



Federal Preemption: Principles and Politics

By Richard A. Epstein and Michael S. Greve

Once-esoteric questions over the federal preemption of state law are now the subject of a prominent, politically charged debate. A year ago, we assembled a group of prominent legal scholars and practicing attorneys at AEI for a probing analysis and a spirited discussion of the difficult legal and policy issues of the preemption debate. Their essays are now published in an AEI Press volume entitled *Federal Preemption: States' Powers, National Interests*. This *Federalist Outlook* provides a brief overview of the book and a thumbnail sketch of the editors' conclusions.

Why Preemption?

The arcane topic of federal preemption has generated much public debate and news coverage. The lines are sharply drawn. Consumer advocates, plaintiffs attorneys, and state officials argue that broad federal preemption claims—often made by federal regulatory agencies, without a clear Congressional mandate—interfere with the states' historic police power to protect their citizens against corporate misconduct. In response, corporations and federal agencies insist that preemption offers a vital safeguard against unwarranted and inconsistent state interferences with the national economy, chiefly by insulating carefully crafted regulatory compromises from the machinations of aggressive trial lawyers and state attorneys general. Fierce struggles along these lines reverberate across multiple regulatory arenas, from financial regulation to automobile safety; from clean air laws to the regulation of telecommunications, energy, and other network industries; from securities law to

consumer products standards; and from pharmaceuticals to pesticides to outboard motors.

In all these areas, billions of dollars hang on regulatory nuances and complex points of law. But this gritty preemption debate is being waged in the shadow of broader, sometimes constitutional arguments over the role and utility of federalism and “states' rights” in a modern, highly mobile, integrated economy. Legal scholars are sharply divided over the merits of these more general arguments and the role they should play in the judicial interpretation of heterogeneous and highly particular, industry- or area-specific preemption arrangements. Often the only common ground is that preemption questions cannot be reduced to the judicial exegesis of (often ambiguous) federal statutes. They also raise profound questions of institutional design and constitutional understanding.

A sensible understanding of preemption should reflect the delicate interplay between broad institutional considerations and regulatory detail. *Federal Preemption: States' Powers, National Interests* supplies that analysis.

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The Book

We assembled a group of authors with stellar and well-deserved reputations in their respective fields—legal theorists and practicing lawyers, liberals and conservatives, nationalists and states'

righters, specialists and generalists. Their essays provide a gratifyingly nuanced and well-rounded picture of the preemption universe. Accompanied by Kenneth W. Starr’s preface and our introduction and conclusion, the contributions are arrayed in three parts.

In part I, Viet D. Dinh and Stephen Gardbaum trace the antecedents of modern preemption law—the nineteenth-century understanding and the transition from the *Lochner* Court to the New Deal, respectively. The New Deal largely settled the constitutional disputes of the earlier eras, but these two essays demonstrate how the preemption debate would benefit from a better understanding of *why* those disputes were settled and on what terms. The contributors in part II examine extant preemption law in a wide range of policy arenas: drug regulation (Daniel E. Troy); telecommunications (Thomas W. Hazlett); banking, insurance, and corporate law (Hal S. Scott); environmental policy (Thomas W. Merrill); and products liability (Samuel Issacharoff and Catherine M. Sharkey). Jointly and severally, the essays provide an in-depth examination of preemption “at work,” illustrating the awesome range of legal and economic questions that fall under this heading. Part III returns to the broader questions. Robert R. Gasaway and Ashley Parrish explore the internal logic of preemption doctrine, while Ernest A. Young examines its federalism dimension. Anne van Aaken’s essay contrasts the American understanding of preemption with that of the European Union.

The contributions defy easy summary—unsurprisingly, since by design this volume spans statutory and constitutional questions, policy and economics, as well as law. Happily, these essays have profoundly influenced our own perspective on preemption and its role in the larger constitutional architecture. Here we sketch our conclusions, with the urgent proviso that our discussion is no substitute for an attentive study of these richly rewarding essays.

Beyond Polemics

As noted, the public and even the scholarly debates over preemption have been waged in highly polemical terms. Simplified only slightly, the dominant line of argument runs as follows: more federal preemption means less regulation, chiefly by placing a ceiling or prohibition on stricter state regulation, including regulation through state tort or contract law. In this view, expansive judicial

doctrines of federal preemption are usually “pro-business.” These doctrines, however, translate into “less federalism,” compromising the states’ vital role as “laboratories of democracy.”

