solid Waste Amendments of 1984* allow the states to assume responsibility for EPA's hazardous waste programs.[64] The states have been partially preempted for hazardous waste programs since 1976.

The *Federal Railroad Safety Act of 1970* provides for state assumption of railroad inspections.[65]

The Agreement State Program of the Nuclear Regulatory Commission is the largest and most successful program of voluntary state administration of federal laws and regulations. The *Atomic Energy Act of 1946*, which totally preempts regulation of ionizing radiation, was amended in 1959 to authorize the commission to enter into agreements under which states would assume certain regulatory responsibilities.[66] Twenty-nine states have signed such agreements.

In contrast to partial federal preemption statutes, which assign regulatory responsibility to the states provided they adopt and enforce standards at least as high as federal standards, the Agreement State Program simply requires that a state radiation control program be compatible with, and not necessarily identical to, the commission's regulatory program.

New Mexico returned to the commission responsibility for the uranium mill licensing program in 1986, primarily because of the cost of the program, which was diverting Radiation Protection Bureau personnel from other licensing responsibilities.[67]

Federal Mandating of State Law Enactment. The *Equal Employment Opportunity Act of 1972* and similar acts mandate that states comply with federal laws by enacting state laws under the threat of civil or criminal penalties.[68] Since the *Garcia* v. *San Antonio Metropolitan Transit Authority* decision of 1985, state and local governments must comply with the provisions of the *Fair Labor Standards Act of 1938* as amended or be subject to both civil and criminal penalties.[69] A similar mandate is contained in the *Federal Mine Safety and Health Act of 1977*.[70]

The *Tax Equity and Fiscal Responsibility Act of 1982* mandated that state and local governments making income tax refunds report that information to the Internal Revenue Service,[71] necessitating amendment of state and local income tax laws to authorize the reporting.

Federal Promotion of Interstate Compact Formation. The *Low-Level Radioactive Waste Policy Act of 1980* declares that "each state is responsible for providing for the availability of capacity either within or outside the state for the disposal of low-level radioactive waste generated within its borders," with the exceptions of such wastes generated by national defense or federal research activities.[72] The act encourages the formation of interstate compacts for this purpose, to take effect after "the Congress has by law consented to the compact. Each such compact shall provide that every five years after the compact has taken effect Congress

may by law withdraw its consent."[73] Effective January 1, 1986, a compact may provide that only wastes generated within a region may be disposed of within the region.

The *Low-Level Radioactive Waste Policy Amendments Act of 1985* granted the consent of the Congress to seven interstate compacts.[74] Several states have initiated action to locate a disposal site within their borders because Nevada, South Carolina, and Washington, which currently accept low-level wastes from other states, may refuse to do so effective January 1, 1993.

Gubernatorial Petition for Preemption Removal. The *Department of Transportation and Related Agencies Appropriation Act of 1986* stipulates that tolls on any bridge connecting Brooklyn and Staten Island, New York, are to be collected only as vehicles leave the bridge in Staten Island.[75] However, the Secretary of Transportation is authorized to remove the limitation on the petition of the governor.

State Veto of a Federal Administrative Decision. The *Nuclear Waste Policy Act of 1982* authorizes the Secretary of Energy to select a site for the construction of a high-level radioactive waste facility, but the site may be vetoed by the governor or the state legislature.[76] The Congress may override the state veto.

Contingent Total Preemption. The *Voting Rights Act* of *1965,* as amended, contains national provisions that are not applied to a state or a local government unless two conditions exist. The law automatically applies if the U.S. Attorney General determines that, as of November 1, 1964, a test or device was employed to abridge the rights of citizens to vote because of race or color *and* the director of the U.S. Bureau of the Census determines that less than 50 percent of citizens of voting age were registered to vote on November 1, 1964, or less than 50 percent of those of voting age voted in the 1964 presidential election.[77]

If a determination is made that the act applies to a state or political subdivision, the covered jurisdiction becomes subject to the preclearance requirement, which prohibits any change, no matter how minor, in the election system unless the Attorney General, within 60 days of submission of a proposed change, fails to register an objection or the District Court for the District of Columbia, in response to an action initiated by the jurisdiction, issues a declaratory judgment that the change would not abridge the right to vote of citizens protected by the act.

Summary

This chapter has presented the results of an examination of federal preemption statutes. There are three basic approaches—dual sovereignty, partial federal preemption, and total federal preemption. The use of these mechanisms by the Congress since 1965 has produced major changes in intergovernmental relations and some confusion regarding the respective powers of the federal government and the states.

Notes

'Joseph E Zimmerman, *Federal Preemption: The Silent Revolution* (Ames: Iowa State University Press, 1991).

[2] South Dakota v. Dole, 483 U.S. 203 (1987).

[3] United States Constitution, art. I, secs. 8 and 10.

[4] Ibid., art. I, secs. 9 and 10.

[5] Ibid., art. I, sec. 8.

[6] Ibid., art. VI, para. 2.

[7] Ibid., art. I, sec. 10.

'Virginia v. Tennessee, 148 US. 503 (1893). See also United States Steel Corp. v. Multistate Tax Comm., 434 U.S. 452 (1978).

[9] Michelin Tire Corporation v. Wages, 423 U.S. 276 at 286 (1975).

"Robert H. Walker, ed. *The Reform Spirit in America: A Documentation of Reform in the American Republic* (New York G.P. Putnam's Sons, 1976), pp. 25-26.

"The Commission on Intergovernmental Relations, *A Report to the President for Transmittal to the Congress* (Washington, DC, 1955), pp. 63-64.

[12] U.S. Advisory Commission on Intergovernmental Relations, *Regulatory Federalism: Policy, Process, Impact, and Refonn* (Washington, DC, 1984), p. 259.

[13] "Federal Preemption of State and Local Authority," *Intergovernmental Perspective* 14 (Winter 1988): 23.

[14] Ibid., p. 24.

[15] Ibid., p. 25.

[16] For details of these controversies, see Joseph E Zimmerman, "Federal Preemption of State and Local Government Activities," a paper presented at the 1986 annual meeting of the American Political Science Association, Washington, DC, pp. 16-20. See also Zimmerman, "Regulating Atomic Energy in a Federal System," *Publius: The Journal of Federalism* 18 (Summer 1988): 51-65.

[17] Water Quality Act of 1965, 79 Stat. 903, 33 U.S.C. §§ 1151 et seq.

[18] H.P. Hood & Sons, Incorporated v. DuMound, 336 U.S. 525 at 534-35 (1949).

[19] Michelin Tire Corporation v. Wages, U.S. 276 at 286 (1975).

[20] Trailer Train Company v. State Board of Equalization, 538 F. Supp. 509 at 599 (1981).

[21] National Bellas Hess v. Illinois Department of Revenue, 386 U.S. 753 (1967) and Quill Corporation v. North Dakota, 119 L. Ed. *2d* 91 (1992). See also U.S. Advisory Commission on Intergovernmental Relations, *State Taxation of Interstate Mail Order Sales: Estimates of Revenue Potential, 1990-1992* (Washington, DC, 1991).

"Virginia v. Tennessee, 148 U.S. 503 (1893).

[23] Civil Rights Act of 1964, 78 Stat. 268d, 2 U.S.C § 206.

[24] Gun Control Act of 1968, 82 Stat. 1226, 18 U.S.C. § 921.

[25] Drug Abuse Control Amendments of 1965, 79 Stat. 235, 21 U.S.C. § 321.

[26] Federal Railroad Safety Act of 1970, 84 Stat. 972, 45 U.S.C. § 151.

[27] Occupational Safety and Health Act of 1970, 84 Stat. 1608, 29 U.S.C. § 667.

[28] Voting Rights Act of 1965, 79 Stat 437, 42 U.S.C. § 1973.

[29] Voting Rights Act Amendments of 1975, 89 Stat. 402, 42 U.S.C. §§ 1973a, 1973d, and 19731.

[30] Voting Rights Act of 1965, 79 Stat. 438, 42 U.S.C. § 1973c. See also, Charles L. Cotrell, ed., "Assessing the Effects of the U.S. Voting Rights Act," *Publius: The Journal of Federalism* 16 (Fall 1986).

[31] Transportation Safety Act of 1974, 88 Stat. 2156, 49 U.S.C. §§ 1801 et seq. See also 49 CFR 170-79.

[32] U.S. Department of Transportation, "Hazardous Materials: Inconsistency Rulings IR-7—IR-15," *Federal Register,* November 27, 1984, p. 46633.

[33] Ibid., p. 46646.

[34] Water Quality Act of 1965, 79 Stat. 903, 33 U.S.C. §§ 1151 et seq.

[35] Federal Water Pollution Control Act Amendments of 1972, 70 Stat. 498.

[36] *Federal Register,* September 14, 1973, pp. 25681 et seq.

[37] Clean Water Act of 1977, 91 Stat. 1575, 33 U.S.C. § 1251.

[38] Patricia M. Crotty, "The New Federalism Game: Options for the States," apaperpresented at the 1986annual meeting of the Northeastern Political Science Association, Philadelphia, Pennsylvania, p. 13.

[39] Air Quality Act of 1967, 81 Stat. 485, 42 U.S.C. §§ 1857-1857l.

[40] Clean Air Act Amendments of 1970, 84 Stat. 1676, 42 U.S.C. §§ 1857 et seq. and 49 U.S.C. §§ 1421 and 1430.

[41] Ibid., §§ 1421 and 1430.

[42] Crotty, "The New Federalism Game," p. 13.

[43] Safe Drinking Water Act of 1974, 88 Stat. 1665, 42 U.S.C. § 201.

"Safe Drinking Water Act Amendments of 1986, 100Stat. 642, 42 U.S.C. § 300g-l.

[45] Surface Mining Control and Reclamation Act, 91 Stat. 445, 30 U. S.C. §§ 1201 et seq.

[46] Occupational Safety and Health Act of 1970, 84 Stat. 1590, 5 U.S.C. §5108.

[47] Ibid., 84 Stat. 1608, 29 U.S.C. § 667.

[48] Ibid.

[49] U.S. Department of Labor, Occupational Safety and Health Administration, "State Programs: Background" (Washington, DC, July 1992).

[50] *Federal Register,* July 12, 1985, pp. 28530 et seq. See also the Toxic Substance Control Act, 90 Stat. 2003, 15 U.S.C. §§ 2601 et seq.

[51] Wholesome Meat Act, 81 Stat. 595, 21 U.S.C. § 71.

[52] Poultry Products Inspection Act, 82 Stat. 791, 21 U.S.C. $451.

[53] Bankruptcy Act of 1898, 30 Stat. 544, 11 U.S.C. §§ 1 et. seq. Congress in 1933established the U.S. Bankruptcy Court to handle all bankruptcy filings. Bankruptcy Act of 1933, 47 Stat. 1467, 11 U.S.C. § 101.

[54] Air Quality Act of 1967, 81 Stat. 485, 42 U.S.C. §§ 1857 et seq.

[55] Airline Deregulation Act of 1978, 92 Stat. 1708, 49 U.S.C. §§ 1305 and 1371.

[56] Bus Regulatory Reform Act of 1982, 96 Stat. 1104, 49 U.S.C. § 10521.

[57] Robinson-Patman Act of 1936, 49 Stat. 1526, 15 U.S.C. § 13a.

[58] Emergency Plans, 10 CFR § 50.47 (1986).

[59] Safe Drinking Water Act Amendments of 1986, 100Stat. 651, 42 U.S.C. § 300g.

[60] Ibid., 100 Stat. 652, 42 U.S.C. § 300g.

[61] National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 719, 15 U.S.C. § 1291(d).

[62] United States Grain Standard Act, 82 Stat. 769, 7 U.S.C. § 71.

[63] Ibid.

[64] Hazardous and Solid Waste Amendments of 1984, 98 Stat. 3256, 42 U.S.C. §§ 6297-298 and 6901-991.

[65] Federal Railroad Safety *Act* of 1970, 84 Stat. 971, 45 U.S.C. §§ 431 et seq.

[66] Atomic Energy Act of 1946, 60 Stat. 755, 42 U.S.C. § 2011 and Atomic Energy Act of 1959, 73 Stat. 688, 42 U.S.C. § 2021.

[67] Memorandum dated March 19, 1986, to New Mexico Governor Toney Anaya from Director Denise Fort of the Environmental Improvement Division, pp. 4-5.

[68] Equal Employment Opportunity Act of 1972, 86 Stat. 104, 42 U.S.C. § 2000 (e)(5).

[69] Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C. §§ 201-19 et. seq.

[70] Federal Mine Safety and Health Act of 1977, 83 Stat. 803, 30 U.S.C. §§ 801 et seq.

[71] Tax Equity and Fiscal Responsibility Act of 1982, 96 Stat. 603, 26 U.S.C. § 6060E.

[72] Low-Level Radioactive Waste Policy Act of 1980.94 Stat. 3347, 42 U.S.C. § 2021d.

[73] Ibid., 94 Stat. 3348, 42 U.S.C§ 2021d.

[74] Low-Level Radioactive Waste Policy Amendments Act of 1985, 99 Stat. 1842, 42 U.S.C. §§ 2021b et seq.

[75] Department of Transportation and Related Agencies Appropriation Act of 1986, 99 Stat. 1288.

[76] Nuclear Waste Policy Act of 1982, 96 Stat. 2217, 42 U.S.C. § 10125.

[77] Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. § 1973. Subsequent amendments changed the wording of the reference to the presidential election to the most recent election. See Joseph F. Zimmerman, "The Federal Voting Rights Act and Alternative Election Systems," *William and Mary Law Review,* Summer 1978, pp. 621-60.

The preemption statutes enacted by the Congress in recent years now rival grant-in-aid statutes in their structuring of federal-state relations. The extensive research on conditional grants, however, contrasts sharply with the limited analyses of federal preemption outside of the legal analyses found in law reviews. This chapter helps rectify that imbalance by presenting the results of a survey of the views of state officials toward federal preemption.

Survey Scope *and* Methods

To assess the impact of federal preemption and perceptions regarding the desirability of various statutory approaches, a questionnaire was sent in 1988 to each governor, attorney general, and state community affairs department, and to the 26 ACIR state counterpart organizations (state ACIRs).[1] A second, more detailed questionnaire was sent to the heads of state departments or agencies responsible for agriculture; atomic energy; banking; environmental protection; labor, health, and safety; natural resources; and transportation and public works.

Returns were received from 25 governors, 23 attorneys general, 25 departments of community affairs, and 15 state ACIRs (see Table 3-1).[2] Returns also were received from 34 departments of agriculture; 10 atomic energy agencies; 18 departments of banking; 35 environmental protection agencies; 31 departments of labor relations, health, and safety; 21 departments of natural resources; and 24 departments of transportation or public works. Multiple questionnaires were returned from a few states where two or more agencies had responsibility for a function.

Because several questionnaires were completed only partially, the total number of responses for each question often varies. Particularly disappointing was the limited response of departments and agencies concerning specific federal preemption statutes in their regulatory fields.

The failure of many officials to return questionnaires and the partial responses to certain questions necessitates caution in drawing firm conclusions about state officials' perceptions of federal preemption based on the survey data alone.

Survey Findings

Each questionnaire contained four general questions relating to federal preemption. In addition, the governors, attorneys general, community affairs departments, and

Table 3-1
Questionnaires Returned
Classified by Region and Respondent,
1987-1988

Region[1]	Questionnaires Distributed (number)	Questionnaires Returned (number)	Response Rate (percent)
Northeast	30	17	57%
North Central	39	18	46
South	52	27	52
West	39	22	56
Total	160	84	52
Respondents			
Governor[2]	50	25	50
Attorney General	50	23	46
Department of Community Affairs[3]	50	25	50
State ACIR[4]	24	15	63

[1] Northeast—Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.

North Central—Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin.

South—Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

West—Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

[2] One governor replied by letter.

[3] The state agency responsible for community affairs vanes and may be a Department of Community Affairs or a division within other departments, such as Commerce and Economic Development.

[4] Responses were received from Connecticut, Florida, Illinois, Iowa, Maine, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, South Carolina, South Dakota, Texas, and Vermont.

state ACIRs were asked to rate the desirability of each type of preemption described in Chapter 2 and to respond to the following questions:

- Has partial or total preemption helped solve any problems (such as air or water pollution) in your state that originated largely in another state?
- Is there a need to clarify federal and state responsibilities and liabilities in federal preemption statutes, for example, by including a "code of restrictions" describing specifically what state and local governments cannot do?
- Has partial or total preemption ever prevented your state from pursuing policies your state prefers?
- Do federal agencies override state decisions on a case-by-case basis?
- Should federal preemption statutes contain a "sunset" provision requiring the Congress to consider whether statutory changes are needed?

State departments were asked questions pertaining to federal preemption statutes applicable to their functional areas.

The responses were grouped into five categories:

(1) Amount of preemption;

(2) Amount of authority delegated to federal administrators and courts;

(3) Latitude for state action provided by statutory provisions for structuring state-local relations;

(4) Restrictions on state actions; and

(5) Potential improvements in federal preemption laws.

The questionnaire and tables containing a regional breakdown of responses are included as Appendices C and D.

Amount of Preemption

On the question of how much federal preemption there should be, 60 percent or more of the governors, attorneys general, community affairs departments, banking departments, and environmental protection agencies are convinced that there is too much federal preemption ("able 3-2). In contrast, only 30 percent of the atomic energy agencies, **38** percent of the state ACIRs, and **41** percent of the agricultural departments responded that there is too much federal preemption.

Typical of comments volunteered by the first group is this view from **a** governor:

> *As* a general rule, I have been opposed to federal preemption of state law. I have always supported the concept of having decisionmaking at levels closest to the people. Yet I do understand that there are circumstances which dictate the use of preemption. For example, I support the use of preemption in the areas of voting rights and air quality. . . . Conversely, I do not support the preemption doctrine as it has been used to limit state and local governments' abilities to regulate wages and hours of their employees.

An attorney general commented that he had to inform the state legislature two or three times a year that various proposed actions were preempted by federal law.

It is not surprising that the highest rate of questionnaire returns from state agencies came from departments of environmental protection and agriculture because their responsibilities are preempted heavily by federal statutes. Sixty percent of the environmental officials reported that there is too much federal preemption, compared to 41 percent of the agriculture departments. Interestingly, only 31 percent of state atomic energy agencies, operating under a total preemption statute, responded that there was too much preemption.

A majority of the governors, attorneys general, and community affairs departments responded that the federal government preempts state actions more than necessary to achieve its policy objectives (see Table 3–2). The other state agencies were divided on this question; for example, 30 percent of the atomic energy agencies and 62 percent of departments of natural resources responded that the federal government preempts state actions more than necessary.

The strongest opposition to preemption by state agriculture departments came from the north central states, and these departments also tended to view the level of preemption as **being** more than necessary (see Appendix D, Table D-1). Two departments, however, indicated that the extent of preemption was less than necessary to achieve national goals. Counsel Herbert **L.** Cohen of the California Department of Food and Agriculture pointed out the difficulty in generalizing when he wrote that a single preemption statute often involves "multiple preemption issues" and added:

> The *Poultry and Poultry Products Inspection Act*, 21 U.S.C. § 451 et seq. . . . will serve as an example. Section 467e contains a broad preemption clause. Compare 21 **U.S.C.** § 678 of the ***Federal Meat Inspection Act*** containing comparable provisions. The California poultry industry competes with imports from other states. It would likely strongly favor the concept of label preemption per section *467e* as to product description and strongly oppose label preemption prohibiting a state requiring label attribution of the state of production. The industry would perhaps be split as to preemption of net weight labeling, which is based on the concept of net weight at time of introduction into interstate commerce, rather than net weight at time of retail sale. Probably, the industry would be generally favorable to preemption of separate state grade standards. Consumer groups would likely disfavor preemption as to net weight labeling and place of production. State government views are not static.

On the question of whether partial or total preemption has helped solve a problem in one state that originated largely in another state, the most common response was "no"—28 percent of the governors, 40 percent of the attorneys general, 40 percent of the community affairs departments, and 13 percent of the state ACIRs. Only a small number of the respondents answered "yes".

Table 3-2

State Officials' Perceptions of Amount of Federal Preemption, 1988

In general, is there too much, just about enough, or too little federal preemption of state activity?

	Too Much		About Enough		Too Little		Don't Know		No Response		Total*	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Governors	15	60	6	24	0	0	1	4	3	12	25	100
Attorneys General	15	65	5	22	0	0	3	13	0	0	23	100
Community Affairs Departments	16	64	8	32	0	0	1	4	0	0	25	100
State ACIRs	9	38	4	17	0	0	2	8	9	38	24	100
Labor Relations, Health and Safety Departments	15	48	13	42	0	0	2	6	1	3	31	100
Natural Resources Departments	11	52	9	43	0	0	1	5	0	0	21	100
Transportation or Public Works Departments	12	50	8	33	0	0	4	17	0	0	24	100
Agricultural Departments	14	41	17	50	0	0	3	9	0	0	34	100
Atomic Energy Agencies	3	30	6	60	0	0	1	10	0	0	10	100
Banking Departments	12	67	6	33	0	0	0	0	0	0	18	100
Environmental Protection Agencies	21	60	11	31	2	6	1	3	0	0	35	100

Does the federal government preempt state actions more than necessary to achieve its policy objectives?

Governors	15	60	0	0	6	24	1	4	3	12	25	100
Attorneys General	14	61	0	0	3	13	6	26	0	0	23	100
Community Affairs Departments	14	56	0	0	9	36	2	8	0	0	25	100
State ACIRs	6	25	1	4	6	25	2	8	9	38	24	100
Labor Relations, Health and Safety Departments	14	45	14	45	1	3	2	6	0	0	31	100
Natural Resources Departments	13	62	2	10	2	10	4	19	0	0	21	100
Transportation or Public Works Departments	12	50	6	25	1	4	5	21	0	0	24	100
Agricultural Departments	12	35	12	35	2	6	5	15	3	9	34	100
Atomic Energy Agencies	3	30	5	50	0	0	2	20	0	0	10	100
Banking Departments	9	50	7	39	0	0	2	11	0	0	18	100
Environmental Protection Agencies	20	57	10	29	3	9	2	6	0	0	35	100

Has partial or total preemption helped to solve any problem (such as air or water pollution) in your state that originated largely in another state?

	Yes, Several Times		Yes, Once or Twice		No		Don't Know		No Response		Total*	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Governors	2	8	5	20	7	28	6	24	5	20	25	100
Attorneys General	2	9	0	0	10	43	9	39	2	9	23	100
Community Affairs Departments	0	0	4	16	10	40	1	4	10	40	25	100
State ACIRs	3	13	1	4	3	13	10	42	7	29	24	100

*Percentages may not total 100% due to rounding.

Labor relations, health, safety, and natural resources departments in the West expressed the strongest opposition to federal preemption (see Appendix Table D-2). Among state transportation departments, those in the north central region reported the strongest objections to preemption, but one southern department responded that there was less preemption than necessary.

Amount of Authority Delegated

The survey contained four questions about the amount of authority delegated by preemption statutes:

(1) Does the Congress delegate authority to make preemption decisions to federal administrative agencies too often?

(2) Do the federal courts too often infer preemption where the Congress did not specifically preempt state action?

(3) Is it desirable for the Congress to authorize an administrative agency to issue preemption rulings?

(4) Is it desirable for the Congress to authorize a federal court to issue a declaratory judgment that a proposed action is not preempted?

On the question of delegating preemption decision-making to administrative agencies, the "too often" response ranged from 20 percent of the atomic energy agencies to 65 percent of the attorneys general (see Table **3-3).** Fifty percent of the banking and transportation or public works departments checked the same response. In general, most of the respondents checked "too often" or "often enough."

One governor, two agricultural departments, four environmental protection agencies, and four labor relations, health, and safety departments responded that the Congress does not delegate authority to make preemption decisions to administrative agencies often enough.

On the question of the desirability of federal courts inferring preemption, a significant number of respondents in each category checked "frequently" or "sometimes." None of the state ACIRs and only **8** percent of the governors responded "frequently," but more than one-third of the attorneys general did so.

Preemption and Environmental Problems. The question of whether preemption helped a state solve a problem that had originated largely in another state (e.g., air and water pollution) brought a variety of responses. Some governors noted that it could work for water but not for air pollution, and that setting national minimum standards and relying on federal-state cooperation is a workable approach to national remediation policies.

Comments of attorneys general indicated that this mechanism could work only if enforced by the federal government.

Both the Congress and **EPA** were criticized by a number of state departments and agencies. For example, one environmental agency wrote:

> Congress, in setting the highest priority on attaining the six national air quality standards, has shaped all air pollution control program structures and has restricted the resources available to pursue other pollutant controls or control approaches. The FCAA sanctions allowing EPA to restrict highway funding or new industrial growth are examples of the force the federal government can bring to bear to promote the accomplishment of its priorities in this regard.

Other respondents commented that EPA **(1)** takes enormous liberties in its interpretation of its overview authority for the ***Clean Air Act,*** **(2)** specifies requirements (air) with no knowledge of how they are to be implemented, **(3)** is out of touch with reality, **(4)** is too interested in quantitative performance indicators, (5) does little to understand the unique problems of the states and to facilitate management for environmental results, and **(6)** produces delays and inconsistencies on rule interpretations, enforcement of policies, and permitting policies.

One department reported that it had sought delegation of all federal programs as provided by federal environmental law, but has begun to question this policy and has contemplated return of primacy where there is a substantial and unresolved discrepancy between federal and state priorities. On the same subject, another department wrote:

> The principal barrier to assuming "primacy" over federal environmental programs . . . has been a lack of available funding to support the additional work required to administer federal programs. In addition, the EPA, in reviewing state authority to administer federal programs, has not shown sufficient deference to the state agencies' interpretations of their own laws. **As** a consequence, the Environmental Protection Agency pressures the state to change state law when no change is necessary because state law is in fact equal to or more stringent than federal requirements.

The same department expressed concern about state environmental regulation of federal facilities, noting that "state regulation of federal facilities is preempted absent a waiver of sovereign immunity." Although the ***Clean Water Act*** and other federal environmental laws expressly waive sovereign immunity, these waivers have been interpreted narrowly by many federal agencies. The department reported that EPA supports the state's interpretation of its authority over federal facilities, but the U.S. Department of Justice backs the other federal agencies' refusal to comply with state law and state rules and regulations.

