Recommendation 84-5

Preemption of State Regulation by Federal Agencies

(Adopted December 5, 1984)

States have the power to regulate many forms of conduct. Each state must have broad power to regulate in ways that it believes to be in the best interests of its citizens, subject to the limitations stated in the federal and state constitutions. The nature and magnitude of the problems that require regulatory action vary substantially among the states, and state governments are normally in a better position than the federal government to determine the types of regulations that will serve the interests of the states' citizens. States sometimes have an incentive however, to impose regulations that advance state interests at the expense of other states' interests or of national interests.

Federal courts have applied the Commerce Clause to limit state power to affect national interests only in those few cases where the state action clearly discriminates against interstate commerce or protects instate economic interests from out-of-state competition. Institutionally however, courts are ill-suited to attempt to limit state power to harm national interests when state regulation furthers in-state interests of one type while it simultaneously frustrates a national interest of a different type.

Congress can limit state power to harm national interests by (i) expressing in a statute a congressional intent to occupy a field completely, (ii) explicitly preempting the specific type of state regulation at issue, or (iii) imposing a Federal regulatory duty directly in conflict with a duty imposed by a state. The conflict, delay, and uncertainty of outcome that occurs when preemption questions must be resolved by the judiciary can be avoided if Congress addresses preemption issues clearly and explicitly when enacting regulatory statutes. The congressional agenda is so crowded, however, that Congress cannot be expected to consider explicitly and in detail all of the forms of state regulation that may harm the national interest. Congress experiences particular difficulty anticipating and resolving directly the many arguable conflicts between the national interest and new state regulations issued in the aftermath of a Federal decision to deregulate an area of conduct.

Because of the limited ability of Congress and the judiciary to act as checks on state regulation that harms the national interest, states possess, in practice, the power to make

regulatory choices that produce net benefits within the state but that produce substantial net detriments on a national level. Without an additional Federal constraint on state regulatory power, states can be expected to regulate in this manner frequently.

Federal agencies can play a valuable role in supplementing judicial and congressional constraints on state regulation. Courts regularly affirm federal agency actions that preempt state regulations when the preemptive effect of the Federal action is no broader than can be justified by the evidence of need for preemption. Federal agencies sometimes consider preemption of a state law or regulation, however, without providing affected states notice and an opportunity to participate effectively in the agencies' proceedings.

A Federal agency considering a regulatory action—whether to expand or reduce regulatory constraints—should be sensitive both to the need to preempt state laws that seriously disrupt the Federal program, and to the need to take into account the states' special needs and circumstances.

Recommendation

1. Congress should address foreseeable preemption issues clearly and explicitly when it enacts a statute affecting regulation or deregulation of an area of conduct.

2. Each Federal agency should establish procedures to ensure consideration of the need to preempt state laws or regulations that harm federally protected interests in the areas of regulatory responsibility delegated to that agency by Congress, and each agency should clearly and explicitly address preemption issues in the course of regulatory decision-making. Particularly in the circumstances where a Federal regulatory program is being reduced or eliminated (deregulation), an agency needs to be alert to the form and magnitude of state regulation that may exist-or may be quickly adopted to fill a perceived void left by the diminished Federal regulation.

3. When a Federal agency foresees the possibility of a conflict between a state law or regulation and federally protected interests within the federal agency's area of regulatory responsibility, the agency should, when practicable, engage in informal dialogue with state authorities in an effort to avoid such a conflict.

4. When a Federal agency proposes to act through agency adjudication or rulemaking to preempt a state law or regulation, the agency should attempt to provide all affected states, as well as other affected interests, notice and an opportunity for appropriate participation in the proceedings.

Citations:

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