

Federalism and Congress: An Uneasy Balance

What is this federalism thing?

- ❖ Key component of separation of powers
- ❖ A means of allowing different functions of government to be carried out by distinct branches designed for those purposes
- ❖ A means of facilitating local decision-making over local issues and disaggregating government power so as to make its concentration and abuse less likely



How federalism took flight...

- ❁ **Gibbons v. Ogden (1824)**
- ❁ Defined and strengthened the Constitution's Commerce Clause
- ❁ Established two principles in U.S. law:
 - Congress alone has the power to regulate commerce among the states, including “coasting trade”
 - In situations where state & federal laws conflict, state laws are nullified (**a.k.a. federal preemption**)



Defining Words

“The power of Congress, then, comprehends navigation, within the limits of every State in the Union, so far as that navigation may be in any manner connected with ‘commerce with foreign nations, or among the several States, or with the Indian tribes.’ It may, of consequence, pass the jurisdictional line of New York and act upon the very waters to which the prohibition now under consideration applies.”

—Chief Justice John Marshall

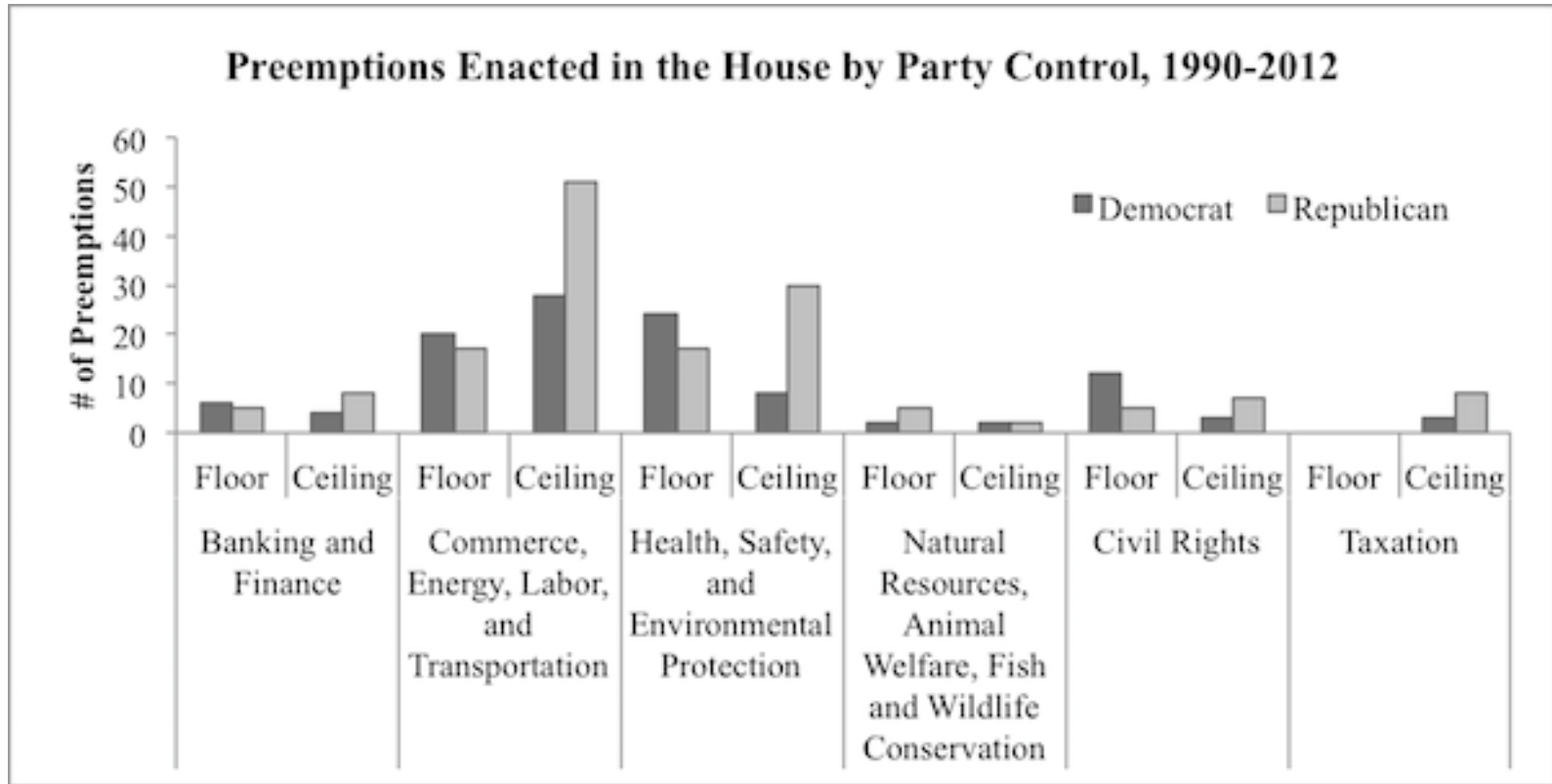


So federalism's still in vogue?

- ❖ It's complicated...kind of a nasty word in Congress
- ❖ Why? Because of states' rights advocates on both sides of the aisle
- ❖ Republicans & Democrats like different flavors of preemption:
 - **GOP: ceilings** that limit states' ability to regulate and restrain attempts to enact greater protections than those set at the federal level
 - **Dem: floors** that create a baseline level of regulation that every state must meet, but that any can exceed if they so choose



Preemption by the Numbers



Make Preemption Great Again!

“To the States respectively each in its sovereign capacity is reserved the power, by its veto, or right of interposition, to arrest the encroachment.”—John C. Calhoun

- ❁ “I am generally against preemption because it’s really often an excuse to water down whatever states are doing.”—Rep. Jan Schakowsky (D-IL)
- ❁ “Rep. Frank Pallone (D-NJ), who chairs the full [House Energy and Commerce] committee, was also critical of preemption. ‘I always prefer not to.’”
- ❁ “In 2016, President Trump said marijuana legalization should be left up to the states, and I agree.”—Sen. Cory Gardner (R-CO)
- ❁ “All the energy is in the state capitols.”—Sen. Mike Braun (R-IN)
- ❁ “We’re going to make states the laboratories of democracy once again.”—President Trump



What does it mean for AWO?

- ❖ Tempered expectations: there is no such thing as a “clean” preemption bill
 - Most *enacted* preemption bills have required some type of state concurrence/involvement
- ❖ A lot of cross-checking with state government on legislative ideas
 - Lawmakers can be reluctant to buck their states, so come prepared with strong arguments
- ❖ Watch out for bills and amendments that make interstate commerce more difficult



Recent Trends

- ❖ Three major preemption bills enacted in the past five years:
 - TSCA
 - GMO Labeling
 - **VIDA**
- ❖ States have jumped into the vacuum left by USCG
 - Questionable initiatives in CA, WA, ME, MA, NY
- ❖ AWO v. Massachusetts



AWO Position

- ❖ Federal preemption is a hill worth dying on, because without it, our industry loses its value proposition
- ❖ Accept the fact that preemption legislation comes with strings attached, but...
- ❖ An ounce of preemption now saves a messy battle later!
- ❖ Headwinds, yes...but remember the legislative process rewards patience and persistence
- ❖ Three-pronged advocacy approach: legislative, executive, judicial
- ❖ We're in it to win it!



Questions & Discussion

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