On the issue of worker protection laws (see Appendix Table **D-4),** a state department of labor reported that "at times, federal preemption is exercised in such a way that worker protections guaranteed under state laws are nullified, with negative consequences to workers, their families and union." Other departments of labor commented that the federal requirement that state standards be as stringent as OSHA standards is very restrictive and that there are problems resulting from federal preemption in the area of fringe benefits.

Table 3-3
State Officials' Perceptions of Amount of Preemption Authority Delegated, 1988

Does the Congress delegate authority to make preemption decisions to federal administrative agencies too often, often enough, or not often enough?

	Too Often		Often Enough		Not Often Enough		Don't Know		No Response		Total*	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Governors	9	36	8	32	1	4	4	16	3	12	25	100
Attorneys General	15	65	5	22	0	0	3	13	0	0	23	100
Community Affairs Departments	10	40	12	48	0	0	2	8	1	4	25	100
State ACIRs	9	38	3	12	0	0	3	12	9	38	24	100
Labor Relations, Health and Safety Departments	10	32	11	35	4	13	6	20	0	0	31	100
Natural Resources Departments	9	43	8	38	0	0	4	19	0	0	21	100
Transportation or Public Works Departments	12	50	7	29	0	0	5	21	0	0	24	100
Agricultural Departments	12	35	14	41	2	6	6	18	0	0	34	100
Atomic Energy Agencies	2	20	6	60	0	0	2	20	0	0	10	100
Banking Departments	9	50	9	50	0	0	0	0	0	0	18	100
Environmental Protection Agencies	13	37	13	37	4	12	5	14	0	0	35	100

Do the federal courts too often infer preemption where the Congress did not specifically preempt state action?

	Yes, Frequently		Yes, Sometimes		No		Don't Know		No Response		Total*	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Governors	2	8	11	44	3	12	6	24	6	24	25	100
Attorneys General	8	35	9	39	3	13	3	13	0	0	23	100
Community Affairs Departments	4	16	10	40	4	16	6	24	1	4	25	100
State ACIRs	0	0	6	25	1	4	8	33	9	38	24	100
Labor Relations, Health and Safety Departments	6	19	12	39	1	3	12	39	0	0	31	100
Natural Resources Departments	4	19	8	38	2	10	7	33	0	0	21	100
Transportation or Public Works Departments	3	13	7	29	0	0	14	58	0	0	24	100
Agricultural Departments	3	9	10	29	3	9	16	47	2	6	34	100
Atomic Energy Agencies	0	0	4	40	1	10	5	50	0	0	10	100
Banking Departments	2	11	11	61	1	6	4	22	0	0	18	100
Environmental Protection Agencies	1	3	17	49	3	9	14	40	0	0	35	100

Congress occasionally authorizes an administrative agency to issue preemptive rulings.

	Most Desirable —1—		—2—		—3—		—4—		Least Desirable —5—		No Response		Total*	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Governors	0	0	1	4	12	48	6	24	2	8	4	16	25	100
Attorneys General	1	4	2	9	4	17	5	22	2	9	9	39	23	100
Community Affairs Departments	3	12	5	20	7	28	3	12	6	24	1	4	25	100
State ACIRs	1	4	2	8	3	13	4	17	5	21	9	38	24	100

Congress may authorize a federal court to issue a declaratory judgment that a proposed action is not preempted.

Governors	1	4	11	44	7	28	3	12	0	0	3	12	25	100
Attorneys General	7	30	6	26	5	22	4	17	0	0	1	4	23	100
Community Affairs Departments	10	40	7	28	3	12	1	4	3	12	1	4	25	100
State ACIRs	2	8	6	25	5	21	2	8	0	0	9	38	24	100

*Percentages may not total 100% due to rounding.

Regarding natural resources, one department reported that EPA and the Office of Surface Mining insist on a "one size fits all" approach to regulation, which puts states in the difficult position of having to develop and implement a regulatory program to address state concerns and problems despite the federal agencies.

By way of contrast, a department of highways noted that the U.S. Department of Transportation and the U.S. Department of Energy have conflicting requirements for transportation of hazardous materials; yet the state department "accommodated federal preemption with little complaint. This is not to say that a substantial amount of time and money was not expended to conform."

Courts **Inferring Preemption.** To date, the *Voting Rights Act of 1965* is the only statute authorizing a court to issue declaratory judgments on federal preemption. It authorizes an administrative ruling by the **U.S.** Attorney General and a declaratory judgment by the **U.S.** District Court for the District of Columbia as to whether a proposed change in a state or local election system was preempted.

Issuing administrative rulings on preemption is a quick and inexpensive method for determining the extent of a statutory preemption, thereby providing guidance to states as to how much discretionary regulatory authority they retain.

Asked about the desirability of administrative rulings, on a scale of 1 (most desirable) to 5 (least desirable), no governor and only one attorney general checked 1. Three community affairs departments checked 1 and five other departments checked **2.** Most of the governors (72 percent) checked **3** and **4,** compared to 39 percent of the attorneys general. The community affairs departments registered the highest percentage **(32** percent) **of** most desirable or desirable responses.

One governor objected to this mechanism on the ground that federal agencies are granted too much latitude in determining whether "unspecified state statutes are null and void, regardless of the practical outcome for the state." He also stressed that this mechanism results in the states carrying the burden of defending their statutes in the **U.S.** District Court.

Attorneys general had diverse views on the administrative rulings mechanism. On one hand, it permits flexibility and can provide a relatively speedy response compared to litigation or legislative review (even though limiting state and local action). On the other hand, such a ruling can leave the agency with the authority to "legislate" on its own behalf and is undesirable. One attorney general, commenting on the *Hazardous Materials Transportation Act,* stated that a review of case law shows that the **U.S.** Department of Transportation "virtually always finds that preemption has occurred, except in those few instances in which a court says it has not." He added:

> Since Congress has provided virtually no guidance to DOT on how to determine inconsistency with the federal statutes, DOT has fashioned its own criteria based on its own reading of the objectives of the statute. Where a state may have different priorities, it may be prevented from enforcing them, no matter how valid they may be in the individual case.

Four state **ACIRs** commented on this question. Two of them said that the courts are the more appropriate forum for this function, but agreed that agencies can provide some guidance. Two ACIRs said that agencies should not be permitted to make such judgments. State officials clearly prefer the issuance of a declaratory judgment by a court to administrative rulings. Nearly half of the governors, more than half of the attorneys general, and more than two-thirds of the community affairs departments said that court judgments are most desirable or desirable (1 or 2).

Most of the attorneys general who commented on this approach said that courts are a more desirable forum because their rulings are presumably definitive and more objective. One preferred congressional determination and one thought the administrative remedy best.

One community affairs department and one state ACIR criticized this approach as applied to small local governments, which may find it overly complex, expensive, and time consuming. Another community affairs department, citing the federal *Voting Rights Act,* suggested that the local U.S. District Court is in a far better position to judge the merits of a local case than the District Court for the District of Columbia and should be authorized to issue the judgment. One governor and one state **ACIR** noted that declaratory judgments allow governments to ascertain the legality of issues before assuming liabilities that would be challenged.

Latitude for State Action

State officials were asked eight questions about the desirability of the devices the Congress uses to provide states with a degree of latitude in initiating action under federal preemption statutes (see Tables **3-4** and D-7). Again, the scale was 1 (most desirable) to **5** (least desirable).

1. *States **may** regulate **if** their standards are **as** high as federal standards.* This is standard partial preemption, described in Chapter 2, and most respondents rated the approach most desirable or desirable.

Governors comments were generally positive, noting that this mechanism can help states deal with issues that go beyond their borders and allow them to establish higher standards. The governors saw potential problems if neighboring states have different standards, if the federal minimum standard is so low that the higher state standards have little impact on problems originating chiefly in other states, if the federal standard imposes a fiscal burden on state and local governments, and if administrative costs are not funded adequately.

The attorneys general who commented on this approach found it generally desirable because it permits the states to address particular problems and allows for shared responsibilities. Two community affairs departments and one state ACIR rated this device highly for interstate boundary issues. Other state **ACIRs** viewed federal standards as sometimes unrealistic and costly, and maintained that minimum standards should be established by law, not by bureaucratic edict.

Table *3-4*
State Officials' Perceptions of Latitude for State Action, 1988

	Most Desirable —1—		—2—		—3—		—4—		Least Desirable —5—		No Response		Total*	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
States may regulate if their standards are as high as federal standards.														
Governors	4	16	12	48	6	24	1	4	0	0	2	8	25	100
Attorneys General	9	39	11	48	2	9	1	4	0	0	0	0	23	100
Community Affairs Departments	9	36	12	48	2	8	2	8	0	0	0	0	25	100
State ACIRs	2	8	12	50	1	4	0	0	0	0	9	38	24	100
State law is valid unless there is a direct and postive conflict with a federal law.														
Governors	8	32	11	44	4	16	0	0	0	0	2	8	25	100
Attorneys General	8	35	10	43	3	13	2	9	0	0	0	0	23	100
Community Affairs Departments	16	64	3	12	3	12	0	0	1	4	2	8	25	100
State ACIRs	7	29	4	17	1	4	3	13	0	0	9	38	24	100
Congress may permit states to act where no federal standard is in effect.														
Governors	9	36	9	36	3	12	1	4	0	0	3	12	25	100
Attorneys General	7	30	9	39	5	22	0	0	1	4	1	4	23	100
Community Affairs Departments	10	40	10	40	3	12	1	4	0	0	1	4	25	100
State ACIRs	3	13	9	38	1	4	2	8	0	0	9	38	24	100
Congress may authorize states to transfer inspection authority to a federal agency,														
Governors	6	24	6	24	9	36	0	0	0	0	4	16	25	100
Attorneys General	7	30	6	26	5	22	2	9	1	4	2	9	23	100
Community Affairs Departments	10	40	10	40	5	20	0	0	0	0	0	0	25	100
State ACIRs	3	13	9	38	3	13	0	0	0	0	9	38	24	100
Congress may authorize a limited regulatory turnback by a federal agency to states.														
Governors	3	12	16	64	3	12	0	0	0	0	3	12	25	100
Attorneys General	2	9	10	43	7	30	1	4	1	4	2	9	23	100
Community Affairs Departments	8	32	13	52	2	8	0	0	1	4	1	4	25	100
State ACIRs	1	4	12	50	0	0	2	8	0	0	9	38	24	100

Table 3-4 (cont.)
State Officials' Perceptions of Latitude for State Action, 1988

	Most Desirable —1—		—2—		—3—		—4—		Least Desirable —5—		No Response		Total*	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Congress may exempt states from provisions of a regulatory statute.														
Governors	6	24	5	20	8	32	1	4	1	4	4	16	25	100
Attorneys General	4	17	5	22	9	39	5	22	0	0	0	0	23	100
Community Affairs Departments	4	16	10	40	7	28	3	12	1	4	0	0	25	100
State ACIRs	3	13	4	17	7	29	1	4	0	0	9	38	24	100
Congress may authorize a governor to petition a federal department to remove the preemption.														
Governors	2	8	11	44	6	24	2	8	0	0	4	16	25	100
Attorneys General	1	4	6	26	6	26	3	13	2	9	5	22	23	100
Community Affairs Departments	9	36	6	24	6	24	3	12	1	4	0	0	25	100
State ACIRs	2	8	6	25	2	8	3	13	2	8	9	38	24	100
Congress may authorize a governor or state legislature to veto a federal administrative decision subject to an override by Congress.														
Governors	6	24	7	28	3	12	4	16	1	4	4	16	25	100
Attorneys General	6	26	9	39	2	9	2	9	1	4	3	13	23	100
Community Affairs Departments	11	44	8	32	2	8	0	0	3	12	1	4	25	100
State ACIRs	4	17	6	25	2	8	3	13	0	0	9	38	24	100

*Percentages may not total 100% due to rounding.

2. State law is valid unless there is a direct and positive conflict with a federal law. This approach was rated most desirable by 64 percent of the community affairs departments, 35 percent of the attorneys general, and 32percent of the governors. The only least desirable rating was given by **a** community affairs department.

The two governors who commented had opposite views. One of them called the approach very desirable, providing for state flexibility and protecting state law unless federal courts find a "direct and positive conflict" between state and federal law. The other governor wrote that this device has the potential for causing unanticipated disruptions for states (e.g., the *Garcia* decision).

Some attorneys general pointed out that it is difficult to define a direct and positive conflict. Another commented that the approach shows congressional intent and would be helpful to the states. Similarly, a state ACIR wrote that the approach, at least on the surface, recognizes the constitutional basis for the relationship between the states and the federal government.

3. The Congress maypermit states to act where no federal standard is in effect. Not surprisingly, a large majority of the respondents rated this approach as most desirable or desirable (1 or 2)-72percent of the governors, 69 percent of the attorneys general, and 80 percent of the community affairs departments.

Governors noted that this approach allows states to take the initiative when there is no federal standard and to achieve an effective balance between federal policy mandates and state program implementation that is sensitive to local conditions and concerns. The attorneys general who commented were equally positive about this approach, as were community affairs departments.

4. The Congress may authorize states to transfer inspection authority to a federal agency. Nine governors rated the approach a neutral 3, while 12 rated it most desirable or desirable (1 or 2), as did 20 community affairs departments. No governor and no department of community affairs rated this device as not desirable or least desirable (4 or 5). Attorneys general were more divided; two rated the device 4 and one gave it a 5.

Governors described the device as encouraging states to establish and manage their own programs and ensuring administrative efficiency in the coordination of federal and state programs, but they noted that the federal government should reimburse states for a portion of administrative costs. Attorneys general and state ACIR respondents who commented also said this approach is desirable.

5. The Congress may authorize a limited regulatory turnback by a federal agency to states. This device drew a most desirable or desirable rating from 76 percent of the governors, 52 percent of the attorneys general, and 84 percent of the departments of community affairs. No governor rated the device as somewhat undesirable or least desirable.

One governor commented that a turnback is desirable when (1) states are given flexibility to develop their own approaches and (2) federal funds are provided to pay for mandated activities.

Two attorneys general took the middle ground, rating this approach better than a mandate but leaving little discretion to the states. Others noted that turnbacks protect minimum standards and are acceptable, provided that preemption authority is clear. Opinions of community affairs and state ACIR officials ranged from most desirable to somewhat undesirable unless the revenues are also turned back.

6. The Congress may exempt states from provisions of a regulatory statute. Forty-four percent of the governors rated this approach most desirable or desirable, compared to 39 percent of the attorneys general and 56 percent of the departments of community affairs.

While the governors who commented described the approach as generally desirable, their opinions varied: (1) states should not be required to establish a standard higher than the federal standard; (2) federal regulations should apply in some cases, such as interstate commerce and the environment; and (3) state regulations should be flexible and should meet or exceed the federal standard. The attorneys general who commented had a similar range of views.

7. The Congress may authorize a governor to petition a federal department to remove the preemption. Although 44 percent of the responding governors rated this approach as desirable, only 8 percent said it is most desirable. No governor assigned the lowest rating to this approach. The attorneys general ratings were similar to the governors', but 36 percent of the departments of community affairs rated the approach most desirable.

Among the governors' comments were that (1) this approach is less desirable than congressional stipulation that a state law is valid unless there is a positive conflict between state law and federal law on the same subject or congressional authorization for the transfer of responsibility, (2) such a formal appeal mechanism allows a state to demonstrate undue hardship or the unanticipated negative impact of a specific federal preemption, and (3) the practice is an inconsistent patchwork process.

The attorneys general who commented felt generally that this approach gives states a political choice, although one added the qualifier of making sure there are constitutional guidelines for granting or rejecting such petitions. Only one attorney general offered a negative opinion (uneven administration and subject to politics).

8. The Congress may authorize a governor or state legislature to veto a federal administrative decision subject to an override by the Congress. Fifty-two percent of the responding governors rated this approach desirable or most desirable, compared to 65 percent of the attorneys general and 76 percent of the departments of community affairs.

Two governors commented on this approach, one saying that it is desirable if the state veto is final and the other noting that congressional override may be essential to address a critical national issue. Although one attorney general described the approach as "just politics," others noted that it seems to be a reasonable alternative and that,

while the ultimate authority remains federal, it is better to have the final say in Congress than in an agency. Community affairs and state ACIR officials saw this approach as a good check-and-balance process for issues of national importance.

Restrictions on State Actions

State officials were asked seven questions about federal preemption statutes that restrict the independence of state action (see Tables 3-5, D-3 and D-8).

1. ***The Congress may forbid states to enact economic regulations of an industry.*** The most common rating for this practice was undesirable (4).

Two governors commented on this approach, one seeing it as desirable as long as rural states do not suffer from deregulation (such as a loss of service). The other governor stated that it is desirable when dealing with interstate commerce, but it often prevents the regulation of purely intrastate activities, leaving states powerless to prevent improper and/or injurious activities by an industry on its citizens, even though state action would have little, if any, national consequences. The comments of the attorneys general, community affairs departments, and state ACIRs echoed concerns about intrastate regulation and consumer protection issues.

2. ***The Congress may require states to enforce a federal statute.*** There was substantial divergence in perceptions among state officials about this practice. Whereas most governors and attorneys general rated it neutral (3), somewhat undesirable (4), or least desirable (5), four departments of community affairs rated it most desirable and *six* departments rated the approach desirable.

Of the governors who commented, one saw this approach as desirable by virtue of the flexibility it provides to states to determine an appropriate enforcement mechanism. Another governor rated this approach least desirable because states are not permitted to exercise the administrative and policy flexibility inherent in some of the other preemption mechanisms. All of the governors who commented objected to the requirement that the states pay for enforcement.

All of the attorneys general raised the funding issue. Some questioned the constitutionality of the Congress enacting a standard and requiring the states to pay the cost of enforcement. Although there were comments that this approach may be a good policy for health and safety issues and that state enforcement is more effective than creating a separate federal capability, the departments of community affairs and the state ACIRs also raised the issue of states having to pay for enforcement.

3. ***The Congress may require states to enact a law complying with provisions of a federal law.*** While no governor rated this approach as most desirable and only one said it was desirable, one attorney general (4 percent) and six departments of community affairs (24 percent) rated the approach most desirable. However, 40 percent of the governors, 39 percent of the attorneys general, and 40 percent of the community affairs departments gave this approach the least desirable rating.

The governors and attorneys general who commented called this approach undesirable mainly for the same reasons as with requiring states to enforce a federal statute—the constitutionality of the practice and the costs to the states. Some attorneys general said this is the most intrusive tactic and is unenforceable. On the other hand, some departments of community affairs found the approach most desirable in some cases.

4. ***The Congress may assign responsibility for a function to the states.*** Thirty-five percent of the attorneys general rated this approach as most desirable, compared to only 16 percent of the governors. Interestingly, no governor and only one attorney general and one department of community affairs rated this approach least desirable.

Governors and attorneys general called this approach desirable because of the flexibility it gives states to form interstate compacts, which can develop policies and programs that reflect the needs and priorities of the affected parties. One attorney general stressed that the Congress cannot "assign" anything. Comments from departments of community affairs also focused on the necessity of interstate compacts for responding to conditions that may vary widely among regions.

5. ***The Congress may enact a national suspensive law that becomes effective within a state if specified conditions prevail.*** While no governor rated this device least desirable, only 8 percent rated it most desirable. In general, governors and attorneys general rated the device 2 or 3, but 24 percent of the departments of community affairs rated it as 1.

Two governors commented that the use of this approach needs to be on a case-by-case basis, and one noted that preemption power should be used in this manner only when there is a clear and compelling denial of the constitutional rights of a group of citizens.

Attorneys general agreed that this mechanism could keep preemptions from applying to those not affected, and that its workability would depend on the particular case (e.g., the *Voting Rights Act*).

6. ***Do federal agencies override state decisions on a case-by-case basis?*** The most common response to this question was "sometimes"—48 percent of the governors and attorneys general, and 40 percent of the community affairs departments checked this response. One governor and five departments of community affairs checked "almost always." Interestingly, the "don't know" response was checked by six governors, four attorneys general, five state ACIRs, and nine community affairs departments.

7. *Has* ***partial or total preemption ever prevented your state from pursuing policies your state prefers?*** A significant percentage of each group of respondents checked "yes, several times," ranging from 36 percent of the community affairs departments to 40 percent of the governors and 53 percent of the attorneys general.

Combining the first two categories of responses, 60 percent of the governors, 83 percent of the attorneys general, and 64 percent of the community affairs departments reported that partial or total federal preemption had pre-

Table 3-5
State Officials' Perceptions of Restrictions on State Action, 1988

Congress may forbid states to enact economic regulations of an industry.

	Most Desirable —1—		—2—		—3—		—4—		Least Desirable —5—		No Response		Total*	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Governors	2	8	6	24	3	12	8	32	3	12	3	12	25	100
Attorneys General	3	13	1	4	6	26	11	48	2	9	0	0	23	100
Community Affairs Departments	3	12	6	24	8	32	7	28	0	0	1	4	25	100
State ACIRs	3	13	2	8	2	8	6	25	2	8	9	38	24	100

Congress may require states to enforce a federal statute.

Governors	2	8	3	12	7	28	9	36	1	4	3	12	25	100
Attorneys General	1	4	2	9	7	30	5	22	6	26	2	9	23	100
Community Affairs Departments	4	16	6	24	7	28	3	12	3	12	2	8	25	100
State ACIRs	1	4	3	13	1	4	6	25	4	17	9	38	24	100

Congress may require states to enact a law complying with provisions of a federal law.

Governors	0	0	1	4	4	16	7	28	10	40	3	12	25	100
Attorneys General	1	4	0	0	1	4	10	43	9	39	2	9	23	100
Community Affairs Departments	6	24	0	0	6	24	3	12	10	40	0	0	25	100
State ACIRs	0	0	0	0	4	17	4	17	7	29	9	38	24	100

Congress may assign responsibility for a function to the states.

Governors	4	16	10	40	8	32	2	8	0	0	1	4	25	100
Attorneys General	8	35	2	9	10	43	2	9	1	4	0	0	23	100
Community Affairs Departments	8	32	7	28	3	12	5	20	2	8	0	0	25	100
State ACIRs	3	13	7	29	4	17	0	0	1	4	9	38	24	100

Congress may enact a national suspensive law that becomes effective within a state if specified conditions prevail.

	Most Desirable —1—		—2—		—3—		—4—		Least Desirable —5—		No Response		Total*	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Governors	2	8	6	24	6	24	2	8	0	0	9	36	25	100
Attorneys General	1	4	10	43	6	26	1	4	2	9	3	13	23	100
Community Affairs Departments	6	24	6	24	7	28	2	8	4	16	0	0	25	100
State ACIRs	3	13	7	29	3	13	1	4	0	0	10	42	24	100

Table 3-5 (cont.)
State Officials' Perceptions of Restrictions on State Action, 1988

Do federal agencies overide state decisions on a case–by–case basis?

	Almost Always		Sometimes		Rarely		Not At All		Don't Know		No Response		Total*	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Governors	1	4	12	48	2	8	0	0	4	16	6	24	25	100
Attorneys General	0	0	11	48	5	22	0	0	6	26	1	4	23	100
Community Affairs Departments	5	25	10	40	1	5	0	0	9	45	0	0	25	100
State ACIRs	0	0	9	38	1	4	0	0	5	21	9	38	24	100

Has partial or total preemption ever prevented your state from pursuing policies your state prefers?

	Yes, Several Times		Yes, Once or Twice		No		Don't Know		No Response		Total+	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Governors	10	40	5	20	1	4	3	12	6	24	25	100
Attorneys General	12	53	7	30	1	4	2	9	1	4	23	100
Community Affairs Departments	9	36	7	28	0	0	7	28	2	8	25	100
State ACIRs	5	21	6	25	0	0	4	17	9	38	24	100

*Percentages may not total 100% due to rounding.

vented their states from pursuing policies that states prefer once, twice, or several times.

Several governors responded "yes", citing **(1)** the **OSHA** community "right to know" statute, **(2)** environmental problems, (3) asbestos hazards, **(4)** the national vaccine program, (5) transportation issues, *(6)* the 55 mph speed limit, **(7)** water compacts, **(8)** regulation of banks and other financial institutions, (9) public utility regulation, and (10) public safety.

Attorneys general who responded "yes" cited (1) cable TV regulation, **(2)** transporting nuclear waste, (3) operation of tandem trailers, **(4)** the 55 mph speed limit, **(6)** the 21-year-old age requirement for alcoholic beverage purchase, (7) nuclear power plant regulation, **(8)** age discrimination, (9) state securities laws, (10) oil and gas production and transportation, (11) water management, (12) corporate governance, and (13) state employees' political activity.

Departments of community affairs and state ACIRs had similar lists, many including environmental issues, industry regulation, and welfare programs.

Potential Improvements in Preemption Laws

Questions were asked regarding two possible improvements in federal preemption statutes — codes of restrictions and sunset provisions (see Tables **3-6** and D-9).

Code of Restrictions. It has been suggested that the Congress include in each preemption statute a "code of restrictions" detailing actions that states and local governments may not initiate or may initiate only by following specified procedures.

The attorneys general were overwhelmingly in favor of a code **(74** percent), compared to **44** percent of the governors and **48** percent of the community affairs departments.

The governors and attorneys general who commented believe that such a code, with a clear statement of congressional intent for preemption enactments, would be helpful in defining state and local responsibilities and avoiding litigation. The departments of community affairs and state ACIRs generally concurred with these comments.

Negative responses to this question were received from five governors, two attorneys general, and five community affairs departments. Three governors, three attorneys general, and seven community affairs departments responded "don't know."

Sunset. Is there a need for a "sunset" provision requiring periodic congressional review in each preemption statute? A large majority of the respondents checked yes, but differed as to whether the time should be 15, 10, or **5** years. Governors were closely divided between ten years **(32** percent) and five years **(36** percent), and attorneys general were equally divided between these two provisions (35 percent each). Sixty percent of the community affairs departments favored a five-year sunset provision.