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State attorneys general, for example, paint their investigations and litigation campaigns as “federalism in action,” and they strongly protest when federal agencies assert regulatory prerogatives. Ironically, such claims often receive a respectful hearing from conservative justices who, constitutionally, have supported states’ powers against federal overreach. Yet when those “pro-state” justices *do* support broad claims of federal preemption, their critics charge them with simply voting their pro-business, antiregulatory ideology over their purported federalism principles.¹

This last charge rests on shaky empirical foundations, for the conservative justices do *not* reflexively vote for preemption. If anything, liberal justices are more likely to vote reflexively *against* preemption.² It is important to understand which decisions are right and why, because contrary to myth, preemption and federalism are not polar opposites. To see why this is so, it is best to start where *Federal Preemption* starts: with the constitutional arrangements.

Preemption: Ancient and Modern

The pre–New Deal understanding of federalism and preemption was committed to a division between federal and state activities that, while not airtight, looked with suspicion on the exercise of concurrent powers over any particular topic. Over a wide range, federal and state powers were, as Stephen Gardbaum argues in this volume and elsewhere, subject to “latent exclusivity”: when Congress exercised its powers under the Commerce Clause, all state regulation within the scope of the federal statute was preempted, even when state law did not conflict with federal law, and regardless of whether or not Congress intended that draconian result.

The inexorable expansion of the commerce power during the New Deal period brought that era to a close. “Dual” federalism and exclusive federal and state powers gave way to concurrent powers, in which the federal government, under the Supremacy Clause,³ may decide whether to rule the roost alone or to share power with the states. So long as Congress makes its intentions clear, it may displace the states, either in whole

or part, for any reason (except in some marginal cases).

Modern preemption doctrine—the preemption doctrine of the New Deal—is a self-conscious attempt to counter the centralizing effects of a boundless Commerce Clause. Federal law preempts state law when the two are in actual conflict; that much follows straightforwardly from the Supremacy Clause. Likewise, federal law displaces state law when Congress has expressly provided for preemption. That, too, rests squarely on the Supremacy Clause. Beyond these two cases, however, courts will not “imply” federal preemption unless that is the intended result. The intent of Congress is the touchstone of post–New Deal preemption doctrine. Moreover, especially in areas of “historic” state powers (such as health and safety regulation), courts apply a “presumption against preemption”: preemption must be *clearly* intended before courts will give the nod to Congress.

Federalism Translation

The New Deal shift was profound. In James Madison’s famous theory of the “compound republic,” the union’s powers were federal in scope—meaning limited and enumerated—but national in their operation.⁴ When the New Deal rendered the central government’s powers effectively unlimited in scope, the Supreme Court responded by making those powers somewhat less than fully dominant in their operation, the better to maintain federalism’s “balance.” The modern Supreme Court has deployed the presumption against preemption extensively—though not universally, and never consistently—to soften the reaches of its own Commerce Clause jurisprudence. In related legal contexts, the Court has described the Supremacy Clause as an “extraordinary” and slightly uncouth power.⁵

Legal theorists now call this maneuver a “translation” or a “compensating adjustment.”⁶ That notion, though, strikes us as deeply problematic. After all, the Constitution mandates no roving federalism “balance.” Instead, it allocates specified powers to the national government (and often imposes corresponding state disabilities), which is a very different approach. Even the most ardent states’ rights advocate does not think it would be an appropriate “compensating adjustment” to entrust the Eighty-Second Airborne to gubernatorial control. Similarly, modern preemption doctrine in no way approximates the earlier constitutional conception of federalism.