The governors and attorneys general who commented mentioned a ten-year sunset provision most often, but they also stated that the necessity for such a provision should be considered case by case. Some noted that such a review is necessary for the delicate federal-state balance that is a continuing concern of federalism. One suggestion was for an initial three-year review, followed by ten years if the preemption passes muster.

Table 3-6

State Officials' Perceptions of Potential Improvements in Federal Preemption Laws, 1988

	Yes		No		Don't Know		No Response		Total*	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Is there a need for a "code of restrictions" in each preemption statute?										
Governors	11	44	5	20	3	12	6	24	25	100
Attorneys General	17	74	2	9	3	13	1	4	23	100
Community Affairs Departments	12	48	5	20	7	28	1	4	25	100
State ACIRs	7	29	4	17	4	17	9	38	24	100
Is there a need for a "sunset" provision in each preemption statute?										
	Yes, 15 Years		Yes, 10 Years		Yes, 5 Years		No		Don't Know		No Response		Total*	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Governors	1	4	8	32	9	36	0	0	1	4	6	24	25	100
Attorneys General	1	4	8	35	8	35	1	4	4	18	1	4	23	100
Community Affairs Departments	2	8	8	32	15	60	0	0	0	0	0	0	25	100
State ACIRs	1	4	7	29	4	17	2	8	0	0	10	42	24	100

*Percentages may not total 100% due to rounding.

Summary

There is a consensus among state officials who responded to the survey that there is too much federal preemption and that the Congress delegates too much authority to federal administrators. Nevertheless, many respondents acknowledge the need for federal preemption under certain circumstances.

Most respondents were neutral in rating the issue of occasional congressional authorization for a federal administrative agency to issue preemptive rulings. Most preferred to have the Congress authorize a federal court to issue a declaratory judgment on preemption of a proposed action.

In general, state officials rated highly **(1)** standard partial preemption, **(2)** a federal statutory provision stipulating that a state law is valid unless there is a direct and positive conflict with a federal law, and **(3)** congressional permission for states to act where no federal standard is in effect.

There was a division of opinion about congressional authorization for states to transfer inspection authority to a federal administrative agency, with community affairs departments most favorable to the approach and attorneys general rating it least favorable. Respondents expressed strong opposition to federal statutes forbidding states to enact economic regulation of an industry.

Congressional requirements that states enforce a federal statute received negative ratings from most governors and attorneys general, but favorable ratings from ten departments of community affairs. Congressional authorization for a federal administrative agency to make a limited turnback of regulatory authority to states was viewed favorably by most respondents.

A federal statute requiring states to enact a law complying with provisions of a federal law received a large least desirable rating; yet one attorney general and six departments of community affairs rated the approach most desirable.

Respondents gave a high rating to federal statutes authorizing a governor or state legislature to veto a federal administrative decision subject to an override of the veto by the Congress. Less enthusiasm was expressed for federal suspensive laws that become effective within a state if specified conditions prevail.

Federal preemption, according to state officials, does not often solve problems in their states originating in other states. Furthermore, preemption often prevents states from pursuing policies they prefer.

The suggestion for a code of restrictions in each federal preemption statute received strong positive ratings, particularly from attorneys general. In addition, there was nearly unanimous agreement that each preemption statute should contain a sunset provision, although there were differences of opinion as to the appropriate time.

Notes

[1] Many of these state bodies are structured in the same way as the U.S. Advisory Commission on Intergovernmental Relations. There are, however, variations in these organizations' names, structures, and relationships to the governors' offices and the state legislatures. There are active ACIR type state-local relations organizations in 26 states. See U.S. Advisory Commission on Intergovernmental Relations, *State-Local Relations Organizations: The ACIR Counterparts* (Washington, DC, 1991).

[2] A questionnaire was classified as prepared by the governor if completed at the governor's direction by another state official.

Clearly, federal preemption of state and local powers has become a prominent feature of our federal system. Federal grants-in-aid to state and local governments declined from a high of 26.5 percent of state and local outlays in FY 1978 to an estimated 20.5 percent in FY 1991, but preemption continued to increase, rivaling grants-in-aid as the most significant facet of intergovernmental relations today. It is possible that the growth of preemption, like grants-in-aid, will level off or decline in the future, but the forces that seem to be encouraging preemption point to a continued expansion of federal preemption for the foreseeable future.

Factors Contributing to Increased Preemption

For one, federal preemption of state and local powers follows the general trend of increased federal regulation in the United States. Although the growth of federal regulation is difficult to measure, one indicator is suggested by a study which estimated that the number of Federal regulatory employees increased from less than 70,000 people in 1970 to about 125,000 in 1992.' However, this indicator, rough in itself, underestimates the extent of federal regulation because many federal regulatory activities are carried out by state and local government employees, either directly, pursuant to federal law, or indirectly, pursuant to state and local laws enacted in compliance with federal laws.

Another factor contributing to the rise of preemption has been the loosening of constitutional restraints on the exercise of congressional powers. Expansive interpretations of the commerce clause, for example, have been the basis of many federal preemptions of state and local powers.[2] Large areas of modern life can arguably be brought under the aegis of interstate or foreign commerce. As the U.S. Supreme Court has also made clear in ***Garcia*** v. ***Sun Antonio Metropolitan Transit Authority*** (1985)' and ***South Carolina*** v. ***Baker*** (1988),[4] state and local governments must look to the congressional political process rather than to judicially enforced provisions of the Constitution, such as the Tenth Amendment, to protect their powers from federal encroachment?

At the same time, the Congress has acquired positive constitutional obligations to protect rights uniformly across the country, largely as a result of U.S. Supreme Court interpretations of the Fourteenth Amendment and the U.S. Bill of Rights. Judicial decisions have nationalized many facets of rights protection, thereby authorizing and obligating the legislative and executive branches to follow suit. Initially reluctant to enact rights legislation in the late 1950s and early 1960s, the Congress has increasingly expanded rights protection and extended the reach of federal rights protection to more groups of persons. Indeed, in many respects, the Congress has surpassed the Supreme Court as the branch of the Federal government most likely to define new rights and expand old rights.

A fourth factor in the rise of preemption is the reduced fiscal capability of the federal government, which has operated with deficits every year since 1969.6Lacking the kind of fiscal power to influence public policy that was characteristic of the late 1950s to early 1970s, the federal government has turned more to regulatory powers to accomplish policy objectives.[7] At the same time, the Congress has increasingly encroached on state and local tax bases—sometimes to raise more federal revenue without overtly increasing federal taxes, as in the elimination of the deductibility of state sales taxes—and also imposed or retained limits on state and local taxation?

In addition, new fields of regulation have been opened for federal action since the 1960s, as exemplified by environmental protection, which was not a major field of federal regulation before the 1970s. The intergovernmental fiscal impact of environmental regulation, for example, was recently illustrated by the city of Columbus, Ohio. The city found that more than "75 new federal and state environmental mandates were implemented from 1988-1991." Less than 40 such mandates were in effect prior to 1988. The city estimated that 10.6 percent of its "1991budget, or $62 million, was spent for environmental compliance on the regulations studied. In 1995 . . . this total will rise to $107 million, or 18.3 percent of the city budget. Environmental compliance costs for the years 1996 to 2000 will average $135 million annually, or 23.1 percent of the total budget.'*

Still another factor influencing the rise of preemption has been the proliferation of interest groups operating in Washington, DC. During the 1960s, there was an explosion of interest-group activity "inside the Beltway" largely for the purpose of securing federal benefits. Preemption increased as these groups became more powerful and advocated the exercise of national power, in part to defeat state and local policies not to their liking and, in part, to make life easier for themselves by dealing with one government rather than 50 states or thousands of local governments. As some industry representatives have put it,

they would prefer to cope with one 500-pound gorilla in Washington than with 50 monkeys on steroids. As business has come to recognize the political inevitability of regulation, and as states (and many local governments) have become more energetic regulators in the face of consumer pressure, business has increasingly sought federal preemption of state and local powers. For example, when the U.S. Supreme Court upheld in 1991 the statutory authority of local governments to enact pesticide regulations more stringent than federal rules,[10] the pesticide industry quickly obtained the introduction in the Congress of a bill to overturn the Court's ruling and preempt local pesticide regulation."

Preemption also is being fostered by growing concern about America's competitive position in the world economy, especially with the strengthening of the European Community. As Secretary of the Treasury Nicholas Brady said on introducing President George Bush's proposals to reform the nation's dual (federal and state) regulated banking system in 1991, something is seriously amiss when a bank in California can open a branch in Birmingham, England, but not in Birmingham, Alabama." The President proposed, therefore, to preempt certain state powers over interstate banking.

President Bush's concern has been echoed by many European leaders. For example, the ambassador of the European Community (EC) to the United States noted:

> When Europeans look at the United States, we are surprised to find increasing fragmentation of this huge market. We see states establishing different rules on labeling, air quality, bottled water contents and a wide variety of other health and safety regulations. We also see U.S. competitiveness hampered by skyrocketing federal and state budget deficits and hurt by outdated banking and insurance systems, which states overregulate.[13]

Indeed, developments similar to federal preemption in the United States appear to be under way in the EC. Pursuant to the *Single Europe Act of 1987*, for example, the internal market program sets forth 297 measures to be implemented throughout the EC. It is expected, moreover, that 75 percent of national legislation will originate, directly or indirectly, from EC legislation in the near future.'"

Concern for international economic competition also has led many governors and other state and local officials to support federal preemptions intended to create a more uniform national marketplace. In addition, states have sometimes supported federal preemption in order to protect themselves from the adverse effects of regulations enacted by other states, especially large states. For example, California's popularly initiated food labeling law, Proposition 65 (1986), could require cancer warning labels on products from other states, such as Georgia peanuts and Vermont maple syrup. Given that California is the nation's single largest consumer market, and given that California, New York, and Illinois together account for about 27.2 percent of the drug market, for example, regulations enacted by these states can effectively drive the marketplace and constitute de facto preemptions of the preferences of other states.

Another factor driving preemption is bipartisan support. Different kinds of preemptions advance the policy objectives of different interests, whether it be federal preemption in order to replace state and local regulation with federal regulation or federal preemption in order to displace state and local regulation by federal deregulation (e.g., the *Cable Communications Policy Act of 1984*). Although, in the past, federal preemption was often associated with liberal policy objectives, conservatives have also found preemption to be a useful tool. Robert H. Bork, for example, has argued forcefully for federal preemption of California's Proposition 65.[15] Consequently, federal preemption has continued to increase despite changes in the party composition of the Congress and control of the executive branch.[16]

Finally, preemption has been spurred by the popularity of many preemptive enactments. There is strong public support, for example, for federal action on behalf of environmental protection. Approximately half of all preemptions enacted during the 1970s and 1980s were in the fields of health, safety, and environmental protection. It is difficult, therefore, for state and local governments to challenge preemptions that appear to provide such widespread public benefits.

Public Opinion on Preemption, 1992

How well the public understands the dynamics of preemption and the costs to state and local taxpayers of certain preemptions is unclear. In an initial effort to gauge public opinion, the Advisory Commission on Intergovernmental Relations included five questions about preemption in its 1992 national public opinion poll conducted by the Gallup Organization.[17] The five issues included in the poll have been subject to debate as to whether the federal government should preempt state or local powers. The results are shown in Table 4-1.

The respondents expressed strong support (74.7 percent total) for federal regulation of health-risk labels on food products sold throughout the country. Support for federal regulation was stronger (85.6 percent) among persons who have completed college, compared to 57.8 percent among persons who have not completed high school. Similarly, support for federal regulation generally increased by income, from 61.0 percent of persons in low-income households (less than $15,000 annual income) to 83.8 percent of persons in households having annual incomes above $40,000. There was also a difference between black and white respondents, with 57.4 percent of the former and 77.5 percent of the latter supporting federal regulation.

Less support (49.8 percent total) was expressed for federal regulation of interstate banking. Again, support for federal regulation increased with education, from 34.0 percent of those who have not completed high school to 60.4 percent of those who have completed college. There were no consistent variations in support for federal regulation among income groups; however, there was a marked difference among age groups, with 54.1 percent of the respondents under age 35 supporting federal preemption, compared to 38.6 percent of those over age 65.

Table 4-1

Federal Preemption and Public Choices of Federal, State, or Local Regulation

Issue Question[1]	Percent Selecting Government That Should Regulate			
	Federal	State	Local	No Answer
Should the federal government regulate the listing of health risks on the labels of food products sold throughout the country, or should each state government regulate the listing of health risks on the labels of food products sold in its state?	**74.7**	**17.8**	—	**7.5**
Should the federal government regulate banks so as to let them operate freely across state lines throughout the country, or should each state government regulate banks that operate in its state so as to be able to limit or keep out banks from other states if it wishes to do so?	**49.8**	**37.9**	—	**12.3**
Should the federal government regulate companies that sell life, fire, property, casualty, and automobile insurance throughout the country, or should each state government regulate the companies that sell these types of insurance in its state?	**37.4**	**51.0**	—	**11.6**
Should the federal government regulate the use of pesticides on home lawns and public grounds throughout the country, or should each local government regulate the use of pesticides on home lawns and public grounds in its community?	**37.4**	—	**52.0**	**10.5**
Should the federal government regulate the location and building of low-income housing in communities throughout the country, or should each local government regulate the location and building of low-income housing in its community?	**20.4**	—	**72.2**	**7.4**

[1] These questions were prefaced by the following statement: Now I would like to ask you about federal preemption. Preemption means that the federal government in Washington takes a power from state or local government in order to use that power itself. For example, the federal government has preempted the power of state and local governments to regulate prescription drugs, airlines, and atomic energy. Therefore, these things are regulated by the federal government. For each of the following, I would like to ask whether you think the federal government should take over the regulation of the activity in order to set uniform rules across the country, or whether you think state or local governments should continue to regulate the activity, each in its own way.

Source: U.S. Advisory Commission on Intergovernmental Relations, ***Changing Public Attitudes on Governments and Taxes 1992*** (Washington, DC, **1992).**

Respondents expressed little support (37.4 percent total) for federal as opposed to state regulation of companies that sell life, fire, property, casualty, and automobile insurance. The only marked difference among groups of respondents was a greater preference (45.2 percent) for federal regulation by persons in white-collar, sales, and clerical occupations.

Similarly, respondents expressed little support (37.4 percent total) for federal regulation of pesticide use on home lawns and public grounds. The strongest support (45.7 percent) for federal regulation was expressed by respondents in households having annual incomes of more than $40,000 and by respondents living in suburban areas (45.1 percent).

Very little support (**20.4** percent total) was expressed for federal regulation of the location and building of low-income housing in local communities. Support for local regulation tended to increase with education and income. Among persons who have not completed high school, 58.8 percent supported local regulation, compared to 77.7 percent of persons who have completed college. Support for local regulation was expressed by 61.4 percent of the respondents from households having annual incomes under $15,000 and by 78.0 percent of persons from households having annual incomes over $40,000. More striking differences occurred by race and region. Local regulation was supported by 75.3 percent of the white respondents, but only by 52.8 percent of the black respondents. The strongest support (85.5 percent) was expressed by respondents from the Midwest, compared to 74.5 percent from the West, 69.5 percent from the South, and 57.9 percent from the Northeast. Support for local regulation was greater (78.6 percent) in areas outside of metropolitan areas than in suburbs (68.7 percent) and central cities (68.1 percent). Finally, homeowners (76.0 percent) were more supportive of local regulation than were renters (64.7 percent).

In the absence of trend data, it is impossible to determine whether the public's responses to the five issues reflect more or less support for federal preemption than in the past. Nor is it possible to infer how the public might respond to other preemption issues. The results do indicate that citizens have different preferences about

preemption on different policy issues. The limited results presented here suggest that the public may be more willing to support federal preemption in fields of activity that involve mass production and clearly interstate commerce. The public seems less willing to endorse federal preemption in areas of activity that may involve interstate commerce but can arguably be tailored to state preferences and conditions, as in the case of automobile insurance. The public does not seem willing to support federal preemption in fields that involve matters of individual use and choice about goods and services that may be products of interstate commerce but nevertheless susceptible to local regulations without undue interference with interstate commerce.

Issues in Preemption

The tremendous growth of federal preemption since the late 1960sraises a number of important issues of intergovernmental concern.

The first is the sheer scope of federal preemption, which suggests an increasingly coercive system of intergovernmental relations.'*Is the federal government going too far, and too fast, thus centralizing power and undermining federalism itself? Federal preemption has not been marked by generally steady and continuous growth since 1789, reflecting a pattern of accumulated wisdom and experience, but rather by a sudden and unprecedented spurt after 1969. This spurt has involved preemptions not only in historic fields of federal activity but also in many new fields.

The second issue is the clarity of preemption. The Congress often enacts statutes that require regulatory agencies and courts to divine the Congress's intentions on preemption. **As** a recent report of the Appellate Judges Conference of the American Bar Association **(ABA)** noted: "By their very nature, implied preemption doctrines authorize courts to displace state law based on indirect and sometimes less than compelling evidence of legislative intent. This indirectness in turn suggests a greater potential for unpredictabilityand instability in the law."[19] The **ABA** report concluded, therefore, that: "In our federal system, Congress has a duty to address clearly whether a federal enactment has displaced state law."[20] Although the **U.S.** Supreme Court has been reining in the field of implied preemption by requiring plain statements of the Congress's intentions, **U.S.** Sen. Carl Levin has noted that preemption is simply not high on congressional radar screens. Unless the Congress has to face up to preemption explicitly, it may preempt state or local authority even when it has no real desire to do so.

A third issue is what Governor John Ashcroft of Missouri has called "preemption by evolution," whereby federal agencies gradually expand preemptive legislation through rulemaking. In this instance, he was referring to a finding by the Equal Employment Opportunity Commission (EEOC) that the federal ***Age Discrimination in Employment Act*** of ***1967,*** as amended in 1972, preempted the Missouri Constitution's requirement that state judges retire at age 70. In 1991, the **U.S.** Supreme Court upheld the Missouri constitutional provision, with Justice Sandra Day O'Connor delivering a strong federalist opinion for five justices, in which she seemed to extend and strengthen the Court's "plain statement" rule regarding congressional intent to preempt state or local powers.[21]

A related issue is the extent to which the Congress explicitly or implicitly delegates preemption authority to administrative agencies to make not only general rules based on statutes but also specific preemption decisions. Such delegations may, in effect, invest substantial preemption powers in lower level administrators of federal agencies.

A fifth preemption issue is whether and when the federal government should set minimum or maximum standards in a regulatory field. Minimum standards ordinarily allow state and/or local governments to enact standards that exceed the federal minimum. Minimum standards, therefore, preserve some scope for the exercise of state or local powers and discretion. Maximum standards, however, promote uniform national regulation.

A sixth issue concerns the flexibility accorded state and local governments in complying with federal preemptions that involve state or local action, whether it be flexibility in meeting standards, flexibilityin theadministration of requirements, or flexibility in terms of state versus federal implementation. ***An*** important element of flexibility is clarity of congressional intent, which might be detailed in a "code of restrictions," as well as the clarity and timeliness of federal administrative rules promulgated pursuant to preemption statutes. Lack of clarity and flexibility can lead to unnecessary litigation.

A seventh issue concerns the extent to which the diverse forms of preemption created by the Congress since the mid-1960s are well matched to the particular issues to which the forms are applied by the Congress, the courts, and administrative agencies. There has been no assessment of which forms are most appropriate for particular policy issues and objectives. Such an assessment would provide useful information for federal-state-local negotiations on the form to be taken by preemption when federal preemption is judged to be necessary.

This points to a further issue: the lack of evaluation, in many cases, of specific preemptions and of the various forms of preemption. ***An*** exception was the ***Cable Communications Policy Act of 1984,*** which was reexamined within a few years of its inception. However, this reexamination was provoked largely by consumer complaints about increased cable TV rates. In most areas of preemption, citizens do not feel the positive or negative effects so directly; consequently, there may be little or no public pressure to evaluate the impacts of federal preemption on state and local governments. Once the federal government preempts a state or local power and assumes regulatory authority itself, then evaluation, to the extent it is conducted, is likely to focus on the adequacy of federal regulation rather than on alternatives to the preemption, such as restoring power to state or local governments or providing for more cooperative federal-state regulation. Also, given that many preemptions do not require appropriations, they are likely to be left in force without evaluation.

The lack of evaluation raises the question of whether "sunset" rules should be applied to some or all preemption statutes. Subsequent developments can complicate the implementation of preemption statutes or produce unintended consequences. For example, when the Congress ceased funding for the Office of Noise Abatement and Control (ONAC) in the Environmental Protection Agency (EPA) in 1981, it did not repeal the *Noise Control Act,* which preempts state and local governments from adopting standards that differ from those adopted by ONAC. However, the defunding of ONAC essentially froze the federal noise-emission and labeling standards that had been promulgated as of 1981. Neither EPA nor state and local governments have been in a position to reexamine the existing preemptive standards and to amend or update possibly outdated standards in order to take advantage of scientific and technological developments that might render implementation of the Congress's preemption intention more effective and efficient.

Finally, the unprecedented increase in federal statutory preemption of state and local powers since the late 1960s raises questions about the adequacy of our understanding and appreciation of the constitutional balance of power in the federal system, particularly in light of the supremacy clause. The supremacy clause does not make the federal government "supreme" in all matters of public policy, nor does it make the U.S. government dominant in our federal system. The clause simply means that the limited powers delegated to the U.S. government by the people may be exercised by the federal government without interference from or dependence upon the states. The point is to make sure that the U.S. government is not swallowed up by the states.

Obviously, if states could enact laws overriding any federal law, we would not have much of a nation, if at all. "The government of the Union, though limited in its powers, is supreme within its sphere of action," wrote Chief Justice John Marshall in 1819.[22] At the same time, if the U.S. government could override any state law, we would not have a federal system of government; instead, we would have a unitary system.

The supremacy clause, therefore, is a balance-of-power provision in the Constitution, not a provision that makes the federal government supreme or sovereign. The supremacy clause must be read in light of other provisions of the Constitution, especially the republican guarantee clause and the Tenth Amendment. The former clause provides that: "The United States shall guarantee to every State in this Union a republican form of government." The Tenth Amendment reiterates that the powers not delegated to the U.S. government "by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Indeed, one of the reasons for adding the Tenth Amendment to the Constitution was to drive home the point that the federal government is not supreme, pure and simple, and that it cannot swallow up the states. The supremacy clause is a grant of limited supremacy bounded by the delegations of power made by the people of the states through the U.S. Constitution. With respect to all other powers not delegated to the U.S. government or denied the states, each state's constitution is the supreme law of the land within the state. Thus, we have two "supreme" laws in the United States: the U.S. Constitution and each state constitution.[23]

In the 1780s, of course, the framers of the Constitution were mainly concerned about guaranteeing the supremacy of the U.S. Constitution and U.S laws against the powerful centrifugal forces of state constitutional and statutory law. The framers succeeded in ensuring this co-supremacy of the U.S. government. Subsequent generations managed to maintain the co-supremacy of the state and national governments for approximately 175 years. In fact, considering the tremendous growth of the United States as well as the enormous changes and events, including a civil war and two world wars, that occurred in our society from 1789 to the mid-1960s, it is perhaps surprising that our nation prospered and became the preeminent world power with relatively little federal statutory preemption of state and local authority.

Just where to draw lines between federal and state powers in a changing world will always be subject to debate, and such debate is healthy for a federal system of democratic governance. However, the rapidly advancing line of preemption, which has darted forward almost unnoticed and with little public debate, clearly needs to be monitored and evaluated by state and local governments together with their representatives in the Congress.[24]

Notes

[1] Melinda Warren and James Lis, "Regulatory Standstill Analysis of the 1993 Federal Budget," Occasional Paper No. 105 (St. Louis: Washington University, Center for the Study of American Business, June 1992), p. 1.

[2] U.S. Constitution, Art. 1, Sec. 8, Cl. 3.

[3] 469 U.S. 528 (1985).

[4] 485 U.S. 505 (1988).

[5] See also John C. Pittenger, "*Garcia* and the Political Safeguards of Federalism: Is There a Better Solution to the Conundrum of the Tenth Amendment?" *Publius: The Journal of Federalism* 22 (Winter 1992): 1-19.

[6] U.S. Advisory Commission on Intergovernmental Relations, ***Fiscal Discipline in the Federal System: National Reform and the Experience of the States*** (Washington, DC, 1987).

[7] See also U.S. Advisory Commission on Intergovernmental Relations, ***Regulatory Federalism: Policy, Process, Impact and Reform*** (Washington, DC, 1984).

[8] Gerald H. Goldberg, "Federal Preemption of State Tax Policy," ***National Tax Journal*** 44 (September 1991): 293-296.

[9] Richard C. Hicks, "Environmental Legislation and the Costs of Compliance," ***Government Finance Review*** 8 (April 1992): 7.

[10] Wisconsin Public Intervener v. Mortier, 111 S.Ct. 2476 (1991).

[11] The Federal-State Pesticide Regulation Partnership Act (1991).

[12] Nicholas F. Brady, "Remarks to the Press: Financial Services Reform," *Treasury News* (February 5, 1991): 3.

[13] Andreas van Agt, "Trading with the New Europe," ***State Government News*** 34 (December 1991): 20.

[14] Theo A. J. Toonen, "Europe of the Administrations: The Challenges of '92 (and Beyond)," ***Public Administration Review*** 52 (March/April 1992): 108-115.

[15] Robert H. Bork, ***Federalism and Federal Regulation: The Case of Product Labeling,*** Critical Legal Issues: Working Paper Series No. 46 (Washington, DC: Washington Legal Foundation, July 1991).

[16] See also Timothy Conlan, "Intergovernmental Mandates and Preemption in an Era of Deregulation," *Publius: The Journal of Federalism* 21 (Summer 1991): 43-57.

[17] U.S. Advisory Commission on Intergovernmental Relations, *Changing Public Attitudes on Govertinients and Tares 1992* (Washington, DC, 1992).

[18] See also John Kincaid, "From Cooperative to Coercive Federalism," *Annals* of *the American Academy of Political and Social Science* 509 (May 1990): 139-152.

[19] Kenneth Starr et al., *The Law of Preemption, A Report of the Appellate Judges Conference* (Chicago: American Bar Association, 1991), p. 15.

[20] Ibid., p. 55.

[21] Gregory v. Ashcroft, 111 St. Ct. 630 (1991).

[22] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

[23] See also U.S. *Advisory* Commission on Intergovernmental Relations, *State Constitutions in the Federal System: Selected Issues and Opportunities for State Initiatives* (Washington, DC, 1989) and *State Constitutional Law Cases and Materials* (Washington, DC, 1990).

[24] See also Academy for State and Local Government, *Preemption: Drawing the Line* (Washington, DC, October 1986).

Following is a list of statutes enacted by the federal government that preempt state and local government authority. Listed as well are statutes that provide preemption relief.

In addition to the statutes cited here, all amendments thereto and recodifications thereof would be preemptive, although they are not listed. Only those amendments to an act that produce a substantive expansion of a preexisting preemption are listed separately. For example, amendments to the ***Age Discrimination in Employment Act*** that removed the previous maximum age limit for protection, 70 years, are included.

Preemption relief statutes do not include repeals of preemptive measures or provisions, but only those instances when Congress enacted specific legislation reducing the preemptive impact of previous legislation or clarifying its intent regarding preemption.

Some of the statutes listed have been repealed or declared unconstitutional. Our research did not attempt to identify those developments.

Before 1900

Purpose[1]	Statute
C	Patent Act of 1790, 1 Stat. 109.
C	Copyright Act of 1790, 1 Stat. 124.
C	An Act to Regulate the Collection of Duties on Imports and Tonnage of 1799 (priority of sureties), Section 65, 1 Stat. 627.
C	Bankruptcy Act of 1800, 2 Stat. 19.
C	An Act Relating to Passenger Ships and Vessels (1819), 3 Stat. 488.
C	Bankruptcy Act of 1841, 5 Stat. 440.
R	Coolie Trade Prohibition Act of 1862, 12 Stat. 340.
T	An Act to Provide a National Currency (National Bank Act of 1864), 13 Stat. 99.
R	Civil Rights Act of 1866, 14 Stat. 27.
C	Commercial Communication Act of 1866, 14 Stat. 66.
C	An Act Relating to Pilots and Pilot Regulation (1866), 14 Stat. 93.
C	Bankruptcy Act of 1867, 14 Stat. 517.
R	Peonage Abolition Act of 1867, 14 Stat. 546.
T	An Act in Relation to Tax Shares in National Banks (1868), 15 Stat. 34.
R/T	Civil Rights Act of 1870, 16 Stat. 140.
R	Civil Rights Act Amendments of 1871, 16 Stat. 433.
H	Act of February 28,1871 (Dangerous Cargo Act), 16 Stat. 440.
R	Ku Klux Klan Act of 1871, 17 Stat. 13.
NR	Livestock Transportation Act of 1873, 17 Stat. 584.
R	Civil Rights Act of 1875, 18 Stat. 336.
C	Animal Industry Act of 1884, 23 Stat. 31.
C	The Act to Regulate Commerce of 1887 (Interstate Commerce Act of 1887), 24 Stat. 379.
C	The Act of July 2, 1890 (Sherman Antitrust Act), 26 Stat. 209.
H	Cattle Inspection Act of 1891, 26 Stat. 1089.
C	Limited Liability Act of 1893, 27 Stat. 445.
H	Safety Appliance Act of 1893, 27 Stat. 531.
C	An Act to Establish a Uniform System of Bankruptcy of 1898, 30 Stat. 544.
C	River and Harbor Act of 1899, 30 Stat. 1151. [Appropriation for Rivers and Harbors, Sections 9-20, 30 Stat. 11211
H	Refuse Act of 1899, 30 Stat. 1152. [Appropriation for Rivers and Harbors, Section 13, 30 Stat. 1121]

1900-1909

Purpose	Statute
NR	Endangered Species Act of 1900 (Lacey Act), 31 Stat. 187.
C	An Act to Establish a National Bureau of Standards (1901), 31 Stat. 1449.
C	Dairy and Food Products Labeling Act of 1902, 32 Stat. 632.
H	Cattle Contagious Diseases Act of 1903, 32 Stat. 791.
C	An Act to Further Regulate Commerce with Foreign Nations, and Among the States of 1903 (Elkins Act), 32 Stat. 847.
H	Safety Appliance Act of 1903, 32 Stat. 943.
H	Cattle Contagious Diseases Act of 1905, 33 Stat. 1264.
C	Federal Employer's Liability Act of 1906, 34 Stat. 232
C	Interstate Commerce Act Amendments of 1906, 34 Stat. 584.
NR	Live Stock Transportation Act of 1906 (Cruelty to Animals Act, 28 Hour Law, or Food and Rest Law), 34 Stat. 607.
H	Food and Drug Act of 1906 (Pure Food Act), 34 Stat. 768.
H	Federal Meat Inspection Act of 1907, 34 Stat. 1260. [Department of Agriculture Appropriations Act of 1938, 34 Stat. 1256]
C	Hours of Service on Railroads Act of 1907 (Esch Act), 34 Stat. 1415.
C	Federal Employer's Liability Act Amendments of 1908, 35 Stat. 65.

1910-1919

Purpose	Statute
H	Safety Appliance Act of 1910, 36 Stat. 298.
H	The Insecticide Act of 1910, 36 Stat. 331.
C	Commerce Court Act of 1910, 36 Stat. 539.
H	Boiler Inspection Act of 1911, 36 Stat. 913.
C	Standard Barrel Act of 1912 (apple barrels), 37 Stat. 250.
C	An Act to Regulate the Importation of Nursery Stock (Nursery Stock or Plant Quarantine Act of 1912), 37 Stat. 317.
C	Valuation Act of 1913, 37 Stat. 701.
B	Federal Reserve Act of 1913, 38 Stat. 251.

[1] The purposes of the statutes are as follow
B = Banking and Finance
C = Commerce, Energy, Labor, and Transportation
H = Health, Safety, and Environmental Protection
NR = Natural Resources, Animal Welfare, Fish and Wildlife Conservation
O = Other
R = Civil Rights
T = Taxation

C	The Act of September 26, 1914 (Federal Trade Commission Act), 38 Stat. 717.
C	The Act of October 15, 1914 (Clayton Antitrust Act), 38 Stat. 730.
C	Standard Barrel Act of 1915 (fruits, vegetables), 8 Stat. 1186.
O	National Defense Act of 1916, 39 Stat. 166.
C	U.S. Cotton Futures Act of 1916, 39 Stat. 476. [Department of Agriculture Appropriations Act of 1917, Part A, 39 Stat. 446]
C	U.S. Grain Standards Act of 1916, 39 Stat. 482. [Department of Agriculture Appropriations Act of 1917, Part B, 39 Stat. 446]
C	Standard Barrel Act of 1916 (lime barrels), 39 Stat. 530.
C	Pomerene Bill of Lading Act of 1916, 39 Stat. 538.
C	Standard Baskets Act of 1916, 39 Stat. 673.
C	An Act to Prevent Interstate Commerce in the Products of Child Labor of 1916, 39 Stat. 675.
C	An Act to Establish an Eight-Hour Day for Employees of Carriers Engaged in Interstate and Foreign Commerce (Adamson Act of 1916), 39 Stat. 721.
C	Standard Time Act of 1918 (Calder Act), 40 Stat. 450.
C	An Act to Promote Export Trade, and for Other Purposes of 1918 (Webb Pomerene Act), 40 Stat. 516.
NR	Migratory Bird Treaty Act of 1918, 40 Stat. 755.

1920-1929

Purpose	Statute
C	Transportation Act of 1920, 41 Stat. 456. [Includes the Interstate Commerce Act of 1920, Title IV, 41 Stat. 474]
B	Ship Mortgage Act of 1920, 41 Stat. 1000. [Merchant Marine Act of 1920, Section 30, 41 Stat. 988]
C	Federal Water Power Act of 1920, 41 Stat. 1063.
H	41 Stat. 1444. (transportation of explosives)
C	Packers and Stockyards Act of 1921, 42 Stat. 159.
C	Agricultural Producers Association Act of 1922, 42 Stat. 388.
C	Grain Futures Act of 1922, 42 Stat. 998.
H	Filled Milk Act of 1923, 42 Stat. 1486.
C	U.S. Cotton Standards Act of 1923, 42 Stat. 1517.
C	United States Arbitration Act of 1925, 43 Stat. 883.
C	Railway Labor Act of 1926, 44 Stat. 577.
B	Banking Act of 1927, 44 Stat. 1224.
H	Federal Caustic Poison Act of 1927, 44 Stat. 1406.
C	Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424.
C	45 Stat. 685. (standard measures)
C	Agricultural Marketing Act of 1929, 46 Stat. 11.
C	Perishable Agricultural Commodities Act of 1930, 46 Stat. 531.

1930-1939

Purpose	Statute
B/T	Federal Home Loan Bank Act of 1932, 47 Stat. 725.
C	Bankruptcy Act of 1933, 47 Stat. 1467.
B	48 Stat. 1. [Includes Bank Conservation Act of 1933, Title 11, 48 Stat. 2]
C	Agricultural Adjustment Act of 1933, 48 Stat. 31.
B/T	Home Owners' Loan Act of 1933, 48 Stat. 128.
B	Banking Act of 1933, 48 Stat. 162.
C	National Industrial Recovery Act of 1933, 48 Stat. 195.
C	Emergency Railroad Transportation Act of 1933, 48 Stat. 211.
C	Bankruptcy Act of 1934, 48 Stat. 798.
B	Securities Exchange Act of 1934, 48 Stat. 881.
C	Communications Act of 1934, 48 Stat. 1064.
C	Producers of Aquatic Products Antitrust Act (1934), 48 Stat. 1213.
C	National Firearms Act of 1934, 48 Stat. 1236.
B	National Housing Act of 1934, 48 Stat. 1246.
B	Farm Credit Act of 1935, 49 Stat. 313.
C	National Labor Relations Act of 1935, 49 Stat. 449.
C	Motor Carrier Act of 1935, 49 Stat. 543.
C	Tobacco Inspection Act of 1935, 49 Stat. 731.
C	Public Utility Holding Company Act of 1935, 49 Stat. 803. [Public Utility Act of 1935, Title I, 49 Stat. 803]
C	Antitrust Act Amendments of 1936 (Robinson-Patman Antidiscrimination Act), 49 Stat. 1526.
H	Regulation of Steam Vessels Act (1936), 49 Stat. 1889.
C	Agricultural Marketing Agreement Act of 1937, 50 Stat. 246.
C	Federal Trade Commission Act Amendments of 1938, 52 Stat. 111.
C	Natural Gas Act of 1938, 52 Stat. 821.
C	Bankruptcy Act Amendments of 1938 (Chandler Act), 52 Stat. 840.
C	Civil Aeronautics Act of 1938, 52 Stat. 973.
H	Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040.
C	Fair Labor Standards Act of 1938, 52 Stat. 1060.
B	Securities Exchange Act Amendments of 1938, 52 Stat. 1070.
C	Federal Firearms Act of 1938, 52 Stat. 1250.
C	Trust Indenture Act of 1939, 53 Stat. 1149.

1940-1949

Purpose	Statute
NR	Bald Eagle Protection Act of 1940, 54 Stat. 250.
O	Alien Registration Act of 1940 (Smith Act), 54 Stat. 670.
B	54 Stat. 789 [Includes Title I, Investment Company Act of 1940, 54 Stat. 789 and Title 11, Investment Advisers Act of 1940, 54 Stat. 847]
C	Transportation Act of 1940, 54 Stat. 898.
H	Dangerous Cargo Act of 1940, 54 Stat. 1023.
C	Wool Products Labeling Act of 1939, 54 Stat. 1128.
C	Emergency Price Control Act of 1942, 56 Stat. 23.
C	Second War Powers Act of 1942, 56 Stat. 176.
H	Public Health Service Act of 1944, 58 Stat. 682.
C	Trademark Act of 1946 (Lanham Act), 60 Stat. 427.
C	Atomic Energy Act of 1946, 60 Stat. 755.
C	Portal-to-Portal Act of 1947, 61 Stat. 84. (employer's obligations)
C	Labor-Management Relations Act of 1947 (Taft-Hartley Act), 61 Stat. 136.
H	Federal Insecticide, Fungicide, and Rodenticide Act of 1947, 61 Stat. 163.
NR	Sockeye Salmon Fishery Act of 1947, 61 Stat. 511.
C	An Act to Amend the interstate Commerce Act with Respect to Certain Agreements between Carriers of 1948 (Interstate Commerce Act of 1948), 62 Stat. 472.

1950-1959

Purpose	Statute
NR	Whaling Convention Act of 1949, 64 Stat. 421.
B/C	Defense Production Act of 1950, 64 Stat. 798.
B	Federal Deposit Insurance Act Amendments of 1950, 64 Stat. 873.
NR	Northwest Atlantic Fisheries Act of 1950, 64 Stat. 1067.
C	Fur Products Labeling Act of 1951, 65 Stat. 175.

C Communications Act Amendments of 1952, 66 Stat. 711.
H Flammable Fabrics Act of 1953, 67 Stat. 111.
C Outer Continental Shelf Lands Act of 1953, 67 Stat. 462
H Pesticide Chemical Residue Act of 1954 (the Miller amendment), 68 Stat. 511.
NR North Pacific Fisheries Act of 1954, 68 Stat. 698.
O Communist Control Act of 1954, 68 Stat. 775.
C Atomic Energy Act of 1954, 68 Stat. 919.
H An Act to Regulate Certain Devices on Household Refrigerators (1956), 70 Stat. 953.
C Federal Plant Pest Act of 1957, 71 Stat. 31.
H Poultry Products Inspection Act of 1957, 71 Stat. 441.
O Atomic Energy Damages Act of 1957 (Price-Anderson Act), 71 Stat. 576. (liability)
R Civil Rights Act of 1957, 71 Stat. 634.
C Automobile Information Disclosure Act of 1958, 72 Stat. 325.
C/H Federal Aviation Act of 1958, 72 Stat. 731.
H Food Additives Amendment of 1958, 72 Stat. 1784.
C Textile Fiber Products Identification Act of 1958, 72 Stat. 1717.
C Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519.
T Public Law 86-272 (1959), 73 Stat. 555.
B/T Federal Credit Union Act of 1959, 73 Stat. 628.

1960-1969

Purpose Statute

R Civil Rights Act of 1960, 74 Stat. 86.
C Great Lakes Pilotage Act of 1960, 74 Stat. 259.
H Federal Hazardous Substances Labeling Act of 1960 (subsequently retitled the Federal Hazardous Substances Act), 74 Stat. 372.
H Color Additive Amendments Act of 1960, 74 Stat. 397.
C Communications Act Amendments of 1960, 74 Stat. 889.
H An Act to Provide that Hydraulic Brake Fluid Sold or Shipped in Commerce for Use in Motor Vehicles Meet Certain Specifications (1962), 76 Stat. 437.
H Drug Amendments of 1962, 76 Stat. 780.
R Equal Pay Act of 1963, 77 Stat. 56.
H An Act to Provide that Seat Belts Sold or Shipped in Commerce for Use in Motor Vehicles Shall Meet Certain Safety Standards (1963), 77 Stat. 361.
R Civil Rights Act of 1964, 78 Stat. 241.
C Farm Labor Contractor Registration Act of 1963, 78 Stat. 920.
H Drug Abuse Control Amendments of 1965, 79 Stat. 226.
H Federal Cigarette Labeling and Advertising Act of 1965, 79 Stat. 282.
R Voting Rights Act of 1965, 79 Stat. 437.
H Water Quality Act of 1965, 79 Stat. 903.
H Motor Vehicle Air Pollution Control Act of 1965, 79 Stat. 992. [Public Law 89-272, Title I, 79 Stat. 992]
C Food and Agriculture Act of 1965, 79 Stat. 1187.
C Uniform Time Act of 1966, 80 Stat. 107.
NR Public Law 89-544 (1966), 80 Stat. 350. (animal welfare)
H National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718.
H Federal Metal and Nonmetallic Mine Safety Act of 1966, 80 Stat. 772.
B Banking Interest Rates Act (1966), 80 Stat. 823.
NR Fur Seal Act of 1966, 80 Stat. 1091.
C Fair Packaging and Labeling Act of 1966, 80 Stat. 1296.
H Child Protection Act of 1966, 80 Stat. 1303.
H Air Quality Act of 1967 (Clean Air Act), 81 Stat. 485.
H Clinical Laboratories Improvement Act of 1967, 81 Stat. 536. [Partnership for Health Amendments of 1967, Section 5, 81 Stat. 533]
H Flammable Fabrics Act of 1967, 81 Stat. 568.
H Wholesome Meat Act of 1967, 81 Stat. 584.
R Age Discrimination in Employment Act of 1967, 81 Stat. 602.
B Public Law 90-203 (1967), 81 Stat. 608. (lotteries)
R Fair Housing Act of 1968, 82 Stat. 81. [Civil Rights Act of 1968, Title VIII, 82 Stat. 73]
R Civil Obedience Act of 1968, 82 Stat. 90. [Civil Rights Act of 1968, Title X, 82 Stat. 73]
C Agricultural Fair Practices Act of 1968, 82 Stat. 93.
B Consumer Credit Protection Act of 1968 (Truth in Lending Act), 82 Stat. 146.
B Bank Protection Act of 1968, 82 Stat. 294.
H Animal Drug Amendments Act of 1968, 82 Stat. 342.
H Federal Aviation Act Amendments of 1968, 82 Stat. 395. (relates to aircraft noise)
C Interstate Land Sales Full Disclosure Act of 1968, 82 Stat. 590. [Housing and Urban Development Act of 1968, Title XIV, 82 Stat. 476]
H Natural Gas Pipeline Safety Act of 1968, 82 Stat. 720.
C United States Grain Standards Act of 1968, 82 Stat. 761.
H Wholesome Poultry Products Act of 1968, 82 Stat. 791.
NR Wild and Scenic Rivers Act of 1968, 82 Stat. 906.
H Radiation Control for Health and Safety Act of 1968, 82 Stat. 1173.
H Gun Control Act of 1968, 82 Stat. 1213.
B Credit Control Act of 1969, 83 Stat. 376. [Public Law 91-151, Title 11, 83 Stat. 371]
H Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742. [Includes the Black Lung Benefits Act of 1972, Title IV, 83 Stat. 792]

1970-1979

Purpose Statute

H Public Health Cigarette Smoking Act of 1969, 84 Stat. 87.
H Water Quality Improvement Act of 1970, 84 Stat. 91. [Public Law 91-224, Title I, 84 Stat. 91]
R Voting Rights Act Amendments of 1970, 84 Stat. 314.
C Newspaper Preservation Act of 1970, 84 Stat. 466.
H Organized Crime Control Act of 1970, Title XI, 84 Stat. 922. (explosives)
H Federal Railroad Safety Act of 1970, 84 Stat. 971. [Federal Railroad Safety and Hazardous Materials Control Act of 1970, Title 11, 84 Stat. 971]
B Public Law 91-508, 84 Stat. 1114 [Includes Bank Secrecy Act of 1970, Titles 1-11, 84 Stat. 1114; Credit Card Act of 1970, Title V, 84 Stat. 1126; and Fair Credit Reporting Act of 1970, Title VI, 84 Stat. 1128]
O Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236. (forfeiture)
C Rail Passenger Service Act of 1970, Section 306, 84 Stat. 1327.
NR Horse Protection Act of 1970, 84 Stat. 1404.
T Public Law 91-569 (1970), 84 Stat. 1499. (employees income tax withholding)
C Plant Variety Protection Act of 1970, 84 Stat. 1542.
NR Animal Welfare Act of 1970, 84 Stat. 1560.
H Occupational Safety and Health Act of 1970, 84 Stat. 1590.
H Egg Products Inspection Act of 1970, 84 Stat. 1620.

B Securities Investor Protection Act of 1970, 84 Stat. 1636.
H Poison Prevention Packaging Act of 1970, 84 Stat. 1670.
H Clean Air Amendments of 1970, 84 Stat. 1676.
B Bank Holding Company Act Amendments of 1970, 84 Stat. 1760.
H Federal Boat Safety Act of 1971, 85 Stat. 213.
B/T Farm Credit Act of 1971, 85 Stat. 583.
O Federal Election Campaign Act of 1971, 86 Stat. 3.
R Equal Employment Opportunity Act of 1972, 86 Stat. 103.
C Ports and Waterways Safety Act of 1972, 86 Stat. 424.
H Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816.
C Motor Vehicle Information and Cost Savings Act of 1972, 86 Stat. 947.
H Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973.
NR Marine Mammal Protection Act of 1972, 86 Stat. 1027.
NR Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1052.
H Consumer Product Safety Act of 1972, 86 Stat. 1207.
H Noise Control Act of 1972, 86 Stat. 1234.
C Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251.
T Airport Development Acceleration Act of 1973, 87 Stat. 88. (prohibits passenger facility charges)
T State Taxation of Depositories Act of 1973, 87 Stat. 347. [Public Law 93-100, Sec. 7, 87 Stat. 342]
O Trans-Alaska Pipeline Authorization Act of 1973, 87 Stat. 584. [Public Law 93-153, Title 11, 87 Stat. 576] (preempts liability laws)
C Health Maintenance Organization Act of 1973, Section 1311, 87 Stat. 914.
H Lead-Based Paint Poisoning Prevention Act Amendments of 1973, 87 Stat. 565.
C Emergency Petroleum Allocation Act of 1973, 87 Stat. 627.
NR Endangered Species Act of 1973, 87 Stat. 884.
C Fair Labor Standards Amendments of 1974, 88 Stat 55.
R Age Discrimination in Employment Act Amendments of 1974, 88 Stat. 74. [Fair Labor Standards Amendments of 1974, Section 28, 88 Stat. 55]
R Equal Educational Opportunities Act of 1974, 88 Stat. 514. [Education Amendments of 1974, Title 11, 88 Stat. 484.1
H National Mobile Home Construction and Safety Standards Act of 1974 (National Manufactured Housing Construction and Safety Standards Act of 1974), 88 Stat. 700. [Housing and Community Development Act of 1974, Title VI, 88 Stat. 633]
C Employee Retirement Income Security Act of 1974, 88 Stat. 829.
O Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263.
H Motor Vehicle and Schoolbus Safety Amendments of 1974, 88 Stat. 1470.
B Fair Credit Billing Act of 1974, 88 Stat. 1511. [Public Law 93-495, Title III, 88 Stat. 1500]
R Equal Credit Opportunity Act of 1974, 88 Stat. 1521. [Public Law 93-495, Title V, 88 Stat. 1500]
C Veterans' Reemployment Rights Act Amendments of 1974, 88 Stat. 1594. [Vietnam Era Veterans' Readjustment Assistance Act of 1974, Section 404, 88 Stat. 1578]
H Safe Drinking Water Act of 1974, 88 Stat. 1660.
C Real Estate Settlement Procedures Act of 1974, 88 Stat. 1724.
C Deepwater Port Act of 1974, 88 Stat. 2126.
C Federal Noxious Weed Act of 1974.88 Stat. 2148.
H Transportation Safety Act of 1974, 88 Stat. 2156. [Includes the Hazardous Materials Transportation Act of 1974, Title I, 88 Stat. 2156]
C Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, 88 Stat. 2183.
H National Health Planning and Resources Development Act of 1974, 88 Stat. 2225.
NR Atlantic Tunas Convention Act of 1975, 89 Stat. 385.
R Voting Rights Act of 1965—Amendments (1975), 89 Stat. 400.
C Consumer Goods Pricing Act of 1975, 89 Stat. 801.
C Energy Policy and Conservation Act of 1975, 89 Stat. 871.
B Home Mortgage Disclosure Act of 1975, 89 Stat. 1125. [Public Law 94-200, Part 111, 89 Stat. 1124]
C Real Estate Settlement Procedures Act Amendments of 1975, 89 Stat. 1157.
B/C/T Railroad Revitalization and Regulatory Reform Act of 1976 (4 R Act), 90 Stat. 31.
R Equal Credit Opportunity Act Amendments of 1976, 90 Stat. 251.
B Consumer Leasing Act of 1976, 90 Stat. 257.
NR Fishery Conservation and Management Act of 1976 (subsequently retitled Magnuson Fishery Conservation and Management Act of 1976), 90 Stat. 331.
NR Animal Welfare Act Amendments of 1976, 90 Stat. 417.
H Consumer Product Safety Commission Improvements Act of 1976, 90 Stat. 503.
H Medical Device Amendments of 1976, 90 Stat. 539.
B Veterans Housing Amendments Act of 1976, 90 Stat. 720. (usury)
C Federal Railroad Safety Authorization Act of 1976, 90 Stat. 817.
C Packers and Stockyards Act Amendments (1976), 90 Stat. 1249.
T Tax Reform Act of 1976, Section 2121, 90 Stat. 1520.
H Toxic Substances Control Act of 1976, 90 Stat. 2003.
H Resource Conservation and Recovery Act of 1976, 90 Stat. 2795.
C United States Grain Standards Act of 1976, 90 Stat. 2867.
H Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445.
H Clean Air Act Amendments of 1977, 91 Stat. 685.
B Fair Debt Collection Practices Act (1977), 91 Stat. 874.
NR Marine Protection, Research, and Sanctuaries Act Amendments of 1977, 91 Stat. 1255.
H Federal Mine Safety and Health Act of 1977, 91 Stat. 1290.
R Age Discrimination in Employment Act Amendments of 1978, 92 Stat. 189.
C Petroleum Marketing Practices Act of 1978, 92 Stat. 322.
c / o Outer Continental Shelf Lands Act Amendments of 1978, 92 Stat. 629. (liability limits and information disclosure)
H Federal Pesticide Act of 1978, 92 Stat. 819.
H Port and Tanker Safety Act of 1978, 92 Stat. 1471.
C Airline Deregulation Act of 1978, 92 Stat. 1705.
C Interstate Horseracing Act of 1978, 92 Stat. 1811.
R Pregnancy Discrimination Act of 1978, 92 Stat. 2076.
H Federal Railroad Safety Authorization Act of 1978, 92 Stat. 2459.
H Uranium Mill Tailings Radiation Control Act of 1978, 92 Stat. 3021.
H Quiet Communities Act of 1978, 92 Stat. 3079.
C Public Utility Regulatory Policies Act of 1978, 92 Stat. 3117.
B/C National Energy Conservation Policy Act of 1978, 92 Stat. 3206.