Under the earlier constitutional arrangements, the principle of state autonomy forced states to compete in the areas that then lay beyond federal control, from employment relations in manufacturing and retail to land-use law. The presumption against preemption creates precisely the opposite institutional dynamic. When Congress legislates in areas once reserved to the states, the new federal “floor” puts an end to state competition. Simultaneously, the presumption against preemption facilitates additional state regulation on top of that floor. So conceived, concurrent powers cut in only one direction: stricter regulation. That problem is rendered more acute because many large firms do business in all states, which gives aggressive regulators in one state leverage outside the state’s boundaries. That extraterritorial power is further strengthened by the expansive reach of personal jurisdiction and malleable rules governing choice of law. Under those conditions, large individual states like California can often rival the federal government in their capability to influence the course of regulation on both national and global bases. Nationwide firms must comply with each of fifty-one different regulatory regimes, which again implies that the strictest regulator will dominate. Thus, while the ancien régime achieved some rough balance between regulatory incentives and political discipline at the state level, the modern regime creates a strong, ineluctable pro-regulatory bias.⁷

One common defense of this arrangement is that state-empowering preemption rules preserve a valuable error-correction mechanism. If the Securities and Exchange Commission falls down on the job, the New York attorney general stands ready to jump into the breach. When the Food and Drug Administration (FDA) cozies up to drug manufacturers, plaintiffs lawyers will help to restore a proper concern for public health. This argument, however, presupposes wrongly that the needed error “correction” runs only in one direction. Because federal law will in all events serve as a legal floor, no state can correct for *excessive* federal regulation, even though that state can compound the problem with further regulation. In the end, the argument assumes that more regulation is *ipso facto* better regulation.

We likewise do not believe that respect for state autonomy points in the direction of weak preemption rules. A federal statute that targets primarily *in-state* conduct effectively liberates some states from having to compete with each other to attract businesses—and prevents others from pursuing that strategy. It is a mistake, therefore, to view the preemptive effect of a federal

statute in isolation from the regulatory floor established in the same statute. Less regulation-minded states lost when the federal floor was established. Why should pro-regulation states, having already won once, get to tighten the noose further? When a federal statute primarily curbs *interstate* externalities and spillovers, the case for antipreemptive presumptions is still harder to discern: in what sense is a “right” of aggressive states to inflict costs on each other a net gain in state autonomy?

In this light, we see no warrant for using judicial presumption against preemption as a remedy to an expanded Commerce Clause power. Federal statutes should be given their full preemptive force and effect, without having to swim against the tide that this presumption creates. But how?

Preemption in Three Pieces

By and large, preemption doctrine must take federal statutes as it finds them, such that any Congressional division of power between federal and state governments should not be undone by the dark art of statutory interpretation. Federal statutes, however, are rarely crystal clear with respect to preemption, least of all in the hard cases that go to litigation. Preemption law requires presumptions or canons of construction.

We favor three such canons: a rule against circumvention; an exclusivity presumption, meaning that either federal or state government, *but not both*, should handle any given matter; and a preemption canon that tracks the dormant Commerce Clause, or more precisely, the constitutional precepts that it embodies. Here we provide a brief discussion and a few applications.

Against Circumvention

Statutes are directed against (more or less) well-defined abuses. Once the direct route is blocked by the statute, the regulated parties—states as well as individuals—will search for byways to achieve their illicit objectives without running afoul of the literal statutory language. The hard interpretive question is how far to extend the statutory reach to block these circumventions—many of which will be unforeseen—without cutting off legitimate conduct that the statute never meant to forbid. That two-sided inquiry, not some one-way presumption

against preemption, should determine the scope of implied preemption.

A general anticircumvention principle appeared in English law around the mid-sixteenth century, when British courts began to treat acts of Parliament as authoritative law. Sometimes called the “mischief rule,” it admonished all judges “always to make such [statutory] construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief . . . and to add force and life to the cure and remedy, according to the true intent of the makers of the act.”⁸ Anticircumvention and its limitation—“the true intent of the makers”—go hand in hand. Long before even that canon of construction, the Roman *Lex Aquilia* made it unlawful to

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kill the slave or work animal of another person.⁹ That prohibition easily covers forcing poison down a victim’s throat, but what about setting a drink laced with poison before an innocent suspect? That case is not covered by the literal terms of the statute because some act of the victim must complete the causal chain. By an early application of the anticircumvention principle, the Romans created an adjacent category of wrongs: to furnish a cause of death (*causam mortis praestare*). But the Roman statute never imposed liability when a person committed suicide by concocting his own poison out of ingredients supplied by another. Killing was covered, but suicide was not.