C Powerplant and Industrial Fuel Use Act of 1978, 92 Stat. 3289.
C Natural Gas Policy Act of 1978, 92 Stat. 3350.
B/R Financial Institutions Regulatory and Interest Rate Control Act of 1978, 92 Stat. 3641. [Includes the Depository Institution Management Interlocks Act of 1978, Title II, 92 Stat. 3672; Right *to* Financial Privacy Act of 1978, Title XI, 92 Stat. 3697; and Electronic Fund Transfer Act of 1978, Title XX, 92 Stat. 3728]
C Emergency Energy Conservation Act of 1979, 93 Stat. 749.
B Business and Agricultural Loans-Interest Limitations Act (1979), 93 Stat. 789.
H Pipeline Safety Act of 1979, 93 Stat. 989.
B Housing and Community Development Amendments of 1979, 93 Stat. 1101.
B Automatic Transfer Accounts Act of 1979, 93 Stat. 1234.

1980-1989

Purpose **Statute**

T Aviation Safety and Noise Abatement **Act** of 1979 (enacted in 1980), 94 Stat. 50.
B Depository Institutions Deregulation and Monetary Control Act of 1980, 94 Stat. 132. [Includes the Depository Institutions Deregulation Act of 1980, Title 11, 94 Stat. 142]
C Energy Security Act of 1980, 94 Stat. 611.
H Nuclear Regulatory Commission Reauthorization Act of 1980, 94 Stat. 780.
C/T Motor Carrier Act of 1980, 94 Stat. 793.
C Soft Drink Interbrand Competition Act of 1980, 94 Stat. 939.
C Ocean Thermal Energy Conversion Act of 1980, 94 Stat. 974.
H Infant Formula Act of 1980, 94 Stat. 1190.
O Maritime Torts, Statute of Limitations (1980), 94 Stat. 1525.
C Condominium and Cooperative Conversion Protection and Abuse Relief Act of 1980, 94 Stat. 1672. [Housing and Community Development Act of 1980, Title VI, 94 Stat. 16141
C Staggers Rail Act of 1980, 94 Stat. 1895.
C Household Goods Transportation Act of 1980, 94 Stat. 2011.
H Used Oil Recycling Act of 1980, 94 Stat. 2055.
H Swine Health Protection Act of 1980, 94 Stat. 2229.
NR Alaska National Interest Lands Conservation Act of 1980, 94 Stat. 2371.
H Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 94 Stat. 2767.
B Cash Discount Act of 1981, 95 Stat. 144.
C/T Northeast Rail Service Act of 1981, 95 Stat. 643. [Omnibus Budget Reconciliation Act of 1981, Title XI(E), 95 Stat. 357]
C Product Liability Risk Retention Act of 1981, 95 Stat. 949.
O Veteran's Health Care, Training, and Small Business Loan Act of 1981, 95 Stat. 1047. (recovery for cost of care)
NR Lacey Act Amendments of 1981, 95 Stat. 1073.
R Voting Rights Act Amendments of 1982, 96 Stat. 131.
O Peer Review Improvement Act of 1982, 96 Stat. 381. [Tax Equity and Fiscal Responsibility Act of 1982, Title I(C), 96 Stat. 324] (liability)
T Airport and Airway Improvement Act of 1982, 96 Stat. 671. [Tax Equity and Fiscal Responsibility Act of 1982, Title V, 96 Stat. 324]
C Lanham Trademark Act Amendment (1982), 96 Stat. 1316.
C Bus Regulatory Reform Act of 1982, 96 Stat. 1102.
B Garn-St. Germain Depository Institutions Act of 1982 96 Stat. 1469.
H Nuclear Waste Policy Act of 1982, 96 Stat. 2201.
C Migrant and Seasonal Agricultural Worker Protection **Act,** 96 Stat. 2583.
O Social Security Amendments of 1983, Section 339, 97 Stat. 65. (release of information on prisoners)
C Commercial Fishing Industry Vessel Act of 1984, 98 Stat. 445. [Public Law 98-364, Title IV, 98 Stat. 440]
C Retirement Equity Act of 1984, 98 Stat. 1426.
B/C Housing and Urban-Rural Recovery Act of 1983, 97 Stat. 1155. [Supplemental Appropriations Act of 1984, Title IV, 97 Stat. 1153]
C Drug Price Competition and Patent Term Restoration Act of 1984, Title III, 98 Stat. 1585. (textile and wool products labeling)
C Longshore and Harbor Workers' Compensation Act Amendments of 1984, 98 Stat. 1639.
B Secondary Mortgage Market Enhancement Act of 1984, 98 Stat. 1689.
NR Eastern Pacific Tuna Licensing Act of 1984, 98 Stat. 1715.
O National Cooperative Research Act of 1984, 98 Stat. 1815. (liability limitations and attorney's fees)
C Motor Vehicle Theft Law Enforcement Act of 1984, 98 Stat. 2754.
C Cable Communications Policy Act of 1984, 98 Stat. 2779.
H Motor Carrier Safety Act of 1984, 98 Stat. 2832 [Public Law 98-554, Title II, 98 Stat. 28291
C Commercial Space Launch Act of 1984, 98 Stat. 3055.
NR Atlantic Striped Bass Conservation Act of 1984, 98 Stat. 3187.
H Hazardous and Solid Waste Amendments of 1984, 98 Stat. 3221.
C Semiconductor Chip Protection Act of 1984, 98 Stat. 3347. [Public Law 98-620, Title 111, 98 Stat. 3335]
NR Pacific Salmon Treaty Act of 1985, 99 Stat. 7.
C Food Security Act of 1985, Section 1324, 99 Stat. 1354. (clear title)
H Low-Level Radioactive Waste Policy Amendments Act of 1985, 99 Stat. 1842.
H Comprehensive Smokeless Tobacco Health Education Act of 1986, 100 Stat. 30.
B Consolidated Omnibus Budget Reconciliation Act of 1985, Section 18008, 100 Stat. 82. (debentures)
B Student Financial Assistance Amendments of 1985, 100 Stat. 339. [Consolidated Omnibus Budget Reconciliation Act of 1985, Title XVI, 100 Stat. 82] (statute of limitations on student loan collections)
C Firearms Owners' Protection Act of 1986, 100 Stat. 449.
H Safe Drinking Water Act Amendments of 1986, 100 Stat. 642.
C Daylight Savings Time Extension Act of 1986, 100 Stat. 764.
R Air Carriers Access Act of 1986, 100 Stat. 1080. (handicapped access)
B/C/H Superfund Amendments and Reauthorization Act of 1986, 100 Stat. 1613. [Includes the Emergency Planning and Community-Right-to Know **Act** of 1986, Title 111, 100 Stat. 1728]
O Electronic Communications Privacy Act of 1986, 100 Stat. 1848.
C Surface Freight Forwarder Deregulation Act of 1986, 100 Stat. 2993.

C	Risk Retention Amendments of 1986, 100 Stat. 3170.
H	Commercial Motor Vehicle Safety Act of 1986, 100 Stat. 3207-170. [Anti-Drug Abuse Act of 1986, Title XII, 100 Stat. 3207.]
R	Age Discrimination in Employment Amendments of 1986, 100 Stat. 3342.
C/R	Immigration Reform and Control Act of 1986, 100 Stat. 3359.
O	National Childhood Vaccine Injury Act of 1986, 100 Stat. 3755. [Public Law 99-660, Title 111, 100 Stat. 37431 (compensation for injuries)
O	Health Care Quality Improvement Act of 1986, 100 Stat. 3784. [Public Law 99-660, Title IV, 100 Stat. 37431 (liability limits)
H	Water Quality Act of 1987, 101 Stat. 7.
C	National Appliance Energy Conservation Act of 1987, 101 Stat. 103.
B	Expedited Funds Availability Act of 1987, 101 Stat. 635. [Competitive Equality Banking Act of 1987, Title VI, 101 Stat. 552]
C	Poultry Producers Financial Protection Act of 1987, 101 Stat. 917.
H	Marine Plastic Pollution Research and Control Act of 1987, 101 Stat. 1460. [United States-Japan Fisheries Agreement Approval Act of 1987, Title 11, 101 Stat. 14591
B	Agricultural Credit Act of 1987, 101 Stat. 1568.
O	Alaska Native Claims Settlement Act Amendments of 1987, 101 Stat. 1788.
H	Prescription Drug Marketing Act of 1987, 102 Stat. 95.
NR	Abandoned Shipwreck Act of 1987, 102 Stat. 432.
T	Veterans' Benefits and Services Act of 1988, Section 332, 102 Stat. 487.
H	Rail Safety Improvement Act of 1988, 102 Stat. 624.
R	Employee Polygraph Protection Act of 1988, 102 Stat. 646.
C	National Appliance Energy Conservation Amendments of 1988, 102 Stat. 671.
C	Worker Adjustment and Retraining Notification Act of 1988, 102 Stat. 890.
C/H	Commercial Fishing Industry Vessel Safety Act of 1988, 102 Stat. 1585.
R	Fair Housing Amendments Act of 1988, 102 Stat. 1619.
H	Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, 102 Stat. 2654.
H	Degradable Plastic Ring Carriers Act of 1988, 102 Stat. 2779.
H	Public Law 100-561, 102 Stat. 2805. [Includes Pipeline Safety Reauthorization Act of 1988, Title I, 102 Stat. 2805 and Hazardous Liquid Pipeline Safety Act Amendments of 1988, Title 11, 102 Stat. 2809]
H	Lead Contamination Control Act of 1988, 102 Stat. 2884.
H	Clinical Laboratory Improvement Amendments of 1988, 102 Stat. 2903.
B	Fair Credit and Charge Card Disclosure Act of 1988, 102 Stat. 2960.
H	Federal Energy Management Improvement Act of 1988, Section 4(g), 102 Stat. 3185. (relates to realistic looking toy guns)
C	Satellite Home Viewer Act of 1988, 102 Stat. 3949. [Public Law 100-667, Title 11, 102 Stat. 39351
H	Public Law 100-688, 102 Stat. 4139 [Includes Ocean Dumping Ban Act of 1988, Title I, 102 Stat. 4139; and United States Public Vessel Medical Waste Anti-Dumping Act of 1988, Title 111, 102 Stat. 4152]
H	Alcoholic Beverage Labeling Act of 1988, 102 Stat. 4517. [Anti-Drug Abuse Act of 1988, Title VIII, 102 Stat. 4181]
C	Truck and Bus Safety and Regulatory Reform Act of 1988, 102 Stat. 4527. [Anti-Drug Abuse Act of 1988, Title IX, Subtitle B, 102 Stat. 4181]
B	Home Equity Loan Consumer Protection Act of 1988, 102 Stat. 4725.
B	Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 103 Stat. 183.

1990-1991

Purpose	Statute
T	Thrift Savings Plan Technical Amendments Act of 1990, 104 Stat. 319. (taxation)
R	Americans with Disabilities Act (1990), 104 Stat. 327.
C	Television Decoder Circuitry Act of 1990, 104 Stat. %1.
C	Telephone Operator Consumer Services Improvement Act of 1990, 104 Stat. 986.
C	Sanitary Food Transportation Act of 1990, 104 Stat. 1213.
C	Omnibus Budget Reconciliation Act of 1990, Sec. 4353, 104 Stat. 1388. (medigap insurance)
T	Aviation Safety and Capacity Expansion Act of 1990, 104 Stat. 1388-353. [Omnibus Budget Reconciliation Act of 1990, Title IX(B), 104 Stat. 1388]
H	Airport Noise and Capacity Act of 1990, 104 Stat. 1388-378. [Omnibus Budget Reconciliation Act of 1990, Title IX(D), 104 Stat. 1388.1
H	Nutrition Labeling and Education Act of 1990, 104 Stat. 2353.
H	Clean Air Act Amendments of 1990, 104 Stat. 2399.
C	Fastener Quality Act (1990), 104 Stat. 2943.
H	Aviation Security Improvement Act of 1990, 104 Stat. 3066.
C	Consumer Product Safety Improvement Act of 1990, 104 Stat. 3110.
H	Hazardous Materials Transportation Uniform Safety Act of 1990, 104 Stat. 3244.
B	Low-Income Housing Preservation and Resident Homeownership Act of 1990, 104 Stat. 4249. [Cranston-Gonzalez National Affordable Housing Act, Title VI, 104 Stat. 4079]
C	Visual Artists Rights Act of 1990, 104 Stat. 5128. (Judicial Improvements Act of 1990, Title VI, 104 Stat. 5089]
O	Defense Production Act Extension and Amendments of 1991, 105 Stat. 487. (defense to breach of contract suits)
C	Omnibus Transportation Employee Testing Act of 1991, 105 Stat. 952. [Department of Transportation and Related Agencies Appropriations Act of 1992, Title V, 105 Stat. 917]
R	Civil Rights Act of 1991, 105 Stat. 1071.
C	Civil Space Employee Testing Act of 1991, 105 Stat. 1616 [National Aeronautics and Space Administration Authorization Act for Fiscal Year 1992, Section 21, 105 Stat. 1605]
H	National Highway Traffic Safety Administration Authorization Act of 1991, 105 Stat. 2081. [Intermodal Surface Transportation Efficiency Act of 1991, Title II(B), 105 Stat. 19141
C/T	Motor Carrier Act of 1991, 105 Stat. 2140. [Intermodal Surface Transportation Efficiency Act of 1991, Title IV, 105 Stat. 1914]
B	Federal Deposit Insurance Corporation Improvement Act of 1991, 105 Stat. 2236. [Includes Truth in Savings Act, Title II(F), 105 Stat. 2334]
C	Telephone Consumer Protection Act of 1991, 105 Stat. 2394.

Preemption Relief Statutes

Purpose	Statute
C	An Act for the Establishment and Support of Lighthouses, Beacons, Buoys, and Public Piers (1789), 1 Stat. 53. (regulation of pilots)
H	An Act Respecting Quarantine and Health Laws (1799), 1 Stat. 619.
C	Original Packages Act of 1890 *(Wilson Act),* 26 Stat. 313. (intoxicating beverages)
C	Oleomargarine Act of 1902, 32 Stat. 193.
C	Webb-Kenyon Act of 1913, 37 Stat. 699. (intoxicating beverages)
T	National Bank Tax Act (1923), 42 Stat. 1499.
C	Nursery Stock Quarantine Act of 1926 (Plant Quarantine Act Amendment of 1926), 44 Stat. 250.
C	Convict-Made Goods Act (1928), 45 Stat. 1084.
O	Judicial Code Amendments of 1934, 48 Stat. 775. (federal court jurisdiction over suits regarding orders of state administrative boards)
C	Liquor Law Repeal and Enforcement Act of 1935, 49 Stat. 872.
C	Antitrust Law Amendments of 1937, 50 Stat. 693. [District of Columbia Revenue Act of 1937, Title VIII, 50 Stat. 673] (minimum resale prices)
T	Tax Injunction Act of 1937, 50 Stat. 738. (federal court jurisdiction over suits regarding state taxes)
C	54 Stat. 686 (1940). (prize fight films)
C	Insurance Regulation Act of 1945 (McCarran-Ferguson Act), 59 Stat. 33.
C	Federal Trade Commission Act Amendment of 1952 (McGuire Act), 66 Stat. 631. (state fair trade laws)
NR	Submerged Lands Act of 1953, 67 Stat. 29.
C	Natural Gas Act Amendment of 1954, 68 Stat. 36.
C	Atomic Energy Act of 1959, 73 Stat. 688. (byproduct, source, and special nuclear materials)
B	Investment Advisors Act of 1940 Amendment, 74 Stat. 885.
C	Talmadge-Aiken Act of 1962, 76 Stat. 663. (enforcement authority delegated to states)
T	Public Law 91-156 (1969), 83 Stat. 434. (banks)
C	Uniform Time Act of 1966 Amendment (1972), 86 Stat. 116.
C	Motor Vehicle Information and Cost Savings Act Amendments of 1976, 90 Stat. 981. (gives state Attorney General power to sue)
C	Federal Aviation Act of 1958—Amendments, 91 Stat. 1278. (gives California and Florida carriers additional ticketing powers)
H	Safe Drinking Water Act Amendments of 1977, 91 Stat. 1393. (regulatory relief regarding underground injection control programs)
H	Federal Water Pollution Control Act (Clean Water Act of 1977), 91 Stat. 1566. (water allocation)
H	Solid Waste Disposal Act Amendments of 1980, 94 Stat. 2334. (allows states to set more stringent standards)
NR	Marine Mammal Protection Act Amendments of 1981, 95 Stat. 979. (allows delegation of responsibility to state)
C	Motor Vehicle Safety and Cost Savings Authorization Act of 1982, 96 Stat. 1619. (clarifies authority regarding state standards that are identical to federal ones)
O	Comprehensive Crime Control Act of 1984, 98 Stat. 1976. [Continuing Appropriations Act of 1985, Title 11, Section 2201, 98 Stat. 18371 (labor organization activities)
C	Local Government Antitrust Act of 1984, 98 Stat. 2750. (official conduct of local governments)
C	Fair Labor Standards Amendments of 1985, 99 Stat. 787. (compensation time for state and local government employees)
R	Age Discrimination in Employment Amendments of 1986, 100 Stat. 3342. (application to fire fighters and law enforcement officials)
T	Aviation Safety and Capacity Expansion Act of 1990, 104 Stat. 1388-353. [Omnibus Budget Reconciliation Act of 1990, Title IX(B), 104 Stat. 1388] (passenger facility charges)

Banking and Finance

Federal Reserve Act of 1913, 38 Stat. 251.

Ship Mortgage Act of 1920, 41 Stat. 1000. [Merchant Marine Act of 1920, Section 30, 41 Stat. 988]

Banking Act of 1927, **44** Stat. 1224.

Federal Home Loan Bank Act of 1932, 47 Stat. 725.

48 Stat. 1. [Includes Bank Conservation Act of 1933, Title 11, 48 Stat. 2]

Home Owners' Loan Act of 1933, 48 Stat. 128.

Banking Act of 1933, 48 Stat. 162.

Securities Exchange Act of 1934, 48 Stat. 881.

National Housing Act of 1934, 48 Stat. 1246.

Farm Credit Act of 1935, 49 Stat. 313.

Securities Exchange Act Amendments of 1938, 52 Stat. 1070.

54 Stat. 789 [Includes Investment Company Act of 1940, Title I, 54 Stat. 789; and Investment Advisers Act of 1940, Title 11, 54 Stat. 47]

Defense Production Act of 1950, 64 Stat. 798.

Federal Deposit Insurance Act Amendments of 1950, **64** Stat. 873.

Federal Credit Union Act of 1959, 73 Stat. 628.

Banking Interest Rates Act of 1966, 80 Stat. 823.

Public Law 90-203 (1967), 81 Stat. 608. (lotteries)

Consumer Credit Protection Act of 1968 (Truth in Lending Act), 82 Stat. 146.

Bank Protection Act of 1968, 82 Stat. 294.

Credit Control Act of 1969, 83 Stat. 376. [Public Law 91-151, Title II, 83 Stat. 371]

Public Law 91-508, 84 Stat. 1114 [Includes Bank Secrecy Act of 1970, Titles 1-11, 84 Stat. 1114; Credit Card Act of 1970, Title V, 84 Stat. 1126; and Fair Credit Reporting Act of 1970, Title VI, 84 Stat. 1128]

Securities Investor Protection Act of 1970, 84 Stat. 1636.

Bank Holding Company Act Amendments of 1970, 84 Stat. 1760.

Farm Credit Act of 1971, 85 Stat. 583.

Fair Credit Billing Act of 1974, 88 Stat. 1511. [Public Law 93-495, Title III, 88 Stat. 1500]

Home Mortgage Disclosure Act of 1975, 89 Stat. 1125. [Public Law 94-200, Part III, 89 Stat. 1124]

Railroad Revitalization and Regulatory Reform Act of 1976 (4 R Act), 90 Stat. 31.

Consumer Leasing Act of 1976, 90 Stat. 257.

Veterans Housing Amendments Act of 1976, 90 Stat. 720. (usury)

Fair Debt Collection Practices Act of 1977, 91 Stat. 874.

National Energy Conservation Policy Act of 1978, 92 Stat. 3206.

Financial Institutions Regulatory and Interest Rate Control Act of 1978, 92 Stat. 3641. [Includes the Depository Institution Management Interlocks Act of 1978, Title II, 92 Stat. 3672; Right to Financial Privacy Act of 1978, Title XI, 92 Stat. 3697; and Electronic Fund Transfer Act of 1978, Title XX, 92 Stat. 37281

Business and Agricultural Loans-Interest Limitations Act (1979), 93 Stat. 789.

Housing and Community Development Amendments of 1979, 93 Stat. 1101.

Automatic Transfer Accounts Act of 1979, 93 Stat. 1234.

Depository Institutions Deregulation and Monetary Control Act of 1980, 94 Stat. 132. [Includes the Depository Institutions Deregulation Act of 1980, Title II, 94 Stat. 142]

Cash Discount Act of 1981, 95 Stat. **144.**

Garn-St. Germain Depository Institutions ***Act*** of 1982, 96 Stat. 1469.

Housing and Urban-Rural Recovery Act of 1983, 97 Stat. 1155. [Supplemental Appropriations Act of 1984, Title IV, 97 Stat. 1153]

Secondary Mortgage Market Enhancement Act of 1984, 98 Stat. 1689.

Consolidated Omnibus Budget Reconciliation Act of 1985, Section 18008, 100 Stat. 82. (debentures)

Student Financial Assistance Amendments of 1985, 100 Stat. 339. [Consolidated Omnibus Budget Reconciliation Act of 1985, Title XVI, 100 Stat. 82] (statute of limitations on student loan collections)

Superfund Amendments and Reauthorization **Act** of 1986, 100 Stat. 1613. [Includes the Emergency Planning and Community Right-to-Know Act of 1986, Title 111, 100 Stat. 1728]

Expedited Funds Availability Act of 1987, 101 Stat. 635. [Competitive Equality Banking Act of 1987, Title VI, 101 Stat. 552]

Agricultural Credit Act of 1987, 101 Stat. 1568.

Fair Credit and Charge Card Disclosure Act of 1988, 102 Stat. 2960.

Home Equity Loan Consumer Protection Act of 1988, 102 Stat. 4725.

Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 103 Stat. 183.

Low-Income Housing Preservation and Resident Homeownership Act of 1990, 104 Stat. 4249. [Cranston-Gonzalez National Affordable Housing Act, Title VI, 104 Stat. 4079]

Federal Deposit Insurance Corporation Improvement Act of 1991, 105 Stat. 2236. [Includes Truth in Savings Act, Title II(F), 105 Stat. 2334]

Civil Rights

Coolie Trade Prohibition Act of 1862, 12 Stat. 340.
Civil Rights Act of 1866, 14 Stat. 27.
Peonage Abolition Act of 1867, 14 Stat. 546.
Civil Rights Act of 1870, 16 Stat. 140.
Civil Rights Act Amendments of 1871, 16 Stat. 433.
Ku Klux Klan Act of 1871, 17 Stat. 13.
Civil Rights Act of 1875, 18 Stat. 336.
Civil Rights Act of 1957, 71 Stat. 634.
Civil Rights Act of 1960, 74 Stat. 86.
Equal Pay Act of 1963, 77 Stat. 56.
Civil Rights Act of 1964, 78 Stat. 241
Voting Rights Act of 1965, 79 Stat. 437.
Age Discrimination in Employment Act of 1967, 81 Stat. 602.
Fair Housing Act of 1968, 82 Stat. 81. [Civil Rights Act of 1968, Title VIII, 82 Stat. 73]
Civil Obedience Act of 1968, 82 Stat. 90. [Civil Rights Act of 1968, Title X, 82 Stat. 73]
Voting Rights Act Amendments of 1970, 84 Stat. 314.
Equal Employment Opportunity Act of 1972, 86 Stat. 103.
Age Discrimination in Employment Act Amendments of 1974, 88 Stat. 74. [Fair Labor Standards Amendments of 1974, Section 28, 88 Stat. 55]
Equal Educational Opportunities Act of 1974, 88 Stat. 514. [Education Amendments of 1974, Title II, 88 Stat. 484.1
Equal Credit Opportunity Act of 1974, 88 Stat. 1521. [Public Law 93-495, Title V, 88 Stat. 1500]
Voting Rights Act of 1965—Amendments (1975), 89 Stat. 400.
Equal Credit Opportunity Act Amendments of 1976, 90 Stat. 251.
Age Discrimination in Employment Act Amendments of 1978, 92 Stat. 189.
Pregnancy Discrimination Act of 1978, 92 Stat. 2076.
Financial Institutions Regulatory and Interest Rate Control Act of 1978, 92 Stat. 3641. [Includes the Depository Institution Management Interlocks Act of 1978, Title II, 92 Stat. 3672; Right to Financial Privacy Act of 1978, Title XI, 92 Stat. 3697; and Electronic Fund Transfer Act of 1978, Title XX, 92 Stat. 3728]
Voting Rights Act Amendments of 1982, 96 Stat. 131.
Air Carriers Access Act of 1986, 100 Stat. 1080. (handicapped access)
Age Discrimination in Employment Amendments of 1986, 100 Stat. 3342.
Immigration Reform and Control Act of 1986, 100 Stat. 3359.
Employee Polygraph Protection Act of 1988, 102 Stat. 646.
Fair Housing Amendments Act of 1988, 102 Stat. 1619.
Americans with Disabilities Act (1990), 104 Stat. 327.
Civil Rights Act of 1991, 105 Stat. 1071.