The U.S. Constitution reflects the same logic. At one end, a constitution of limited, enumerated powers reinforces the general observation that an anticircumvention principle must have a limit. At the other end, federal powers, constitutionally specified state disabilities, and federal statutes enacted pursuant to the Supremacy Clause must confront the risk of state evasion. (The constitutional prohibitions against certain state laws, such as laws impairing the obligation of contract, all “suppose the disposition which will evade them,” Madison wrote in 1787.¹⁰) Consistent with the constitutional structure, federal preemption statutes must be read to combat that risk.

We reject the oft-heard contention, dating back to Justice Felix Frankfurter, that Congress can speak “with drastic clarity” on preemption and should be required to do so instead of relying on federal courts to do the dirty work of displacing state law.¹¹ That conceit demands a

precision on preemption that is found nowhere else in the law. Our brief excursion into Roman and English law has illustrated that statutory integrity demands an anticircumvention principle in *all* settings. Even the most detailed and explicit federal preemption statute still needs an anticircumvention principle.

Examples spring readily to mind. When Congress decided to block certain securities class actions—so-called strike suits—in federal courts, those actions migrated to state courts (where they had been virtually unknown). Congress then responded by barring state as well as federal class actions alleging public companies’ noncompliance with certain disclosure obligations “relating to the sale or purchase of a covered security.” In turn, state courts evaded that plain language by inventing a new cause of action that permits identical claims, so long as plaintiffs allege that the failure to disclose prompted them to *hold*, rather than purchase or sell, the security. Last year, in a straightforward and correct application of the anticircumvention principle, the Supreme Court unanimously rejected that maneuver.¹² Legislative “clarity,” however desirable, must be supplemented by judicial vigilance against mischief and evasions.

One Problem, One Sovereign

Where federal statutes can reasonably be read to create exclusive federal or state jurisdiction, courts should cement that arrangement.¹³ That one stroke should minimize the coordination problems, administrative confusion, and political intrigue that typically plague any regime of concurrent jurisdiction. Our intuitions in determining *which* sovereign are a reflection of generally shared federalism assumptions. Very roughly, in the context of network regulation, from interstate airline transport to communications, we are inclined to support exclusive national regulation. Conversely, we favor exclusive state or local regulation where the statutory effects are purely local and where active state competition seems possible. But in the preemption context—as opposed to pure federalism theory—the precise assignments matter less than the terms of government-to-government interaction. We favor exclusivity regardless of where the line of separation may fall under any given statute.

The Supreme Court’s record on this front has been mixed. In the antitrust arena, the Court has lamentably

created a regime of concurrent state and federal powers, in the teeth of the actual statutory language.¹⁴ In contrast, the justices have been admirably clearheaded and consistent in protecting the exclusive prerogatives of federal financial regulators and federally chartered financial institutions, most recently in this year’s decision in *Watters v. Wachovia*.¹⁵ Our exclusivity presumption is not some grandiose innovation. It is implicit in several lines of cases and simply needs to be enforced more consistently.

Commerce: From Balance to Federalism

Even after the New Deal revolution, the “dormant” Commerce Clause has been held to prohibit, of its own force and without Congressional intervention, state laws that threaten to balkanize interstate networks such as railroads, that discriminate against interstate commerce, or that export the costs of regulation to other states.¹⁶

Federal laws that guard against one of those identifiable risks should be given their broad preemptive effect. In the absence of these risks, courts should hesitate to imply or infer a Congressional intent to preempt.¹⁷

Extant preemption law roughly embodies an attempt to match preemption doctrine to the underlying federalism risks, although it is rarely made explicit. For example, the Supreme Court has preempted state tort suits with respect to train speed but not with respect to the design of local warnings at railroad crossings.¹⁸ The antibalkanization rule supports both parts of this ruling.

Our understanding of preemption entails that federal regulatory regimes that govern product standards or labeling, such as the FDA’s, should be read as establishing a comprehensive, and hence preemptive, regulatory balance, rather than a mere minimum floor. (Courts have gone both ways on this intensely contested question.) We take this position not because we trust the FDA’s expertise, but rather because it offers the only solution to acute coordination problems. A mere minimum standard coordinates nothing at all. Arduous federal efforts to tackle federalism’s inevitable frictions should not be frustrated so easily.

The preemptive presumption kicks in, however, only when there is a coordination problem to solve. We have no sympathy, for example, for blind deference to the national government’s mere assertion that nebulous

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interstate effects demand federal intervention. One can think of the invalidation of California's medical marijuana law in *Gonzales v. Raich*—a constitutional case, but one with potent preemption implications—as an example.¹⁹ It is possible that the risk of large-scale diversion of drugs into interstate commerce is substantial enough to let federal law block even carefully controlled state experiments with medical marijuana. Pending evidence to that effect (never presented in *Raich*), the federal law looks like a bare attempt to suppress state competition. Preemption law should not encourage such measures.

Two Steps Forward

Preemption law often tests the patience of even the wonkiest lawyer. Even so, the subject clearly merits the attention it has received of late. Preemption determines who gets to decide which questions in a complicated federal system. In federalism's daily operation, subconstitutional doctrines are every bit as important as grand constitutional propositions.

Our three presumptions—anticircumvention, exclusivity, and federalism risks—cannot decide every preemption case; too much hangs on statutory nuances and details. Then again, that melancholy point is true of all statutory canons. Why make the best the enemy of the good? Our proposed canons have two virtues: they bring greater coherence to a messy universe, and they reorient the preemption debate away from the elusive “balance” sought by the presumption against preemption toward a greater fidelity to constitutional federalism principles. Two good deeds are enough.

AEI research assistant Harriet McConnell and editorial associate Nicole Passan worked with Messrs. Epstein and Greve to edit and produce this Federalist Outlook.

Notes

1. See, e.g., Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption Symposium: Federal Preemption of State Tort Law: The Problem of Medical Drugs and Devices*, 33 Pepp. L. Rev. 69 (2005). For a more measured critique along the same lines see Richard Fallon, *Conservative Paths of the Rehnquist Court's Federalism Decisions*, 69 U. Chi. L. Rev. 429 (2002).

2. For the empirical data and analysis see Michael S. Greve and Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 Sup. Ct. Econ. Rev. 43 (2006).

3. U.S. Constitution Article VI, Section 2: “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.”

4. James Madison, *Federalist* no. 39.

5. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (describing the Supremacy Clause as an “extraordinary power in a federal system”). See also Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 904 (1994) (observing that the Rehnquist Court has tended to view the Supremacy Clause as suspect).

6. Lawrence Lessig, *Federalism in Translation*, 71 Tex. L. Rev. 1165 (1993); and Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 Wm. & Mary L. Rev. 1733 (2005).

7. For praise of the new system of federalism as empowerment, see Erwin Chemerinsky, *The Assumptions of Federalism*, 58 Stan. L. Rev. 1763 (2006).

8. *Heydon's Case*, 3 C. Rep. 7a, 7b (Ex. Exch. 1584).

9. For detailed discussion, see Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 Boston U. L. Rev. 699 (1992).

10. Jack N. Rakove, ed., “Letter from James Madison to Thomas Jefferson (Oct. 24, 1787),” *James Madison: Writings* (New York: Library of America, 1999) 146.

11. See *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947) (J. Frankfurter dissenting).

12. *Merrill Lynch v. Dabit*, 547 U.S. 71 (2006). State officials and plaintiffs lawyers are currently engineering the next end run by having those same suits brought by state pension funds, which are exempt from the federal preemption statute.

13. They have not always done so. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), a famous preemption case and the origin of the “presumption against preemption,” wrongly pressed an exclusive powers statute into a concurrent powers framework. See our conclusion to *Federal Preemption*.

14. See *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991); and *California v. ARC America Corp.*, 490 U.S. 93 (1989).

15. *Watters v. Wachovia Bank*, 127 S.Ct. 1559 (2007).

16. The locus classicus is *South Carolina v. Barnwell Brothers*, 303 U.S. 177, 184-188 (1938).

17. Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L. J. 2085, 2098 (2000), likewise emphasizes the continuity between the dormant Commerce Clause and preemption.

18. *CSX Transp. v. Easterwood*, 507 U.S. 658 (1993). *United States v. Locke*, 529 U.S. 89 (2000), follows the same framework of analysis.

19. *Gonzales v. Raich*, 545 U.S. 1 (2005).