Commerce, Energy, labor, and Transportation

Patent Act of 1790, 1 Stat. 109.
Copyright Act of 1790, 1 Stat. 124.
Bankruptcy Act of 1800, 2 Stat. 19. (repealed by Act of December 19, 1803, 2 Stat. 248)
An Act to Regulate the Collection of Duties on Imports and Tonnage of 1799 (priority of sureties), Section 65, 1 Stat. 627.
An Act Relating to Passenger Ships and Vessels (1819), 3 Stat. 488.
Bankruptcy Act of 1841, 5 Stat. 440.
Commercial Communication Act of 1866, 14 Stat. 66.
An Act Relating to Pilots and Pilot Regulation (1866), 14 Stat 93.
Bankruptcy Act of 1867, 14 Stat. 517.
Animal Industry Act of 1884, 23 Stat. 31.
The Act to Regulate Commerce of 1887 (Interstate Commerce Act of 1887), 24 Stat. 379.
The Act of July 2, 1890 (Sherman Antitrust Act), 26 Stat. 209.
Limited Liability Act of 1893, 27 Stat. 445.
An Act to Establish a Uniform System of Bankruptcy of 1898, 30 Stat. 544.
River and Harbor Act of 1899, 30 Stat. 1151. [Appropriation for Rivers and Harbors, Sections 9-20, 30 Stat. 1121.1
An Act to Establish a National Bureau of Standards (1901), 31 Stat. 1449.
Dairy and Food Products Labeling Act of 1902, 32 Stat. 632.
An Act to Further Regulate Commerce with Foreign Nations, and Among the States of 1903 (Elkins Act), 32 Stat. 847.
Federal Employer's Liability Act of 1906, 34 Stat. 232.
Interstate Commerce Act Amendments of 1906, 34 Stat. 584.
Hours of Service on Railroads Act of 1907 (Esch Act), 34 Stat. 1415.
Federal Employer's Liability Act Amendments of 1908, 35 Stat. 65.
Commerce Court Act of 1910, 36 Stat. 539.
Standard Barrel Act of 1912 (apple barrels), 37 Stat. 250.
An Act to Regulate the Importation of Nursery Stock (Nursery Stock or Plant Quarantine Act of 1912), 37 Stat. 317.
Valuation Act of 1913, 37 Stat. 701.
The Act of September 26, 1914 (Federal Trade Commission Act), 38 Stat. 717.
The Act of October 15, 1914 (Clayton Antitrust Act), 38 Stat. 730.
Standard Barrel Act of 1915 (fruits, vegetables), 38 Stat. 1186.
U.S. Cotton Futures Act of 1916, 39 Stat. 476. [Department of Agriculture Appropriations Act of 1917, Part A, 39 Stat. 446]
U.S. Grain Standards Act of 1916, 39 Stat. 482. [Department of Agriculture Appropriations Act of 1917, Part B, 39 Stat 446]
Standard Barrel Act of 1916 (lime barrels), 39 Stat. 530.
Pomerene Bill of Lading Act of 1916, 39 Stat. 538.
Standard Baskets Act of 1916, 39 Stat. 673.
An Act to Prevent Interstate Commerce in the Products of Child Labor of 1916, 39 Stat. 675.
An Act to Establish an Eight-Hour Day for Employees of Carriers Engaged in Interstate and Foreign Commerce (Adamson Act of 1916), 39 Stat. 721.
Standard Time Act of 1918 (Calder Act), 40 Stat. 450.
An Act to Promote Export Trade, and for Other Purposes of 1918 (Webb-Pomerene Act), 40 Stat. 516.
Transportation Act of 1920, 41 Stat. 456. [Includes the Interstate Commerce Act of 1920, Title IV, 41 Stat. 474]
Federal Water Power Act of 1920, 41 Stat. 1063.
Packers and Stockyards Act of 1921, 42 Stat. 159.
Agricultural Producers Association Act of 1922, 42 Stat. 388.
Grain Futures Act of 1922, 42 Stat. 998.
U.S. Cotton Standards Act of 1923, 42 Stat. 1517.
United States Arbitration Act of 1925, 43 Stat. 883.
Railway Labor Act of 1926, 44 Stat. 577.
Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424.
45 Stat. 685. (standard measures)
Agricultural Marketing Act of 1929, 46 Stat. 11.

Perishable Agricultural Commodities Act of 1930, 46 Stat. 531.
Bankruptcy Act of 1933, 47 Stat. 1467.
Agricultural Adjustment Act of 1933, 48 Stat. 31.
National Industrial Recovery Act of 1933, 48 Stat. 195.
Emergency Railroad Transportation Act of 1933, 48 Stat. **211.**
Bankruptcy Act of 1934, 48 Stat. 798.
Communications Act of 1934, 48 Stat. 1064.
Producers of Aquatic Products Antitrust *Act* (1934), 48 Stat. 1213.
National Firearms Act of 1934, 48 Stat. 1236.
Tobacco Inspection Act of 1935, 49 Stat. 731.
National Labor Relations Act of 1935, 49 Stat. 449.
Motor Carrier Act of 1935, 49 Stat. 543.
Public Utility Holding Company Act of 1935, 49 Stat. 803. [Public Utility Act of 1935, Title I, 49 Stat. 803]
Antitrust Act Amendments of 1936 (Robinson-Patman Antidiscrimination Act), 49 Stat. 1526.
Agricultural Marketing Agreement Act of 1937, 50 Stat. 246.
Federal Trade Commission Act Amendments of 1938, 52 Stat. 111.
Natural Gas Act of 1938, 52 Stat. 821.
Bankruptcy Act Amendments of 1938 (Chandler Act), 52 Stat. 840.
Civil Aeronautics Act of 1938, 52 Stat. 973.
Fair Labor Standards Act of 1938, 52 Stat. 1060.
Federal Firearms Act of 1938, 52 Stat. 1250
Trust Indenture Act of 1939, 53 Stat. 1149.
Transportation Act of 1940, 54 Stat. 898.
Wool Products Labeling Act of 1939, 54 Stat. 1128.
Emergency Price Control Act of 1942, 56 Stat. 23.
Second War Powers Act of 1942, 56 Stat. 176.
Trademark Act of 1946 (Lanham Act), 60 Stat. 427.
Atomic Energy Act of 1946, 60 Stat. 755.
Portal-to-Portal Act of 1947, 61 Stat. 84. (employer's obligations)
Labor-Management Relations Act of 1947 (Taft Hartley Act), 61 Stat. 136.
An Act to Amend the Interstate Commerce Act with Respect to Certain Agreements between Carriers of 1948 (Interstate Commerce Act of 1948), 62 Stat. 472.
Defense Production Act of 1950, 64 Stat. 798.
Fur Products Labeling Act of 1951, 65 Stat. 175.
Communications Act Amendments of 1952, 66 Stat. 711.
Outer Continental Shelf Lands Act of 1953, 67 Stat. 462.
Atomic Energy Act of 1954, 68 Stat. 919.
Federal Plant Pest Act of 1957, 71 Stat. 31.
Automobile Information Disclosure Act of 1958, 72 Stat. 325.
Federal Aviation Act of 1958, 72 Stat. 731.
Textile Fiber Products Identification Act of 1958, 72 Stat. 1717.
Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519.
Great Lakes Pilotage Act of 1960, 74 Stat. 259.
Communications Act Amendments of 1960, 74 Stat. 889.
Farm Labor Contractor Registration Act of 1963, 78 Stat. 920.
Food and Agriculture Act of 1965, 79 Stat. 1187.
Uniform Time Act of 1966, 80 Stat. 107.
Fair Packaging and Labeling Act of 1966, 80 Stat. 1296.
Agricultural Fair Practices Act of 1968, 82 Stat. 93.
Interstate Land Sales Full Disclosure Act of 1968, 82 Stat. 590. [Housing and Urban Development Act of 1968, Title XIV, 82 Stat. 476]
United States Grain Standards Act of 1968, 82 Stat. 761.
Newspaper Preservation Act of 1970, 84 Stat. 466.
Rail Passenger Service Act of 1970, Section 306, 84 **Stat,** *1327.*
Plant Variety Protection Act of 1970, 84 Stat. 1542.
Ports and Watenvays Safety Act of 1972, 86 Stat. 424.
Motor Vehicle Information and Cost Savings Act of 1972, 86 Stat. 947.
Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251.
Emergency Petroleum Allocation Act of 1973, 87 Stat. 627.
Health Maintenance Organization Act of 1973, Section 1311, 87 Stat. 914.
Fair Labor Standards Amendments of 1974, 88 Stat. 55.
Employee Retirement Income Security *Act* of 1974, 88 Stat. 829.
Veterans' Reemployment Rights Act Amendments of 1974, 88 Stat. 1594. [Vietnam Era Veterans' Readjustment Assistance Act of 1974, Section 404, 88 Stat. 1578]
Real Estate Settlement Procedures Act of 1974, 88 Stat. 1724.
Deepwater Port Act of 1974, 88 Stat. 2126.
Federal Noxious Weed Act of 1974, 88 Stat. 2148.
Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, 88 Stat. 2183.
Consumer Goods Pricing Act of 1975, 89 Stat. 801.
Energy Policy and Conservation Act of 1975, 89 Stat. 871.
Real Estate Settlement Procedures Act Amendments of 1975, 89 Stat. 1157.
Railroad Revitalization and Regulatory Reform Act of 1976 (4 R Act), 90 Stat. 31.
Federal Railroad Safety Authorization Act of 1976, 90 Stat. 817.
Packers and Stockyards Act Amendments of 1976, 90 Stat. 1249.
United States Grain Standards Act of 1976, 90 Stat. 2867.
Petroleum Marketing Practices Act of 1978, 92 Stat. 322.
Outer Continental Shelf Lands Act Amendments of 1978, 92 Stat. 629. (liability limits and information disclosure)
Airline Deregulation Act of 1978, 92 Stat. 1705.
Interstate Horseracing Act of 1978, 92 Stat. 1811.
Public Utility Regulatory Policies Act of 1978, 92 Stat. 3117.
National Energy Conservation Policy Act of 1978, *92* Stat. 3206.
Powerplant and Industrial Fuel Use Act of 1978, 92 Stat. 3289.
Natural **Gas** Policy Act of 1978, 92 Stat. 3350.
Emergency Energy Conservation Act of 1979, 93 Stat. 749.
Energy Security Act of 1980, 94 Stat. 611.
Motor Carrier Act of 1980, 94 Stat. 793.
Soft Drink Interbrand Competition Act of 1980, 94 Stat. 939.
Ocean Thermal Energy Conversion Act of 1980, 94 Stat. 974.
Condominium and Cooperative Conversion Protection and Abuse Relief Act of 1980, 94 Stat. 1672. [Housing and Community Development Act of 1980, Title VI, 94 Stat. 1614]
Staggers Rail Act of 1980, 94 Stat. 1895.
Household Goods Transportation Act of 1980, 94 Stat. 2011.
Northeast Rail Service Act of 1981, 95 Stat. 643. [Omnibus Budget Reconciliation Act of 1981, Title XI(E), 95 Stat. 357]
Product Liability Risk Retention Act of 1981, 95 Stat. 949.
Bus Regulatory Reform Act of 1982, 96 Stat. 1102.
Lanham Trademark Act Amendment of 1982, 96 Stat. 1316.
Migrant and Seasonal Agricultural Worker Protection Act, 96 Stat. 2583.

Housing and Urban-Rural Recovery Act of 1983, 97 Stat. 1155. [Supplemental Appropriations Act of 1984, Title IV, 97 Stat. 1153]

Commercial Fishing Industry Vessel Act of 1984, 98 Stat. 445. [Public Law 98-364, Title IV, 98 Stat. 440]

Retirement Equity Act of 1984, 98 Stat. 1426.

Drug Price Competition and Patent Term Restoration Act of 1984, Title 111, 98 Stat. 1585. (textile and wool products labeling)

Longshore and Harbor Workers' Compensation Act Amendments of 1984, 98 Stat. 1639.

Motor Vehicle Theft Law Enforcement Act of 1984, 98 Stat. 2754.

Cable Communications Policy Act of 1984, 98 Stat. 2779.

Commercial Space Launch Act of 1984, 98 Stat. 3055.

Semiconductor Chip Protection Act of 1984, 98 Stat. 3347. [Public Law 98-620, Title 111, 98 Stat. 3335]

Food Security Act of 1985, Section 1324, 99 Stat. 1354. (clear title)

Firearms Owners' Protection Act of 1986, 100 Stat. 449.

Daylight Savings Time Extension Act of 1986, 100 Stat. 764.

Superfund Amendments and Reauthorization Act of 1986, 100 Stat. 1613. [Includes the Emergency Planning and Community Right-to-Know Act of 1986, Title 111, 100 Stat. 1728]

Surface Freight Forwarder Deregulation Act of 1986, 100 Stat. 2993.

Risk Retention Amendments of 1986, 100 Stat. 3170.

Immigration Reform and Control Act of 1986, 100 Stat. 3359.

National Appliance Energy Conservation Act of 1987, 101 Stat. 103.

Poultry Producers Financial Protection Act of 1987, 101 Stat. 917.

National Appliance Energy Conservation Amendments of 1988, 102 Stat. 671.

Worker Adjustment and Retraining Notification Act of 1988, 102 Stat. 890.

Commercial Fishing Industry Vessel Safety Act of 1988, 102 Stat. 1585.

Satellite Home Viewer Act of 1988, 102 Stat. 3949. [Public Law 100-667, Title II, 102 Stat. 3935]

Truck and Bus Safety and Regulatory Reform Act of 1988, 102 Stat. 4527. [Anti-Drug Abuse Act of 1988, Title IX, Subtitle B, 102 Stat. 4181]

Television Decoder Circuitry Act of 1990, 104 Stat. 961.

Telephone Operator Consumer Services Improvement Act of 1990, 104 Stat. 986.

Sanitary Food Transportation Act of 1990, 104 Stat. 1213.

Omnibus Budget Reconciliation Act of 1990, Sec. 4353, 104 Stat. 1388. (medigap insurance)

Fastener Quality Act of 1990, 104 Stat. 2943.

Consumer Product Safety Improvement Act of 1990, 104 Stat. 3110.

Visual Artists Rights Act of 1990, 104 Stat. 5128. [Judicial Improvements Act of 1990, Title VI, 104 Stat. 5089]

Omnibus Transportation Employee Testing Act of 1991, 105 Stat. 952. [Department of Transportation and Related Agencies Appropriations Act of 1992, Title V, 105 Stat. 917]

Civil Space Employee Testing Act of 1991, 105 Stat. 1616 [National Aeronautics and Space Administration Authorization Act for Fiscal Year 1992, Section 21, 105 Stat. 1605]

Motor Carrier Act of 1991, 105 Stat. 2140. [Intermodal Surface ransportation Efficiency Act of 1991, Title IV, 105 Stat. 1914]

Telephone Consumer Protection Act of 1991, 105 Stat. 2394.

Health, Safety, and Environmental Protection

Act of February 28, 1871 (Dangerous Cargo Act), 16 Stat. 440.

Cattle Inspection Act of 1891, 26 Stat. 1089.

Safety Appliance Act of 1893, 27 Stat. 531.

Refuse Act of 1899, 30 Stat. 1152. [Appropriation for Rivers and Harbors, Section 13, 30 Stat. 11211

Safety Appliance Act of 1903, 32 Stat. 943.

Food and Drug Act of 1906 (Pure Food Act), 34 Stat. 768.

Cattle Contagious Diseases Act of 1903, 32 Stat. 791.

Cattle Contagious Diseases Act of 1905, 33 Stat. 1264.

Federal Meat Inspection Act of 1907, 34 Stat. 1260. [Department of Agriculture Appropriations Act of 1938, 34 Stat. 1256]

Safety Appliance Act of 1910, 36 Stat. 298.

The Insecticide Act of 1910, 36 Stat. 331.

Boiler Inspection Act of 1911, 36 Stat. 913.

41 Stat. 1444. (transportation of explosives)

Filled Milk Act of 1923, 42 Stat. 1486.

Federal Caustic Poison Act of 1927, 44 Stat. 1406.

Regulation of Steam Vessels Act (1936), 49 Stat. 1889.

Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040.

Dangerous Cargo Act of 1940, 54 Stat. 1023.

Public Health Service Act of 1944, 58 Stat. 682.

Federal Insecticide, Fungicide, and Rodenticide Act of 1947, 61 Stat. 163.

Flammable Fabrics Act of 1953, 67 Stat. 111.

Pesticide Chemical Residue Act of 1954 (the Miller amendment), 68 Stat. 511.

An Act to Regulate Certain Devices on Household Refrigerators (1956), 70 Star. 953.

Poultry Products Inspection Act of 1957, 71 Stat. 441.

Federal Aviation Act of 1958, 72 Stat. 731.

Food Additives Amendment of 1958, 72 Stat. 1784.

Federal Hazardous Substances Labeling Act of 1960 (subsequently retitled the Federal Hazardous Substances Act), 74 Stat. 372.

Color Additive Amendments Act of 1960, 74 Stat. 397.

An Act to Provide that Hydraulic Brake Fluid Sold or Shipped in Commerce for Use in Motor Vehicles Meet Certain Specifications (1962), 76 Stat. 437.

Drug Amendments of 1962, 76 Stat. 780.

An Act to Provide that Seat Belts Sold or Shipped in Commerce for Use in Motor Vehicles Shall Meet Certain Safety Standards (1963), 77 Stat. 361.

Drug Abuse Control Amendments of 1965, 79 Stat. 226.

Federal Cigarette Labeling and Advertising Act of 1965, 79 Stat. 282.

Water Quality Act of 1965, 79 Stat. 903.

Motor Vehicle Air Pollution Control Act of 1965, 79 Stat. 992. [Public Law 89-272, Title I, 79 Stat. 992]

National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718.

Federal Metal and Nonmetallic Mine Safety Act of 1966, 80 Stat. 772.

Child Protection Act of 1966, 80 Stat. 1303.

Air Quality Act of 1967 (Clean Air Act), 81 Stat. 485.

Clinical Laboratories Improvement Act of 1967, 81 Stat. 536. [Partnership for Health Amendments of 1967, Section 5, 81 Stat. 533]

Flammable Fabrics Act of 1967, 81 Stat. 568.

Wholesome Meat Act of 1967, 81 Stat. 584.

Animal Drug Amendments Act of 1968, 82 Stat. 342.

Federal Aviation Act Amendments of 1968, 82 Stat. 395. (relates to aircraft noise)

Natural Gas Pipeline Safety Act of 1968, 82 Stat. 720.

Wholesome Poultry Products Act of 1968, 82 Stat. 791.

Radiation Control for Health and Safety Act of 1968, 82 Stat. 1173.

Gun Control Act of 1968, 82 Stat. 1213.

Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742. [Includes the Black Lung Benefits Act of 1972, Title IV, 83 Stat. 792]

Public Health Cigarette Smoking Act of 1969, 84 Stat. 87.

Water Quality Improvement Act of 1970, 84 Stat. 91. [Public Law 91-224, Title I, 84 Stat. 91]

Organized Crime Control Act of 1970, Title XI, 84 Stat. 922. (explosives)

Federal Railroad Safety Act of 1970, 84 Stat. 971. [Federal Railroad Safety and Hazardous Materials Control Act of 1970, Title II, 84 Stat. 971]

Occupational Safety and Health Act of 1970, 84 Stat. 1590.

Egg Products Inspection Act of 1970, 84 Stat. 1620.

Poison Prevention Packaging Act of 1970, 84 Stat. 1670.

Clean Air Amendments of 1970, 84 Stat. 1676.

Federal Boat Safety Act of 1971, 85 Stat. 213.

Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 8161.

Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973.

Consumer Product Safety Act of 1972, 86 Stat. 1207.

Noise Control Act of 1972, 86 Stat. 1234.

Lead-Based Paint Poisoning Prevention Act Amendments of 1973, 87 Stat. 565.

National Mobile Home Construction and Safety Standards Act of 1974 (National Manufactured Housing Construction and Safety Standards Act of 1974), 88 Stat. 700. [Housing and Community Development Act of 1974, Title VI, 88 Stat. 633]

Motor Vehicle and Schoolbus Safety Amendments of 1974, 88 Stat. 1470.

Safe Drinking Water Act of 1974, 88 Stat. 1660.

Transportation Safety Act of 1974, 88 Stat. 2156. [Includes the Hazardous Materials Transportation Act of 1974, Title I, 88 Stat. 2156]

National Health Planning and Resources Development Act of 1974, 88 Stat. 2225.

Consumer Product Safety Commission Improvements Act of 1976, 90 Stat. 503.

Medical Device Amendments of 1976, 90 Stat. 539.

Toxic Substances Control Act of 1976, 90 Stat. 2003.

Resource Conservation and Recovery Act of 1976, 90 Stat. 27951.

Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445.

Clean Air Act Amendments of 1977, 91 Stat. 685.

Federal Mine Safety and Health Act of 1977, 91 Stat. 1290.

Federal Pesticide Act of 1978, 92 Stat. 819.

Port and Tanker Safety Act of 1978, 92 Stat. 1471.

Federal Railroad Safety Authorization Act of 1978, 92 Stat. 2459.

Uranium Mill Tailings Radiation Control Act of 1978, 92 Stat. 3021.

Quiet Communities Act of 1978, 92 Stat. 3079.

Pipeline Safety Act of 1979, 93 Stat. 989.

Nuclear Regulatory Commission Reauthorization Act of 1980, 94 Stat. 780.

Infant Formula Act of 1980, 94 Stat. 1190.

Used Oil Recycling Act of 1980, 94 Stat. 2055.

Swine Health Protection Act of 1980, 94 Stat. 2229.

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 94 Stat. 2767.

Nuclear Waste Policy Act of 1982, 96 Stat. 2201.

Motor Carrier Safety Act of 1984, 98 Stat. 2832. [Public Law 98-554, Title 11, 98 Stat. 2829]

Hazardous and Solid Waste Amendments of 1984, 98 Stat. 3221.

Low-Level Radioactive Waste Policy Amendments Act of 1985, 99 Stat. 1842.

Comprehensive Smokeless Tobacco Health Education Act of 1986, 100 Stat. 30.

Safe Drinking Water Act Amendments of 1986, 100 Stat. 642.

Superfund Amendments and Reauthorization Act of 1986, 100 Stat. 1613. [Includes the Emergency Planning and Community Right-@Know Act of 1986, Title III, 100 Stat. 1728]

Commercial Motor Vehicle Safety Act of 1986, 100 Stat. 3207-170. [Anti-Drug Abuse Act of 1986, Title XII, 100 Stat. 3207]

Water Quality Act of 1987, 101 Stat. 7.

Marine Plastic Pollution Research and Control Act of 1987, 101 Stat. 1460. [United States-Japan Fisheries Agreement Approval Act of 1987, Title 11, 101 Stat. 1459]

Prescription Drug Marketing Act of 1987, 102 Stat. 95.

Rail Safety Improvement Act of 1988, 102 Stat. 624.

Commercial Fishing Industry Vessel Safety Act of 1988, 102 Stat. 1585.

Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, 102 Stat. 2654.

Degradable Plastic Ring Carriers Act of 1988, 102 Stat. 2779.

Public Law 100-561, 102 Stat. 2805. [Includes Pipeline Safety Reauthorization Act of 1988, Title I, 102 Stat. 2805 and Hazardous Liquid Pipeline Safety Act Amendments of 1988, Title 11, 102 Stat. 2809]

Lead Contamination Control Act of 1988, 102 Stat. 2884.

Clinical Laboratory Improvement Amendments of 1988, 102 Stat. 2903.

Federal Energy Management Improvement Act of 1988, Section 4(g), 102 Stat. 3185. (realistic looking toy guns)

Public Law 100-688, 102 Stat. 4139 [Includes Ocean Dumping Ban Act of 1988, Title I, 102 Stat. 4139; and United States Public Vessel Medical Waste Anti-Dumping Act of 1988, Title 111, 102 Stat. 4152]

Alcoholic Beverage Labeling Act of 1988, 102 Stat. 4517. [Anti-Drug Abuse Act of 1988, Title VIII, 102 Stat. 4181]

Airport Noise and Capacity Act of 1990, 104 Stat. 1388-378. [Omnibus Budget Reconciliation Act of 1990, Title IX(D), 104 Stat. 1388]

Nutrition Labeling and Education Act of 1990, 104 Stat. 2353.

Clean Air Act Amendments of 1990, 104 Stat. 2399.

Aviation Security Improvement Act of 1990, 104 Stat. 3066.

Hazardous Materials Transportation Uniform Safety Act of 1990, 104 Stat. 3244.

National Highway Traffic Safety Administration Authorization Act of 1991, 105 Stat. 2081. [Intermodal Surface Transportation Efficiency Act of 1991, Title II(B), 105 Stat. 1914]

Natural Resources, Animal Welfare, Fish and Wildlife Conservation

Livestock Transportation Act of 1873, 17 Stat. 584.

Endangered Species Act of 1900 (Lacey Act), 31 Stat. 187.

Live Stock Transportation Act of 1906 (Cruelty to Animals Act, 28 Hour Law, or Food and Rest Law), 34 Stat. 607.

Migratory Bird Treaty Act of 1918, 40 Stat. 755.

Bald Eagle Protection Act of 1940, 54 Stat. 250.

Sockeye Salmon Fishery Act of 1947, 61 Stat. 511.

Whaling Convention Act of 1949, 64 Stat. 421.

Northwest Atlantic Fisheries Act of 1950, 64 Stat. 1067.

North Pacific Fisheries Act of 1954, 68 Stat. 698.

Wild and Scenic Rivers Act of 1968, 82 Stat. 906.

Public Law 89-544 (1966), 80 Stat. 350. (animal welfare)

Fur Seal Act of 1966, 80 Stat. 1091.

Horse Protection Act of 1970, 84 Stat. 1404.

Animal Welfare Act of 1970, 84 Stat. 1560.

Marine Mammal Protection Act of 1972, 86 Stat. 1027.

Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1052.

Endangered Species Act of 1973, 87 Stat. 884.

Atlantic Tunas Convention Act of 1975, 89 Stat. 385.

Fishery Conservation and Management Act of 1976 (subsequently retitled Magnuson Fishery Conservation and Management Act of 1976), 90 Stat. 331.

Animal Welfare Act Amendments of 1976, 90 Stat. 417.

Marine Protection, Research, and Sanctuaries Act Amendments of 1977, 91 Stat. 1255.

Alaska National Interest Lands Conservation Act of 1980, 94 Stat. 2371.

Lacey Act Amendments of 1981, 95 Stat. 1073.

Eastern Pacific Tuna Licensing Act of 1984, 98 Stat. 1715.

Atlantic Striped Bass Conservation Act of 1984, 98 Stat. 3187.

Pacific Salmon Treaty Act of 1985, 99 Stat. 7.

Abandoned Shipwreck Act of 1987, 102 Stat. 432.

Other

National Defense Act of 1916, 39 Stat. 166.

Alien Registration Act of 1940 (Smith Act), 54 Stat. 670.

Communist Control Act of 1954, 68 Stat. 775.

Atomic Energy Damages Act of 1957 (Price-Anderson Act), 71 Stat. 576. (liability)

Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236. (forfeiture)

Federal Election Campaign Act of 1971, 86 Stat. 3.

Trans-Alaska Pipeline Authorization Act of 1973, 87 Stat. 584. [Public Law 93-153, Title 11, 87 Stat. 576] (preempts liability laws)

Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263.

Outer Continental Shelf Lands Act Amendments of 1978, 92 Stat. 629. (liability limits and information disclosure)

Maritime Torts, Statute of Limitations (1980), 94 Stat. 1525.

Veterans' Health Care, Training, and Small Business Loan Act of 1981, 95 Stat. 1047. (recovery for cost of care)

Peer Review Improvement Act of 1982, 96 Stat. 381. [Tax Equity and Fiscal Responsibility Act of 1982, Title I(C), 96 Stat. 324] (liability)

Social Security Amendments of 1983, Section 339, 97 Stat. 65. (release of information on prisoners)

National Cooperative Research Act of 1984, 98 Stat. 1815. (liability limitations and attorney's fees)

Electronic Communications Privacy Act of 1986, 100 Stat. 1848.

National Childhood Vaccine Injury Act of 1986, 100 Stat. 3755. [Public Law 99-660, Title III, 100 Stat. 37431 (compensation for injuries)

Health Care Quality Improvement Act of 1986, 100 Stat. 3784. [Public Law 99-660, Title IV, 100 Stat. 37431 (liability limits)

Alaska Native Claims Settlement Act Amendments of 1987, 101 Stat. 1788.

Defense Production Act Extension and Amendments of 1991, 105 Stat. 487. (defense to breach of contract suits)

Taxation

An Act to Provide a National Currency (National Bank Act of 1864), 13 Stat. 99.

An Act in Relation to Tax Shares in National Banks (1868), 15 Stat. 34.

Civil Rights Act of 1870, 16 Stat. 140.

Federal Home Loan Bank Act of 1932, 47 Stat. 725.

Home Owners' Loan Act of 1933, 48 Stat. 128.

Federal Credit Union Act of 1959, 73 Stat. 628.

Public Law 86-272 (1959), 73 Stat. 555.

Public Law 91-569 (1970), 84 Stat. 1499. (employees income tax withholding)

Farm Credit Act of 1971, 85 Stat. 583.

Airport Development Acceleration Act of 1973, 87 Stat. 88. (prohibits passenger facility charges)

State Taxation of Depositories Act of 1973, 87 Stat. 347. [Public Law 93-100, Sec. 7, 87 Stat. 342]

Railroad Revitalization and Regulatory Reform Act of 1976 (4 R Act), 90 Stat. 31.

Tax Reform Act of 1976, Section 2121, 90 Stat. 1520.

Aviation Safety and Noise Abatement Act of 1979, 94 Stat. 50. (enacted in 1980)

Motor Carrier Act of 1980, 94 Stat. 793.

Northeast Rail Service Act of 1981, 95 Stat. 643. [Omnibus Budget Reconciliation Act of 1981, Title XI(E), 95 Stat. 357]

Airport and Airway Improvement Act of 1982, 96 Stat. 671. [Tax Equity and Fiscal Responsibility Act of 1982, Title V, 96 Stat. 324]

Veterans' Benefits and Services Act of 1988, Section 332, 102 Stat. 487.

Thrift Savings Plan Technical Amendments Act of 1990, 104 Stat. 319. (taxation)

Aviation Safety and Capacity Expansion Act of 1990, 104 Stat. 1388-353. [Omnibus Budget Reconciliation Act of 1990, Title IX(B), 104 Stat. 13881

Motor Carrier Act of 1991, 105 Stat. 2140. [Intermodal Surface Transportation Efficiency Act of 1991, Title IV, 105 Stat. 1914]

PREEMPTION RELIEF STATUTES

Banking and Finance

Investment Advisors Act of 1940 Amendment (1960), 74 Stat. 885.

Civil Rights

Age Discrimination in Employment Amendments of 1986, 100 Stat. 3342. (application to fire fighters and law enforcement officials)

Commerce, Energy, Labor, and Transportation

An Act for the Establishment and Support of Lighthouses, Beacons, Buoys, and Public Piers (1789), 1 Stat. 53. (regulation of pilots)

Original Packages Act of 1890 (Wilson Act), 26 Stat. 313. (intoxicating beverages)

Oleomargarine Act of 1902, 32 Stat. 193.

Webb-Kenyon Act of 1913, 37 Stat. 699. (intoxicating beverages)

Nursery Stock Quarantine Act of 1926 (Plant Quarantine Act Amendment of 1926), 44 Stat. 250.

Convict-Made Goods Act of 1928, 45 Stat. 1084.

Liquor Law Repeal and Enforcement Act of 1935, 49 Stat. 872.

Antitrust Law Amendments of 1937, 50 Stat. 693. [District of Columbia Revenue Act of 1937, Title VIII, 50 Stat. 673] (minimum resale prices)

54 Stat. 686 (1940). (prize fight films)

Insurance Regulation Act of 1945 (McCarran-Ferguson Act), 59 Stat. 33.

Federal Trade Commission Act Amendment of 1952 (McGuire Act), 66 Stat. 631. (state fair trade laws)

Natural Gas Act Amendment of 1954, 68 Stat. 36.

Atomic Energy Act of 1959, 73 Stat. 688. (byproduct, source, and special nuclear materials)

Talmadge-Aiken Act of 1962, 76 Stat. 663. (enforcement authority delegated to states)

Uniform Time Act of 1966 Amendment (1972), 86 Stat. 116.

Motor Vehicle Information and Cost Savings Act Amendments of 1976, 90 Stat. 981. (gives state Attorney General power to sue)

Federal Aviation Act of 1958—Amendments, 91 Stat. 1278. (gives California and Florida carriers additional ticketing powers)

Motor Vehicle Safety and Cost Savings Authorization Act of 1982, 96 Stat. 1619. (clarifies authority regarding state standards that are identical to federal ones)

Local Government Antitrust Act of 1984, 98 Stat. 2750. (official conduct of local governments)

Fair Labor Standards Amendments of 1985, 99 Stat. 787. (compensation time for state and local government employees)

Health, Safety, and Environmental Protection

An Act Respecting Quarantine and Health Laws (1789), 1 Stat. 619.

Safe Drinking Water Act Amendments of 1977, 91 Stat. 1393. (regulatory relief regarding underground injection control programs)

Federal Water Pollution Control Act (Clean Water Act of 1977), 91 Stat. 1566. (water allocation)

Solid Waste Disposal Act Amendments of 1980, 94 Stat. 2334. (allows states to set more stringent standards)

Natural Resources, Animal Welfare, Fish and Wildlife Conservation

Submerged Lands Act of 1953, 67 Stat. 29.

Marine Mammal Protection Act Amendments of 1981, 95 Stat. 979. (allows delegation of responsibility to state)

Other

Judicial Code Amendments of 1934, 48 Stat. 775. (federal court jurisdiction over suits regarding orders of state administrative boards)

Comprehensive Crime Control Act of 1984, 98 Stat. 1976. [Continuing Appropriations Act of 1985, Title II, Section 2201.98 Stat. 1837] (labor organization activities)

Taxation

National Bank Tax Act of 1923, 42 Stat. 1499.

Tax Injunction Act of 1937, 50 Stat. 738. (federal court jurisdiction over suits regarding state taxes)

Public Law 91-156 (1969), 83 Stat. 434. (banks)

Aviation Safety and Capacity Expansion Act of 1990, 104 Stat. 1388-353. [Omnibus Budget Reconciliation Act of 1990, Title IX(B), 104 Stat. 1388] (passenger facility charges)

Congressional Uses of Preemption to Structure Federal-State Relations

For the following questions, please **circle the number** of the response that best corresponds to your assessment of the situation.

1. In general, is there too much, just about enough, or too little federal preemption of state activity in the federal system today?

1. Too much 2. About enough **3.** Too little **4.** Don't know

2. Does the Congress delegate authority to make preemption decisions to federal administrative agencies too often, often enough, or not often enough?

1. Too often 2. Often enough **3.** Not often enough 4. Don't know

3. Do the federal courts too often infer preemption where the Congress did not specifically preempt state action?

1. Yes, frequently 2. Yes, sometimes **3.** No **4.** Don't know

4. Does the federal government preempt state action more or less than necessary to achieve its policy objectives?

1. More than necessary 2. Less than necessary **3.** About as much as necessary **4.** Don't know

Listed below are **15** kinds of federal preemption mechanisms. Although the desirability of using a particular mechanism may depend upon circumstances, we would like to have your assessment of the general desirability of each mechanism. Below each mechanism is a rating scale ranging from 1 to **5,** with 1 being most desirable and 5 being least desirable. Please **circle the number** of the scale that best corresponds to your assessment of the general desirability of the mechanism.

5. In preempting responsibility for a function, the Congress occasionally authorizes a federal administrative agency to issue rulings on whether implementation of a state law or rule is precluded by federal preemption. Examples of this mechanism are the *Transportation Safety Act of 1974* and the ***U.S.*** *Voting Rights Act of 1965 (VRA).* Under the *VRA,* for example, a covered unit may seek the approval of the **U.S.** Attorney General for a change in the unit's electoral system. (Please circle one number.)

(MOST DESIRABLE) **1** 2 **3** **4** 5 (LEAST DESIRABLE)

COMMENT (if any):

6. In preempting responsibility for a function, the Congress may authorize a federal court to issue a declaratory judgment that a proposed state or local action has not been preempted by a federal law. Under the *Voting Rights Act*, for example, a covered governmental unit may seek a declaratory judgment in the United States District Court for the District of Columbia that a proposed change in the unit's electoral system will not violate the *Voting Rights Act*.

(MOST DESIRABLE) **1** 2 3 **4** 5 (LEAST DESIRABLE)

COMMENT (if any):

7. Since 1965, the Congress has enacted laws or authorized federal administrative agencies to issue rules and regulations establishing minimum national standards in a field. States may continue to exercise primary responsibility for the partially preempted regulatory function so long as state standards are at least as high as the national standards, and those standards are enforced by the state. The *Water Quality Act of* 1965 and the ***Air*** *Quality Act of* 1967 (now the *Clean* ***Air*** *Act)* are examples.

(MOST DESIRABLE) **1** 2 3 **4** ***5*** (LEAST DESIRABLE)

COMMENT (if any):

8. The Congress, in exercising its understanding of its delegated powers, may include a section in a law stipulating that a state law on the same subject is valid unless there is a direct and positive conflict between the state law and the federal law. In a case of conflict, the federal courts will hold under the Supremacy Clause of the **U.S.** Constitution that the federal law prevails.

(MOST DESIRABLE) **1** 2 3 **4** 5 (LEAST DESIRABLE)

COMMENT (if any):

9. In preempting responsibility for a function, the Congress may permit states to act where no federal standard is in effect and also to submit a plan to a federal administrative agency to assume responsibility for a regulatory function. For example, the *Occupational Safety and Health Act* of 1970 stipulated that "nothing in this act shall prevent any state agency or court from asserting jurisdiction under state law over any occupational safety or health issue with respect to which no standard is in effect under section 6." The act also allows a state to submit a plan to the Secretary of Labor to assume responsibility for the regulatory function so long **as** the state accepts the condition that state and local government employees be given protection equivalent to the protection given to private employees.

(MOST DESIRABLE) **1** 2 3 **4** 5 (LEAST DESIRABLE)

COMMENT (if any):

10. In preempting responsibility for a function, the Congress may authorize transfers of responsibility for certain regulatory functions between states and a federal administrative department. For example, the *Wholesome Meat Act* and the *Poultry Products Inspection Act* grant the Secretary of Agriculture the authority to inspect meat and poultry, and to transfer to a state responsibility for meat and poultry inspection, provided that the state has enacted laws requiring such inspection and reinspection consistent with federal standards. States are also authorized to transfer responsibility to the **U.S.** Department of Agriculture for the inspection of meat and/or poultry products confined to intrastate commerce.

(MOST DESIRABLE) **1** 2 **3** **4** **5** (LEAST DESIRABLE)

COMMENT (if any):

11. In legislating economic deregulation of an industry, the Congress may forbid states and their political subdivisions from enacting economic regulations of the industry. The *Airline Deregulation Act of* 1978 is an example.

(MOST DESIRABLE) 1 **2** **3** **4** 5 (LEAST DESIRABLE)

COMMENT (if any):

12. In enacting a total preemption statute, the Congress may require state and local enforcement of the statute. For example, the *Safe Drinking Water Act Amendments of* 1986 ban the use of lead pipes, solder, and **flux** in any public water system. The amendments direct states to enforce the prohibition "through State or local plumbing codes, or such other means of enforcement as the State may determine to be appropriate."

(MOST DESIRABLE) **1** **2** **3** **4** **5** (LEAST DESIRABLE)

COMMENT (if any):

13. In exercising a power of preemption, the Congress may exempt or partially exempt states and their political subdivisions from the provisions of a regulatory statute. For example, in the *National Traffic and Motor Vehicle Safety Act of* 1966, the Congress totally preempted responsibility for establishing motor vehicle safety standards. However, the act makes an exception for motor vehicles operated by a state or local government. *These governments may establish "a safety requirement* applicable to motor vehicles ... procured for [their] own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable federal standard."

(MOST DESIRABLE) **1** 2 **3** **4** 5 (LEAST DESIRABLE)

COMMENT (if any):

14. In preempting responsibility for a function, the Congress may nevertheless authorize a federal official or agency to "turn back" limited regulatory responsibility to states so long as they meet certain minimum requirements. Examples of such authorization include the ***United States Grain Standards Act,*** the ***Hazardous and Solid Waste Amendments of 1984,*** the ***Surface Mining Control and Reclamation Act of 1977***, the ***Federal Railroad Safety Act of 1970,*** and the ***Atomic Energy Act of 1959***.

(MOST DESIRABLE) **1** **2** **3** **4** 5 (LEAST DESIRABLE)

COMMENT (if any):

15. In exercising a power of preemption, the Congress may enact a law mandating that state legislatures enact a state statute complying with the provisions **of** the federal statute. The ***Equal Employment Opportunity Act of 1972*** and the ***Fair Labor Standards Act of the 1938*** as amended are examples. Failure of a state to comply with the law may result in both civil and criminal penalties.

(MOST DESIRABLE) **1** **2** **3** **4** 5 (LEAST DESIRABLE)

COMMENT (if any):

16. The Congress may assign responsibility for certain functions to the states. In making an assignment of functional responsibility, the Congress may encourage the formation of interstate compacts to achieve the purposes of the federal law. **An** example is the ***Low Level Radioactive Policy Act of 1980.***

(MOST DESIRABLE) **1** 2 **3** **4** 5 (LEAST DESIRABLE)

COMMENT (if any):

17. Acting on the basis of the commerce power, the Congress may preempt a function but also authorize the governor of a state to petition the secretary of a federal department to remove the preemption. The ***Department of Transportation and Related Agencies Appropriation Act of 1986*** is an example.

(MOST DESIRABLE) **1** **2** **3** **4** **5** (LEAST DESIRABLE)

COMMENT (if any):

18. The Congress may stipulate that an action of a federal department or agency head, undertaken on the basis of a preemption statute, may be vetoed by a state governor and/or state legislature. The veto may be final, or it may be subject to an override by the Congress. For example, the ***Nuclear Waste Policy Act of 1982*** authorizes the Secretary of Energy to select a site for the construction of a high–level radioactive waste facility. The site may be vetoed by either the governor or the legislature, but the veto may be overridden by the Congress.

(MOST DESIRABLE) 1 2 **3** **4** **5** (LEAST DESIRABLE)

COMMENT (if any):

19. In exercising a preemption power, the Congress may enact a statute containing provisions that apply to a given state or political subdivision only if one or more conditions specified in the law are present within the state or political subdivision. For example, the *U.S. Voting Rights Act of 1965* applied automatically to a state or local government if (1) the U.S. Attorney General had determined that as of November 1, 1964, a test or device had been employed to abridge voting rights because of race or color and (2) the Director of the U.S. Bureau of the Census had determined that less than 50 percent of voting-age persons were registered to vote on November 1, 1964, or that less than 50 percent of the persons of voting age voted in the 1964 presidential election.

(MOST DESIRABLE) 1 2 3 4 5 (LEAST DESIRABLE)

COMMENT (if any):

For the following questions, please **circle the number** of the response that best corresponds to your assessment of the situation. Whenever possible, we would greatly appreciate your providing explanations that will help us to add body and substance to our understanding of issues and problems.

20. Has partial or total preemption helped to solve any problems (such as air or water pollution) in your state that largely originated in *another state?*

1. Yes, several times 2. Yes, once or twice 3. No 4. Don't Know

IF YES, PLEASE EXPLAIN:

21. Is there a need to clarify federal and state responsibilities and liabilities in federal preemption statutes: for example, by including a "Code of Restrictions" in each preemption statute describing specifically what state and local governments cannot do?

1. Yes 2. No 3. Don't Know

IF YES, PLEASE EXPLAIN:

22. Has partial or total preemption ever prevented your state from pursuing policies your state prefers?

1. Yes, several times 2. Yes, once or twice 3. No 4. Don't know

IF YES, PLEASE EXPLAIN:

23. Do federal agencies override state decisions on a case-by-case basis?

1. Almost always 2. Sometimes 3. Rarely 4. Not at all 5. Don't know

IF YES, PLEASE EXPLAIN:

24. Should federal preemption statutes contain a "sunset" provision requiring the Congress to consider whether statutory changes are needed?

1. Yes, a 15–year sunset provision
2. Yes, a 10–year sunset provision
3. Yes, a 5–year sunset provision
4. No
5. Don't know

25. Additional Comments (use reverse side, if needed)

Name:_____ Telephone: (___)_____

Title:_____

Address:_____

Address:_____

City, State & ZIP_____

You may_____ may not_____ quote me by name in your report.

Congressional Uses of Preemption to Structure Federal-State Relations in Agriculture

For the following questions, please circle the number of the response that best corresponds to your assessment of the situation.

1. In general, is there too much, just about enough, or too little federal preemption of state regulation in the field of agriculture?

   1. Too much 2. About enough 3. Too little 4. Don't know

2. Does the Congress delegate authority to make preemption decisions in the field of agriculture to federal administrative agencies too often, often enough, or not often enough?

   1. Too often 2. Often enough 3. Not often 4. Don't know enough

3. Do the federal courts too often infer preemption where the Congress did not specifically preempt state action in the field of agriculture?

   1. Frequently 2. Sometimes 3. Never 4. Don't know

4. Does the federal government preempt state action more or less than necessary to achieve its agricultural policy objectives?

   1. More than necessary 2. Less than necessary 3. About as much 4. Don't know

Listed on the following page are federal laws that totally or partially preempt state activity in the field of agriculture. Please respond by placing a check or number as appropriate in the spaces provided next to each law and under the questions. If a question item does not apply to a particular law, please leave the space blank.

5. Federal Law

Please *check each* law under which your state has voluntarily turned over regulatory responsibility to a federal agency.

Please use numbers "0" (very dissatisfied) through "5" (very satisfied) to indicate you state's level of satisfaction with those laws under which your state has not assumed primacy.

A. *Egg* Produck *Inspection Act of 1970.*	_____	_____
B. *Food and Agriculture Act of 1965 (Wheat Acreage Allotments).*	_____	_____
C. *Horse Protection Act of 1970 ("Sored" Honer).*	_____	_____
D. *Poultry Product8 Inspection Act of 1968.*	_____	_____
E *Surface Mining Control and Reclamation Act of 1977.*	_____	_____

6. Federal Law

Please use numbers "0" (none at all) through "5" (a great deal) to rate the amount of discretionary authority that federal regional offices in your area possess with regard to *each* law below.

Please use numbers "0" (none at all) through "5" (a great deal) to rate the amount of discretionary authority the federal regional office in your area *should be granted* with regard to each law.

A. *Egg* Produck *Inspection Act of 1970.*	_____	_____
B. *Food and Agriculture Act of 1965 (Wheat Acreage Allotments).*	_____	_____
C. *Hone Protection Act of 1970 ("Sored" Horses).*	_____	_____
D. *Poultry Product8 Inspection Act of 1968.*	_____	_____
E *Surface Mining Control and Reclamation Act of 1977.*	_____	_____

7. Federal Law

Please check *each* law under which federal agencies override state decisions on a "case–by–case" basis.

Please check each law that should, in your view, contain a "sunset" provision requiring the Congress to consider whether statutory changes are needed.

A. *Egg Product8 Inspection Act of 1970.*	_____	_____
a *Food and Agriculture Act of 1965 (Wheat Acreage Allotments).*	_____	_____
C. *Hone Protection Act of 1970 ("Sored" Horses).*	_____	_____
D. *Poultry* Produck *Inspection Act of 1968.*	_____	_____
E *Surface Mining Control and Reclamation Act of 1977.*	_____	_____

8. Federal Law

Please check each law that should in your view, be amended to authorize a federal agency to issue administrative rulings on whether a contemplated state action is prohibited.

Please check those laws that have helped to solve a problem in your state that was caused by another state, or that your state might not have been able to solve without preemption.

A. *Egg Products Inspection Act of 1970.*	_____	_____
a *Food and Agriculture Act of 1965 (Wheat Acreage Allotments).*	_____	_____
C. *Horse Protection Act of 1970 ("Sored" Horses).*	_____	_____
D. *Poultry Product8 Inspection Act of 1968.*	_____	_____
E *Surface Mining Control and Reclamation Act of 1977.*	_____	_____

9. Federal Law	Please check those laws under which your state has decided not to assume "primacy."	Please check those laws under which your state has voluntarily returned "primacy" to a federal agency.
A *Egg Products Inspection Act of 1970.*	_____	_____
R *Food and Agriculture Act of 1965 (Wheat Acreage Allotments).*	_____	_____
C. *Horse Protection Act of 1970 ("Sored" Horses).*	_____	_____
D. *Poultry Products Inspection Act of 1968.*	_____	_____
E *Surface Mining Control and Reclamation Act of 1977.*	_____	_____

10. Federal Law	Please check those laws that are in need of a clarification of federal and state responsibilities.	Please check those laws for which it would be useful to have a "code of restrictions" stipulating proscribed state and local government actions.
A *Egg Products Inspection Act of 1970.*	_____	_____
R *Food and Agriculture Act of 1965 (Wheat Acreage Allotments).*	_____	_____
C. *Horse Protection Act of 1970 ("Sored" Honer).*	_____	_____
D. *Poultry Products Inspection Act of 1968.*	_____	_____
E Surface *Mining Control and Reclamation Act of 1977.*	_____	_____

11. Using a scale of "0" (none at all) through "5" (a great deal), please indicate for each law below the degree of discretionary authority that should be granted to your state.

Federal Law	(None at All)	-	-	-	-	(A Great Deal)
A *Egg Products Inspection Act of 1970.*	0	1	2	3	4	5
B. *Food and Agriculture Act of 1965 (Wheat Acreage Allotments).*	0	1	2	3	4	5
C. *Hone Protection Act of 1970 ("Sored" Horses).*	0	1	2	3	4	5
D. *Poultry Products Inspection Act of 1968.*	0	1	2	3	4	5
E *Surface Mining Control and Reclamation Act of 1977.*	0	1	2	3	4	5

12. Have overlapping responsibilities on the part of federal agencies administering federal preemption statutes caused problems in your state?

Yes ____ No ____

Comments:

13. Please indicate the agency which has been most cooperative and most understanding of your state's problems.

Agency: _____

Comments:

14. Please indicate the agency which has been the least cooperative and least understanding of your state's problems.

Agency:_____

Comments:

15. Additional Comments (use reverse side, if needed)

Name:_____ Telephone: (_____)

Tile:_____

Address:_____

Address:_____

City, State & ZIP_____

You may_____ may not_____ quote me by name in your report.

Table D-1
State Officials' Perceptions of Amount of Federal Preemption, by Region, 1988

In general, is there too much, just about enough, or too little federal preemption of state activity?

Region	Too Much	About Enough	Too Little	Don't Know	Too Much	About Enough	Too Little	Don't Know
	Governors				*Attorneys General*			
Northeast	2	1	0	0	4	1	0	1
North Central	3	2	0	1	1	0	0	1
South	4	1	0	0	4	3	0	1
West	6	2	0	0	6	1	0	0
Total	15	6	0	1	15	5	0	3
Percent*	60	24	0	4	65	22	0	13
	Community Affairs Departments				*State Agriculture Departments*			
Northeast	3	1	0	0	2	6	0	1
North Central	4	2	0	0	5	2	0	1
South	4	3	0	1	3	7	0	1
West	5	2	0	0	4	2	0	0
Total	16	8	0	1	14	17	0	3
Percent*	64	32	0	4	41	50	0	9
	State Environmental Protection Departments				*State Labor Relations, Health, and Safety Departments*			
Northeast	2	1	1	0	4	2	0	0
North Central	6	2	0	0	2	5	0	1
South	7	4	1	1	3	5	0	0
West	6	4	0	0	6	1	0	1
Total	21	11	2	1	15	13	0	2
Percent*	60	31	6	3	48	42	0	6
	State Natural Resources Departments				*State Transportation and Public Works Departments*			
Northeast	0	0	0	0	4	3	0	0
North Central	0	3	0	0	5	1	0	3
South	3	5	0	0	0	2	0	0
West	8	1	0	1	3	2	0	1
Total	11	9	0	1	12	8	0	4
Percent*	52	43	0	5	50	33	0	17

*Percentages are based on the total number of questionnaires returned. See Table 3-2 for totals.

Table 0-2
State Officials' Perceptions of Extent of Federal Preemption, by Region, 1988

Does the federal government preempt state actions more than necessary to achieve its objectives?

	More Than Necessary	Less Than Necessary	About as Much as Necessary	Don't Know	More Than Necessary	Less Than Necessary	About as Much as Necessary	Don't Know
	Governors				*Attorneys General*			
Northeast	1	0	1	1	4	0	0	2
North Central	4	0	2	1	1	0	0	1
South	4	0	1	0	3	0	3	2
West	6	0	2	0	6	0	0	1
Total	15	0	6	1	14	0	3	6
Percent*	60	0	24	4	61	0	13	26
	Community Affairs Departments				*State Agriculture Departments*			
Northeast	3	0	1	0	2	0	4	2
North Central	2	0	4	0	4	1	2	2
South	4	0	2	2	3	1	3	1
West	5	0	2	0	3	0	3	0
Total	14	0	9	2	12	2	12	5
Percent*	56	0	36	8	35	6	35	15
	State Environmental Protection Departments				*State Labor Relations, Health, and Safety Departments*			
Northeast	2	1	1	0	4	0	2	0
North Central	4	1	1	1	2	0	5	0
South	8	1	4	1	3	1	5	0
West	6	0	4	0	5	0	2	2
Total	20	3	10	2	14	1	14	2
Percent*	57	9	29	6	45	3	45	6
	State Natural Resources Departments				*State Transportation and Public Works Departments*			
Northeast	0	0	0	0	4	0	1	2
North Central	1	1	0	1	5	0	2	2
South	4	0	2	2	0	1	2	0
West	8	1	0	1	3	0	1	1
Total	13	2	2	4	12	1	6	5
Percent*	62	10	10	19	50	4	25	21

*Percentages are based on the total number of questionnaires returned. See Table 3-2 for totals.

Table D-3
State Officials' Perceptions of Effects of Federal Preemption, by Region, 1988

		Yes, Several Times	Yes, Once Or Twice	No	Don't Know
Has Preemption Helped To Solve Problems Originating In Another State?					
Northeast	Governors	0	1	1	0
	Attorneys General	0	0	3	3
	Community Affairs Departments	0	1	1	0
North Central	Governors	1	2	1	2
	Attorneys General	0	0	0	2
	Community Affairs Departments	0	0	2	0
South	Governors	1	1	3	0
	Attorneys General	1	0	4	2
	Community Affairs Departments	0	1	3	0
West	Governors	0	1	2	4
	Attorneys General	1	0	3	2
	Community Affairs Departments	0	2	4	1
Total	Governors	2	5	7	6
	Attorneys General	2	0	10	9
	Community Affairs Departments	0	4	10	1
Percent*	Governors	8%	20%	28%	24%
	Attorneys General	9%	0%	46%	39%
	Community Affairs Departments	0%	16%	40%	4%
Has Preemption Prevented Your State From Pursuing Policies It Prefers?					
Northeast	Governors	0	1	0	0
	Attorneys General	2	2	0	1
	Community Affairs Departments	1	2	0	1
North Central	Governors	3	1	0	1
	Attorneys General	1	0	0	1
	Community Affairs Departments	3	1	0	1
South	Governors	4	1	1	0
	Attorneys General	5	2	1	0
	Community Affairs Departments	4	0	0	3
West	Governors	3	2	0	2
	Attorneys General	4	3	0	0
	Community Affairs Departments	1	4	0	2
Total	Governors	10	5	1	3
	Attorneys General	12	7	1	2
	Community Affairs Departments	9	7	0	7
Percent*	Governors	40%	20%	4%	12%
	Attorneys General	53%	30%	4%	9%
	Community Affairs Departments	36%	28%	0%	28%

*Percentages are based on the total number of questionnaires returned. See Tables 3-2 and 3-5 for totals.

Table D-4

State Officials' Perceptions of Delegation of Federal Preemption to Administrators, by Region, 1988

Does the Congress delegate authority to make preemption decisions to federal administrative agencies too often, often enough, or not often enough?

	Too Often	Often Enough	Not Often Enough	Don't Know	Too Often	Often Enough	Not Often Enough	Don't Know
	Governors				*Attorneys General*			
Northeast	0	1	0	1	5	0	0	1
North Central	2	3	1	1	1	0	0	1
South	3	2	0	0	5	2	0	1
West	4	2	0	2	4	3	0	0
Total	9	8	1	4	15	5	0	3
Percent*	36	32	4	16	65	22	0	13
	Community Affairs Departments				*State Agriculture Departments*			
Northeast	2	1	0	1	2	4	0	3
North Central	1	5	0	0	5	3	0	1
South	3	4	0	1	3	4	1	2
West	4	2	0	0	2	3	1	0
Total	10	12	0	2	12	14	2	6
Percent*	40	48	0	8	35	41	6	18
	State Environmental Protection Departments				*State Labor Relations, Health, and Safety Departments*			
Northeast	2	1	1	0	0	3	1	1
North Central	2	3	1	0	2	3	0	2
South	6	5	1	3	5	3	1	0
West	3	4	1	2	3	2	2	3
Total	13	13	4	5	10	11	4	6
Percent'	37	37	12	14	32	35	13	20
	State Natural Resources Departments				*State Transportation and Public works Departments*			
Northeast	0	0	0	0	4	1	0	1
North Central	0	2	0	0	5	1	0	3
South	5	2	0	2	0	3	0	0
West	4	4	0	2	3	2	0	1
Total	9	8	0	4	12	7	0	5
Percent*	43	38	0	19	50	29	0	21

*Percentages are based on the total number of questionnaires returned. See Table 3-3 for totals.

Table D-5
State Officials' Perceptions of Court Inference of Federal Preemption, by Region, 1988

Do the federal courts too often infer preemption where Congress did not specifically preempt state action?

	Frequently	Sometimes	No	Don't Know	Frequently	Sometimes	No	Don't Know
	Governors				*Attorneys General*			
Northeast	0	2	0	0	2	3	0	1
North Central	0	3	2	2	1	0	1	0
South	1	2	1	1	3	3	0	2
West	1	4	0	3	2	3	2	0
Total	2	11	3	6	8	9	3	3
Percent.	8	44	12	24	35	39	13	13
	Community Affairs Departments				*State Agriculture Departments*			
Northeast	0	1	1	1	0	2	1	4
North Central	0	3	0	3	0	4	1	4
South	1	3	3	1	1	2	1	6
West	3	3	0	1	2	2	0	2
Total	4	10	4	6	3	10	3	16
Percent.	16	40	16	24	9	29	9	47
	State Environmental Protection Departments				*State Labor Relations, Health, and Safety Departments*			
Northeast	0	2	1	1	1	4	1	0
North Central	0	3	1	4	1	2	0	4
South	1	6	0	6	2	2	0	5
West	0	6	1	3	2	4	0	3
Total	1	17	3	14	6	12	1	12
Percent*	3	49	9	40	19	39	3	39
	State Natural Resources Departments				*state Transportation and Public Works Departments*			
Northeast	0	0	0	0	0	3	0	4
North Central	0	1	1	2	2	2	0	3
South	2	2	1	2	0	1	0	3
West	2	5	0	3	1	1	0	4
Total	4	8	2	7	3	7	0	14
Percent.	19	38	10	33	13	29	0	58

*Percentages are based on the total number of questionnaires returned. See Table 3-3 for totals.

Table *D-6*
State Officials' Perceptions of Desirability of Delegated Authority for Federal Preemption, by Region, 1988

		▶Most Desirable —1—	—2—	—3—	—4—	Least Desirable4 —5—
Congress occasionally authorizes an administrative agency to issue preemptive rulings.						
Northeast	Governors	0	1	1	0	0
	Attorneys General	1	0	1	1	1
	Community Affairs Departments	0	2	1	1	0
North Central	Governors	0	0	5	1	0
	Attorneys General	0	0	1	0	0
	Community Affairs Departments	0	2	2	0	1
South	Governors	0	0	2	2	1
	Attorneys General	0	0	1	1	1
	Community Affairs Departments	3	0	2	1	2
West	Governors	0	0	4	3	1
	Attorneys General	0	2	1	3	0
	Community Affairs Departments	0	1	2	1	3
Total	Governors	0	1	12	6	2
	Attorneys General	1	2	4	5	2
	Community Affairs Departments	3	5	7	3	6
Percent*	Governors	0%	4%	48%	24%	8%
	Attorneys General	4%	9%	17%	22%	9%
	Community Affairs Departments	12%	20%	28%	12%	24%
Congress may authorize a federal court to issue a declaratory judgment that a proposed action is not preempted.						
Northeast	Governors	1	0	1	0	0
	Attorneys General	2	1	1	1	0
	Community Affairs Departments	1	2	1	0	0
North Central	Governors	0	3	0	1	0
	Attorneys General	0	1	0	1	0
	Community Affairs Departments	3	2	1	0	0
South	Governors	0	3	4	0	0
	Attorneys General	3	3	1	1	0
	Community Affairs Departments	4	2	0	0	1
West	Governors	0	5	2	2	0
	Attorneys General	2	1	3	1	0
	Community Affairs Departments	2	1	1	1	2
Total	Governors	1	11	7	3	0
	Attorneys General	7	6	5	4	0
	Community Affairs Departments	10	7	3	1	3
Percent*	Governors	4%	44%	28%	12%	0%
	Attorneys General	30%	26%	22%	17%	0%
	Community Affairs Departments	40%	28%	12%	4%	12%

*Percentages are based on the total number of questionnaires returned. See Table 3-3 for totals.

Table D-7
State Officials' Perceptions of Latitude for State Action, by Region, 1988

		▶Most Desirable —1—	—2—	—3—	—4—	Least Desirable◀ —5—
States may regulate if their standards are as high as federal standards.						
Northeast	Governors	1	1	0	0	0
	Attorneys General	3	2	1	0	0
	Community Affairs Departments	1	2	0	1	0
North Central	Governors	2	2	1	0	0
	Attorneys General	0	2	0	0	0
	Community Affairs Departments	1	3	1	1	0
South	Governors	0	4	2	0	0
	Attorneys General	2	5	0	1	0
	Community Affairs Departments	5	3	1	0	0
West	Governors	1	4	3	1	0
	Attorneys General	4	2	1	0	0
	Community Affairs Departments	2	4	0	0	1
Total	Governors	4	11	6	1	0
	Attorneys General	9	11	2	1	0
	Community Affairs Departments	9	12	2	2	0
Percent+	Governors	16%	48%	24%	4%	0%
	Attorneys General	39%	48%	9%	4%	0%
	Community Affairs Departments	36%	48%	8%	8%	0%
State law is valid unless there is a direct and positive conflict with a federal law.						
Northeast	Governors	1	1	0	0	0
	Attorneys General	2	2	2	0	0
	Community Affairs Departments	2	1	1	0	0
North Central	Governors	2	2	2	0	0
	Attorneys General	0	1	1	0	0
	Community Affairs Departments	4	1	1	0	0
South	Governors	2	3	1	0	0
	Attorneys General	3	4	0	1	0
	Community Affairs Departments	6	0	0	0	0
West	Governors	3	5	1	0	0
	Attorneys General	3	3	0	1	0
	Community Affairs Departments	4	1	1	0	1
Total	Governors	8	11	4	0	0
	Attorneys General	8	10	3	2	0
	Community Affairs Departments	16	3	3	0	1
Percent+	Governors	32%	44%	16%	0%	0%
	Attorneys General	35%	43%	13%	9%	0%
	Community Affairs Departments	64%	12%	12%	0%	4%
Congress may permit states to act where no federal standard is in effect.						
Northeast	Governors	1	1	0	0	0
	Attorneys General	2	3	1	0	0
	Community Affairs Departments	2	2	0	0	0
North Central	Governors	2	3	0	1	0
	Attorneys General	0	2	0	0	0
	Community Affairs Departments	2	3	0	1	0
South	Governors	4	1	1	0	0
	Attorneys General	2	3	3	0	0
	Community Affairs Departments	5	1	1	0	0
West	Governors	2	4	2	0	0
	Attorneys General	3	1	1	0	1
	Community Affairs Departments	1	4	2	0	0
Total	Governors	9	9	3	1	0
	Attorneys General	7	9	5	0	1
	Community Affairs Departments	10	10	3	1	0
Percent+	Governors	36%	36%	12%	4%	0%
	Attorneys General	30%	39%	22%	0%	4%
	Community Affairs Departments	40%	40%	12%	4%	0%

Table *D-7 (cont.)*
State Officials' Perceptions of Latitude for State **Action,** by **Region, 1988**

		▶Most Desirable —1—	—2—	—3—	—4—	Least Desirable◀ —5—
	Congress may authorize states to transfer inspection authority to a federal agency.					
Northeast	Governors	2	0	0	0	0
	Attorneys General	1	2	3	0	0
	Community Affairs Departments	1	2	1	0	0
North Central	Governors	0	3	2	0	0
	Attorneys General	0	2	0	0	0
	Community Affairs Departments	3	0	3	0	0
South	Governors	3	2	2	0	0
	Attorneys General	4	1	1	1	1
	Community Affairs Departments	4	4	1	0	0
West	Governors	1	1	5	0	0
	Attorneys General	2	1	1	1	0
	Community Affairs Departments	2	4	0	0	0
Total	Governors	6	6	9	0	0
	Attorneys General	7	6	5	2	1
	Community Affairs Departments	10	10	5	0	0
Percent"	Governors	24%	24%	36%	0%	0%
	Attorneys General	30%	26%	22%	9%	4%
	Community Affairs Departments	40%	40%	20%	0%	0%
	Congress may exempt states from provisions of a regulatory statute.					
Northeast	Governors	1	0	1	0	0
	Attorneys General	1	0	1	3	1
	Community Affairs Departments	0	2	1	1	0
North Central	Governors	0	3	1	0	1
	Attorneys General	0	1	2	0	0
	Community Affairs Departments	1	2	1	2	0
South	Governors	2	0	5	0	0
	Attorneys General	3	1	2	2	0
	Community Affairs Departments	2	3	2	0	1
West	Governors	3	2	1	1	0
	Attorneys General	0	3	4	0	0
	Community Affairs Departments	1	3	3	0	0
Total	Governors	6	5	8	1	1
	Attorneys General	4	5	9	5	1
	Community Affairs Departments	4	10	7	3	1
Percent*	Governors	24%	20%	32%	4%	4%
	Attorneys General	17%	22%	39%	22%	4%
	Community Affairs Departments	16%	40%	28%	12%	4%
	Congress may authorize a limited regulatory turn back by a federal agency to states.					
Northeast	Governors	0	2	0	0	0
	Attorneys General	1	1	3	1	0
	Community Affairs Departments	0	1	1	0	1
North Central	Governors	1	4	0	0	0
	Attorneys General	0	1	1	0	0
	Community Affairs Departments	3	3	0	0	0
South	Governors	1	4	2	0	0
	Attorneys General	0	4	1	0	1
	Community Affairs Departments	3	5	0	0	0
West	Governors	1	6	1	0	0
	Attorneys General	1	4	2	0	0
	Community Affairs Departments	2	4	1	0	0
Total	Governors	3	16	3	0	0
	Attorneys General	2	10	7	1	1
	Community Affairs Departments	8	13	2	0	1
Percent*	Governors	12%	64%	12%	0%	0%
	Attorneys General	9%	43%	30%	4%	4%
	Community Affairs Departments	32%	52%	8%	0%	4%

Table *D-7 (cont.)*
State Officials' Perceptions of Latitude for State Action, by Region, 1988

Congress may authorize a governor to petition a federal department to remove the preemption.

		▶Most Desirable 1	2	3	4	Least Desirable◀ 5
Northeast	Governors	0	0	1	1	0
	Attorneys General	1	1	2	1	1
	Community Affairs Departments	0	0	3	1	0
North Central	Governors	0	3	1	1	0
	Attorneys General	0	1	1	0	0
	Community Affairs Departments	4	1	0	1	0
South	Governors	1	4	2	0	0
	Attorneys General	0	3	1	1	1
	Community Affairs Departments	3	3	1	1	0
West	Governors	1	4	2	0	0
	Attorneys General	0	1	2	1	0
	Community Affairs Departments	2	2	2	0	1
Total	Governors	2	11	6	2	0
	Attorneys General	1	6	6	3	2
	Community Affairs Departments	9	6	6	3	1
Percent*	Governors	8%	44%	24%	8%	0%
	Attorneys General	4%	26%	26%	13%	9%
	Community Affairs Departments	36%	24%	24%	12%	4%

Congress may authorize a governor or state legislature to veto a federal administrative decision subject to an override by Congress.

Northeast	Governors	0	1	0	1	0
	Attorneys General	1	2	1	0	1
	Community Affairs Departments	0	2	0	0	2
North Central	Governors	0	3	1	0	0
	Attorneys General	0	2	0	0	0
	Community Affairs Departments	2	3	1	0	0
South	Governors	2	0	1	2	1
	Attorneys General	4	3	0	1	0
	Community Affairs Departments	6	0	1	0	0
West	Governors	4	2	1	1	0
	Attorneys General	1	2	1	1	0
	Community Affairs Departments	3	3	0	0	1
Total	Governors	6	6	3	4	1
	Attorneys General	6	9	2	2	1
	Community Affairs Departments	11	8	2	0	3
Percent.	Governors	24%	24%	12%	16%	4%
	Attorneys General	26%	39%	9%	9%	4%
	Community Affairs Departments	44%	32%	8%	0%	12%

*Percentages are based on the total number of questionnaires returned. See Table 3-4 for totals.

Table *D-8*
State Officials' Perceptions of Restrictions on State Action, by Region, 1988

		▶Most Desirable —1—	—2—	—3—	—4—	Least Desirable◀ —5—
Congress may forbid states to enact economic regulations of an industry.						
Northeast	Governors	0	2	0	0	0
	Attornerys General	1	0	3	2	0
	Community Affairs Departments	0	1	3	0	0
North Central	Governors	0	1	2	2	0
	Attorneys General	0	0	0	2	0
	Community Affairs Departments	1	0	2	3	0
South	Governors	2	1	0	3	0
	Attorneys General	2	0	2	3	1
	Community Affairs Departments	2	3	1	2	0
West	Governors	0	2	1	3	3
	Attorneys General	0	1	1	4	1
	Community Affairs Departments	0	2	2	2	0
Total	Governors	2	6	3	8	3
	Attorneys General	3	1	6	11	2
	Community Affairs Departments	3	6	8	7	0
Percent*	Governors	8%	*24%*	12%	32%	12%
	Attorneys General	13%	4%	26%	48%	9%
	Community Affairs Departments	12%	*24%*	32%	*28%*	0%
Congress may require states to enforce a federal statute.						
Northeast	Governors	1	0	1	0	0
	Attorneys General	1	0	0	2	3
	Community Affairs Departments	0	2	0	1	0
North Central	Governors	0	1	2	2	0
	Attorneys General	0	0	1	0	1
	Community Affairs Departments	0	2	1	1	0
South	Governors	0	0	3	4	0
	Attorneys General	0	1	3	1	1
	Community Affairs Departments	4	0	5	0	0
West	Governors	1	2	1	3	1
	Attorneys General	0	1	3	2	1
	Community Affairs Departments	0	2	1	1	3
Total	Governors	2	3	7	9	1
	Attorneys General	1	2	7	5	6
	Community Affairs Departments	4	6	7	3	3
Percent*	Governors	8%	12%	*28%*	36%	4%
	Attorneys General	4%	9%	30%	22%	26%
	Community Affairs Departments	16%	*24%*	*28%*	12%	12%
	ACIR State Counterpart					
Congress may require states to enact a law complying with provisions of a federal law.						
Northeast	Governors	0	0	0	1	1
	Attorneys General	1	0	0	1	3
	Community Affairs Departments	1	0	0	1	2
North Central	Governors	0	0	1	2	3
	Attorneys General	0	0	0	1	0
	Community Affairs Departments	1	0	1	1	3
South	Governors	0	0	1	2	3
	Attorneys General	0	0	1	5	2
	Community Affairs Departments	3	0	2	1	2
West	Governors	0	1	2	2	3
	Attorneys General	0	0	0	3	4
	Community Affairs Departments	1	0	3	0	3
Total	Governors	0	1	4	7	10
	Attorneys General	1	0	1	10	9
	Community Affairs Departments	6	0	*6*	3	10
Percent*	Governors	0%	4%	16%	*28%*	40%
	Attorneys General	4%	0%	4%	43%	39%
	Community Affairs Departments	24%	0%	24%	12%	40%

Table *D-8 (cont.)*
State Officials' Perceptions of Restrictions on State Action, by Region, 1988

Congress may assign responsibility for a function to the states.

		▶Most Desirable —1—	—2—	—3—	—4—	Least Desirable◀ —5—
Northeast	Governors	1	0	1	0	0
	Attorneys General	0	0	5	0	1
	Community Affairs Departments	0	3	0	1	0
North Central	Governors	1	3	2	2	0
	Attorneys General	1	0	1	0	0
	Community Affairs Departments	2	2	0	1	1
South	Governors	0	3	3	0	0
	Attorneys General	4	2	1	1	0
	Community Affairs Departments	5	1	1	1	0
West	Governors	2	4	2	0	0
	Attorneys General	3	0	3	1	0
	Community Affairs Departments	1	1	2	2	1
Total	Governors	4	10	8	2	0
	Attorneys General	8	2	10	2	1
	Community Affairs Departments	8	7	3	5	2
Percent*	Governors	16%	40%	32%	8%	0%
	Attorneys General	35%	9%	43%	9%	4%
	Community Affairs Departments	32%	28%	12%	20%	8%

Congress may enact a national suspensive law that becomes effective within a state if specified conditions prevail.

Northeast	Governors	0	2	0	0	0
	Attorneys General	1	1	1	0	0
	Community Affairs Departments	1	1	2	0	0
North Central	Governors	1	1	3	0	0
	Attorneys General	0	1	1	0	0
	Community Affairs Departments	2	3	1	0	0
South	Governors	0	2	1	0	0
	Attorneys General	0	3	2	1	2
	Community Affairs Departments	3	0	2	1	2
West	Governors	1	1	2	2	0
	Attorneys General	0	5	2	0	0
	Community Affairs Departments	0	2	2	1	2
Total	Governors	2	6	6	2	0
	Attorneys General	1	10	6	1	2
	Community Affairs Departments	6	6	7	2	4
Percent*	Governors	8%	24%	24%	8%	0%
	Attorneys General	4%	43%	26%	4%	9%
	Community Affairs Departments	24%	24%	28%	8%	16%

*Percentages are based on the total number of questionnaires returned. See Table 3-5 for totals.

Table D-9

State Officials' Perceptions of Potential Improvements in Federal Preemption Laws, by Region, 1988

Is there a need for a "Code of Restrictions" for each federal preemption statute?

		Yes	No	Don't Know
Northeast	Governors	2	0	0
	Attorneys General	6	0	0
	Community Affairs Departments	2	1	1
North Central	Governors	3	2	0
	Attorneys General	2	1	0
	Community Affairs Departments	4	1	0
South	Governors	3	1	1
	Attorneys General	6	0	1
	Community Affairs Departments	3	1	4
West	Governors	3	2	2
	Attorneys General	3	1	2
	Community Affairs Departments	3	2	2
Total	Governors	11	5	3
	Attorneys General	17	2	3
	Community Affairs Departments	12	5	7
Percent*	Governors	44%	20%	12%
	Attorneys General	74%	9%	13%
	Community Affairs Departments	48%	20%	28%

Should preemption statutes contain a "sunset" provision?

		Yes, 15 Years	Yes, 10 Years	Yes, 5 Years	No	Don't Know
Northeast	Governors	0	1	0	0	0
	Attorneys General	0	2	1	0	1
	Community Affairs Departments	0	3	1	0	0
	ACIR State Counterpart					
North Central	Governors	1	0	3	0	1
	Attorneys General	0	1	0	0	1
	Community Affairs Departments	1	1	4	0	0
	ACIR State Counterpart					
South	Governors	0	3	3	0	0
	Attorneys General	1	4	3	0	0
	Community Affairs Departments	1	2	5	0	0
	ACIR State Counterpart					
West	Governors	0	4	3	0	0
	Attorneys General	0	1	4	1	2
	Community Affairs Departments	0	2	5	0	0
	ACIR State Counterpart					
Total	Governors	1	8	9	0	1
	Attorneys General	1	8	8	1	4
	Community Affairs Departments	2	8	15	0	0
	ACIR State Counterpart					
Percent*	Governors	4%	32%	36%	0%	4%
	Attorneys General	4%	35%	35%	4%	18%
	Community Affairs Departments	8%	32%	60%	0%	0%
	ACIR State Counterpart					

*Percentages are based on the total number of questionnaires returned. See Table 3-6 for totals.

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The President appoints 20 members—three private citizens and three federal executive officials directly, and four governors, three state legislators, four mayors, and three elected county officials from slates nominated by the National Governors' Association, the National Conference of State Legislatures, the National League of Cities, U.S. Conference of Mayors, and the National Association of Counties. The three Senators are chosen by the President of the Senate and the three Representatives by the Speaker of the House of Representatives.

Each Commission member serves a two-year term and may be reappointed.

As a continuing body, the Commission addresses specific issues and problems the resolution of which would produce improved cooperation among federal, state, and local governments and more effective functioning of the federal system. In addition to examining important functional and policy relationships among the various governments, the Commission extensively studies critical governmental finance issues. One of the long-range efforts of the Commission has been to seek ways to improve federal, state, and local governmental practices and policies to achieve equitable allocation of resources, increased efficiency and equity, and better coordination and cooperation.

In selecting items for research, the Commission considers the relative importance and urgency of the problem, its manageability from the point of view of finances and staff available to ACIR, and the extent to which the Commission can make a fruitful contribution toward the solution of the problem.

After selecting intergovernmental issues for investigation, ACIR follows a multistep procedure that assures review and comment by representatives of all points of view, all affected governments, technical experts, and interested groups. The Commission then debates each issue and formulates its policy position. Commission findings and recommendations are published and draft bills and executive orders are developed to assist in implementing ACIR policy recommendations.